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FOREWORD

It is truly an honour and a privilege to write this foreword in recognition of the distinguished judicial career of my respected colleague, Hon'ble Mr. Justice Anwaarul Haq Pannun, upon his retirement from the esteemed position of Judge of the Lahore High Court, Lahore. Throughout his tenure, Justice Pannun has exemplified dedication, wisdom, and a profound commitment to justice.

Justice Anwaarul Haq Pannun's time on the Bench has consistently demonstrated thorough analysis, sharp legal insight, and unwavering fairness. His judgments span numerous important areas of law, including constitutional, civil, criminal, service matters, family, and revenue law, clearly reflecting his thoughtful reasoning and deep understanding of complex legal issues. Each judgment delivered by him has notably contributed to the clarity and development of our judicial system, providing valuable guidance for both the bench and the bar.

Apart from his judicial responsibilities, Justice Pannun has shown remarkable capability in administrative matters, contributing significantly to the smooth functioning of the Lahore High Court. His balanced and respectful approach to managing court affairs and maintaining strong relationships between the Bench and the Bar has earned him deep respect from colleagues, advocates, and the wider legal community.

In court, Justice Pannun has always maintained an atmosphere of dignity, patience, and respect. He has ensured that every individual is heard and treated with fairness, embodying the true spirit of judicial conduct. His approachable and humble demeanor has inspired many, particularly younger

lawyers and judges who have greatly benefited from his guidance and example.

As Justice Anwaarul Haq Pannun retires from his position at the Lahore High Court, his contributions to our judiciary will remain highly valued and warmly remembered. The example he has set through his judgments and dedication to justice will undoubtedly inspire future generations of jurists.

On behalf of myself and my esteemed colleagues at the Lahore High Court, Lahore, I express heartfelt appreciation and gratitude to Justice Anwaarul Haq Pannun for his exceptional service to the judiciary and to the cause of justice. We extend our best wishes for his health, happiness, and continued fulfillment in the years ahead.

May Allah Almighty grant him blessings and success in the next chapter of his life. Ameen.

(AALIA NEELUM)
The Chief Justice
Lahore High Court, Lahore

PROFILE

Mr. Justice Anwaar ul Haq Pannun was born in 1963 in the house of Ch. Muhammad Sarwar Pannun at hamlet Jawinda Pannun District Narowal. He did his Matric in 1978 from Government Ghulam Din High School, Mangri (Shakargarh) District Narowal and passed F.A. from Government Degree College, Shakargarh in 1981. For his Graduation, he chose the most prestigious institution of Sub-Continent i.e. Government College, Lahore from where he earned his Graduation (B.A.) in 1984. Thereafter, he joined the Alma Mater-Premier University of the Country, The University of the Punjab and passed his Masters in Political Science in 1986. The Hon'ble Judge (following in the foot-steps of his illustrious real uncle late Mr. Muhammad Akbar Pannun, Bar-at-Law, from Lincoln's Inn) studied law at the University law College, Lahore and passed his LL.B in the year 1989.

For a couple of years, though he taught Political Science as Lecturer, yet he remained, enamored by Advocacy, the profession, adopted by his lordship's real uncle Mr. Muhammad Akbar Pannun, Bar-at-Law from Lincoln's Inn way back in 60's, therefore, after resigning, upon his enrolment as an Advocate Lower Court on 01.09.1991, he started practice at District Courts Narowal. He was enrolled as Advocate High Court on 19.04.1994. He was enrolled as, Advocate Supreme Court of Pakistan in the year 2005.

The Hon'ble Judge was elected Secretary District Bar Association, Narowal in 1994 i.e. right after completing two years of his practice. By electing him twice as President of DBA Narowal in the years 1996-97 and 1997-98 at the completion of mere five years at

the Bar, Learned Members of Local Bar favoured him in a singularly distinct manner. By the time, he completed seven years at the Bar, the respect and popularity, he enjoyed, now swelled to the whole of Gujranwala Division, the proof whereof, is his success as Member Punjab Bar Council, against Narowal Seat, with 2nd highest tally of votes amongst the contestants in the years 1999. Once again, the fraternity conferred the same honour upon his lordship in 2004. All the honours, chronologically detailed above have been a candid recognition of his trusted leaderships, immaculate character and unquestioned professional integrity by legal fraternity. It would also be pertinent to place on record that he has been elected for all the offices with minimum requisite standing at the Bar. As an incumbent Member Punjab Bar Council, he served as member inter Provincial Relations Committee, Disciplinary Committee, Executive Committee, Chairman Jail Reforms Committee, Law Reforms Committee and the legal Education Committee in respect whereof, he shouldered the assignments with dedication and commitment. Thus, he remained most sought-after criminal trial lawyer in District Courts at Narowal, until he shifted to the Provincial Metropolis, Lahore where he proved his mettle as an appellate counsel, and conducted cases in civil, criminal and Constitutional realm with equal mystery and fact remains that his legal acumen resulted in famous reported cases which had duly found print in the leading law journals of the land, which are living testimony of his lordship's command over his profession.

As a lawyer, he enjoys a thorough eloquence, besides having professional acumen. Besides academic and legal spheres, sports was a field, where, he also earned many a distinction. Chief amongst

the sports were athletics, rowing, table tennis and volley-ball. His debut, in volley-ball was the representation as Member of the Punjab under nineteen team thereafter he skippered the teams of both University law College, as well as Punjab University. He was awarded University Blue i.e. a certificate of Honour in Sports. In the year 2018 lady luck smiled over his lordship twice first when he was elected President of Lahore High Court Bar Association and secondly, he was elevated as Additional Judge of this Court on 23.10.2018.

His lordship has a special bent for Literature too and in this pursuit, he patronizes Majlis Hashim Shah, a pioneer movement committed to the propagation, spread and preservation of Punjabi Literature throughout the world.

Family profile:

Mr. Justice Anwaarul Haq Pannun married to Mst. Robina Tabassum in February 1993, who is currently serving as Assistant Professor of Botany at Govt. APWA College, Lahore.

They share four children namely Nayab, Hassan, Momna & Aimen. The three daughters are working in the field of medicine and his son is a barrister at law.

REPORTED JUDGMENTS

2019 M L D 377

[Lahore (Multan Bench)]

Before Anwaarul Haq Pannun, J

SHAHID HAMEED CHANDIA---Petitioner

Versus

The PRESIDING OFFICER ELECTION TRIBUNAL, D.G. KHAN DIVISION and others---Respondents

Writ Petition No.15814 of 2018, decided on 27th November, 2018.

Punjab Local Government Act (XVIII of 2013)---

----Ss. 37, 39 & 46---Punjab Local Government (Conduct of Elections) Rules, 2013, R. 62---Constitution of Pakistan, Art. 199---Constitutional petition---Election petition---Interlocutory order---Scope---Recount of votes---Petitioner was returned candidate and was aggrieved of order passed by Election Tribunal accepting application for recounting of votes---Validity---Interlocutory order passed by Election Tribunal could not be questioned in Constitutional jurisdiction until same was patently illegal and for some reasons could not even be challenged in form of statutory remedy conferred upon parties aggrieved of order on conclusion or final disposal of election petition---If outcome of election petition went against a person/party who was also aggrieved of interlocutory order passed during proceedings, besides assailing main judgment, such person was entitled to assail very legality of interim order and consequences that had flown from it---If order was patently illegal and left a party without any remedy, then an interlocutory order could be challenged for exercising extraordinary Constitutional jurisdiction of High Court---High Court declared that petitioner was not remediless having a remedy for challenging order in question, after passing of final order in election

petition by way of an appeal under S. 46 of Punjab Local Government Act, 2013---Petition was dismissed in circumstances.

Muhammad Raza Hayat Hiraj and others v. The Election Commission of Pakistan and others 2015 SCMR 233 rel.

Imam Bakhsh and another v. Presiding Officer, Election Tribunal, Dera Ghazi Khan and others (in C.P. No.1138/2016); Sajid Hussain Khan v. Presiding Officer, Election Tribunal, Dera Ghazi Khan and others (in C.P. No.1139/2016); Mst. Ashifa Riaz Fatyana v. Mst. Nazia Raheel and 10 others 2011 CLC 48; Chaudhary Pervez Elahi v. Muhammad Faiz Tamman and 2 others 2010 CLC 1490; Kanwar Ijaz Ali v. Irshad Ali and 2 others PLD 1986 SC 483 and Muhammad Raza Hayat Hiraj and others v. The Election Commission of Pakistan and others 2015 SCMR 233 ref.

Syed Athar Hassan Shah Bukhari for Petitioner.

Zafar Ullah Khan Khakwani for Respondent No.2.

Mian Adil Mushtaq, Assistant Advocate General for the State.

Date of hearing: 27th November, 2018.

JUDGMENT

ANWAARUL HAQ PANNUN, J.---Through this petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner has called in question the order dated 24.10.2018 passed by respondent No.1/Election Tribunal, D.G. Khan Division appointed under section 39 of the Punjab Local Government Act, 2013 (hereinafter to be called as Act) whereby a miscellaneous application moved before the learned Election Tribunal by respondent No.2, seeking recount of the votes through a local commission has been accepted.

2. Briefly, stating the facts of the case are that respondent No.2 herein, instituted an election petition under section 38 of the Act read with Rule

62 of the Punjab Local Government (Conduct of Elections) Rules, 2013 (hereinafter to be called as Rules) calling in question the notification issued under section 37 of the Act, of respondents Nos.2 and 7 by the Election Commission, as Returned Candidates i.e. Chairman and Vice-Chairman, Municipal Corporation, D.G. Khan respectively on multiple grounds with the following prayer:--

3. Contesting written statements were filed refuting the allegations and averments contained in the Election Petition. The learned Election Tribunal, in view of divergent pleadings of the parties, on 01.08 2018 proceeded to frame the following issues:-

i) Whether the return of respondents Nos.1 and 7 is outcome of corrupt practice on the part of the election staff under the influence of local MNA? OPP

ii) Whether the respondent No.1, in connivance with the polling staff, got stolen official stamps from some of polling booths for illegal use? OPP

iii) Whether the Presiding Officer did not allow the polling staff to do their job and appointed the polling staff of his own choice? OPP

iv) Whether the respondent managed to purchase ballot papers? OPP

v) Whether the petitioners were not provided copies of election forms by the RIO, if so its effect? OPD

vi) Whether the petition is not maintainable in its present form as the petitioner has not annexed necessary documents with it? OPR1

vii) Whether the petition is liable to be dismissed being time barred? OPR1

viii) Whether the election petition is based upon false and frivolous allegations as such liable to be dismissed with special costs? OPR1

ix) Relief.

4. The learned trial court had recorded the statements of Muhammad Saleem Khan Tareen (PW-1), Mst. Shazia Bano (PW-2) and Atha Abbas (PW-3). On 03.09.2018 an application was moved by respondent No.2 for summoning of one Ayesha Siddique, APO, which was replied by the contesting respondents and the same was yet to be decided, when on 03.10.2018 respondent No.2 filed another application seeking recount of the ballot papers, through a local commission, which also was replied by the petitioner, however, vide impugned order dated 24.10.2018 the learned Election Tribunal was pleased to accept the application of respondent No.2. The operative part of the impugned order is reproduced as under:-

> "The application is, therefore, accepted and rechecking/ recounting of the ballot papers is ordered to be done through a local commission Mr. Tanveer ul Hassan, District Election Commissioner, Dera Ghazi Khan, is appointed as local commission who shall conduct the proceedings on 29.10.2018
>
> at District Election Commissioner Office. Fee of local commission is fixed as Rs.40,000/- which shall be paid by the petitioners to the local commission before start of proceedings of recounting against a receipt. Parties are directed to join the proceedings at 10.00 a.m. sharp on 29.10.2018 in the office District Election Commissioner Dera Ghazi Khan. The local commission shall submit his report on or before 31.10.2018."

hence this petition.

5. At the very outset, learned counsel for the respondents while relying upon the ratio of law laid down in Muhammad Raza Hayat Hiraj and others v. The Election Commission of Pakistan and others (2015 SCMR

233), and an unreported judgment titled Imam Bakhsh and another v. Presiding Officer, Election Tribunal, Dera Ghazi Khan and others (in C.P. No.1138/2016) and Sajid Hussain Khan v. Presiding, Officer, Election Tribunal, Dera Ghazi Khan and others (in C.P. No.1139/2016) has questioned the maintainability of this writ petition on the ground that since the impugned order passed by the learned Election Tribunal is interlocutory in nature, the same cannot be challenged through writ petition, therefore, this petition is not maintainable, yet the learned Tribunal, has to pass a final order, and the petitioner, has a remedy for attacking the impugned order also by means of an appeal provided under section 46 of the Act against the final order, which is a statutory right.

6. Learned counsel for the petitioner while relying upon the case-law reported in Mst. Ashifa Riaz Fatyana v. Mst. Nazia Raheel and 10 others (2011 CLC 48), submits that respondent No.2, has to make out a case for recounted of the ballot papers after producing the requisite evidence, justifying the passing of order of recount by the Election Tribunal, also relied upon the case law reported in Chaudhary Pervez Elahi v. Muhammad Faiz Tamman and 2 others (2010 CLC 1490) to contend that recount could not be ordered in routine, factum of non-checking of votes properly, at the time of consolidation of results by the Returning Officer must be proved through evidence. In order to further strengthen his above submissions, the learned counsel for the petitioner has referred to Kanwar Ijaz Ali v. Irshad Ali and 2 others (PLD 1986 SC 483) and submits that the order impugned has been passed by the Election Tribunal in violation of ratio laid down by superior courts, which is binding upon the Election Tribunal under Article 189 of the Constitution of Islamic Republic of Pakistan, 1973, the impugned order is void, ab-initio, hence liable to be struck down. Interestingly, he also relied upon the case of Muhammad

Raza Hayat Hiraj and others v. The Election Commission of Pakistan and others (2015 SCMR 233) to meet the objection of maintainability.

7. Heard. Record perused.

8. The question, requiring its determination before this Court, in view of the arguments of both the learned counsel for the parties, noted above, is whether a writ petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 is maintainable against, an interlocutory order passed by an Election Tribunal while trying an election petition or not? It will be advantageous to cite Section 39(4) and Section 46 of the Act, respectively hereunder:--

Section 39 (4) of The Punjab Local Government Act, 2013:

(1) .

(2) .

(3) .

(4) The Election Tribunal shall decide an election petition within one hundred and twenty days from the date of filing of the election petition.

Section 416 of The Punjab Local Government Act, 2013:

Appeal against the orders of Election Tribunal.--

(i) Any person aggrieved by a final order of an Election Tribunal may, within thirty days of the communication of such order, prefer an appeal to the Lahore High Court.

(ii) The Lahore High Court shall decide an appeal preferred under subsection (1) within three months.

(Emphasis supplied).

9. The bare verbatim of the above noted provisions of law clearly indicate that the legislature, in its own wisdom, has enacted the above provisions, giving therein a time line, with an underlying object that the election disputes may be decided expeditiously and if the challenges are allowed to be thrown against the interlocutory orders passed by the Election Tribunal, the object of expeditious disposal and decision of the election petition may be defeated. It is well settled principle for interpretation of law that the Courts should interpret the law in furtherance of intention of legislature. In order for High Court to intervene in its Constitutional jurisdiction in an interlocutory order of the Election Tribunal, the order must not only be patiently illegal but if not struck down will leave the aggrieved party without remedy, by attaining the order finality. The legal position which emerges is that the interlocutory order passed by the Election Tribunal cannot be questioned in Constitutional jurisdiction until the same is patiently illegal and the same for some reasons cannot even be challenged in the form of statutory remedy conferred upon the parties aggrieved of the order on the conclusion or final disposal of the election petition. If the outcome of an election petition goes against a person/party who is also aggrieved of an interlocutory order passed during the proceedings, besides impugning the main judgment, he is entitled to assail the very legality of the interim order, and the consequences that flow from it. If the order is patently illegal and leaves a party without any remedy then, an interlocutory order may be challenged for exercising extra ordinary Constitutional jurisdiction of the High Court. The Hon'ble Supreme Court has in the recent past held in authoritative and conclusive judgment reported Muhammad Raza Hayat Hiraj and others v. The Election Commission of Pakistan and others (2015 SCMR 233) that interlocutory orders are not amenable to the jurisdiction of the High Court through Constitutional

jurisdiction as a remedy by way of an appeal under section 67 of the Act (Representation of the People Act (LXXXV of 1976)) was available to the aggrieved persons. The ratio in Muhammad Raza Hayat Hiraj's case mentioned hereinabove that an interlocutory order passed by Election Tribunal in an election petition cannot be impugned, by invoking Constitutional jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 was, in fact laid in a case arising out of the matters pertaining to the election petitions, which were pending before the Tribunals constituted/appointed under the provisions of (Representation of the People Act (LXXXV of 1976). I have been able to lay my hand to an unreported judgment passed in Imam Bakhsh and another v. Presiding Officer, Election Tribunal, Dera Ghazi Khan and others (in C.P. No.1138/2016) arisen out of election petitions, under the Punjab Local Government Act, 2013, by the Hon'ble Supreme Court of Pakistan wherein in para-5 of the judgment a complete answer has been given which was under contemplation of this Court.

"We have heard the learned counsel and have gone through the record with their able assistance. The Act governs the subject and attends to the filing of election petitions (section 38), constitution of election tribunals (section 39), powers vesting in election tribunals (section 40) and the decisions of election tribunals (section 41). Section 46 of the Act, which provides for an appeal against final order of an election tribunal.

Section 46 of the Act provides that against the, "final order of an Election Tribunal" an appeal can be preferred to the High Court, significantly, it does not provide for any remedy against an interlocutory order. Mr. Babar Awan contends that since the statute does not permit an appeal against an interlocutory order,

therefore, the constitutional jurisdiction of the High Court under Article 199 of the Constitution can be invoked. I cannot bring myself to argue with the learned counsel because it will not only defeat the specific language of the Act but would also unnecessarily delay the disposal of election petitions the early disposal of which the legislature has mandated by stipulating in subsections (2) of section 46 that appeals shall he decided within period of three months. The tenure of elected persons is of a limited duration therefore, the delay decision of election disputes must not be thwarted, if challenges are permitted to be made to interlocutory orders, through petitions filed before the High Court which may eventually also come before this Court, then the remedy of an election petition and an appeal will be rendered illusory because in all probability the term of the person whose election has been challenged would have been completed or it would be close to completion. In any event a three member Bench of this Court in the case of Muhammad Raza Hayat Hiraj (above) held (paragraph 36, page 253) that;

"It follows from the above discussion that the interlocutory orders passed by the Election Tribunal impugned before the High Court were not liable to be set aside in its constitutional jurisdiction as the petitioners before the Court had a remedy available to them by way of appeal under section 67 of the Act after disposal of the election petitions. The impugned judgment of the Lahore High Court dated 28.2.2014, therefore, is maintained and similar opinion of the High Court of Sindh in Ali Gohar Khan Mahar's case (supra) and of the High Court of Balochistan in Dur Muhammad Khan Nasar's case (supra) is affirmed."

11. Since the petitioner, has a remedy, for questioning the impugned order, after passing of final order in the election petition by way of an appeal, under section 46 of the Act, hence, it cannot be said that the petitioner is rendered remediless.

12. In the light of what has been discussed above, this petition is dismissed being not maintainable.

MH/S-65/L **Petition dismissed.**

2019 M L D 2005

[Lahore]

Before Shehram Sarwar Ch. and Anwaarul Haq Pannun, JJ

IFTIKHAR AHMAD and another---Appellants

Versus

The STAE and another---Respondents

Criminal Appeal No.1612 and Murder Reference No.348 of 2016, heard on 6th May, 2019.

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

----Ss. 302(b), 324, 148 & 149---Qatl-i-amd, attempt to commit qatl-i-amd, rioting armed with deadly weapon, unlawful assembly---Appreciation of evidence---Benefit of doubt---Accused were charged for committing murder of two persons---Motive for the occurrence was previous enmity---Occurrence took place at 1:00 a.m. night, FIR was lodged at 7:30 a.m. at the spot---Keeping in view the time of occurrence, non-production of any source of light, was safely concluded that due to darkness, the identity of the accused appeared to be doubtful---Even second part of occurrence, in which deceased had been done to death through strangulation, took place outside the village in complete darkness near Dera---Behaviour of the deceased as well as the witnesses, as stated, appeared to be very strange---Feeling danger at the hands of the accused not only the deceased but also the witnesses, instead of rushing towards populated area for seeking some shelter/asylum, started running/going out of village, which was against the common sense---Accused made no fire at the witnesses when they were chasing them---Prosecution version was that firstly the acquitted co-accused caught hold of the deceased reducing him helpless then the accused-appellant strangulated him with his torn 'qameez'---Apparently, without the alleged assistance/help of acquitted co-accused, it was not possible for the accused-appellant to strangulate

deceased single handedly---Trial Court while disbelieving evidence of the prosecution had acquitted the co-accused, which had also caused serious repercussion upon the veracity of the evidence of prosecution witnesses---Applying the principle of falsus in uno, falsus in omnibus, the evidence was liable to be disbelieved once again---Occurrence had taken place in the darkness of night---Claim of the prosecution witnesses having seen the occurrence by chasing/running after the accused who were following the deceased appeared to be preposterous and unbelievable, therefore, the same was accordingly disbelieved---Prosecution's case was that enmity existed with appellant only---Besides appellant, six persons were also arrayed as accused, out of them, five were acquitted of the charge on the same set of evidence---If evidence of the prosecution was disbelieved qua bulk of accused, it could not be believed qua the other in absence of very strong corroboration---Said facts and circumstances, when evaluated on judicial parlance, reflected that prosecution had failed to establish culpability of the accused-appellants in the case through reliable, trustworthy and confidence inspiring evidence---Accused were acquitted, in circumstances.

Akhtar Ali and others v. The State PLJ 2008 SC 269; Shera alias Sher Muhammad's case 1999 SCMR 697 and Sher Bahadur's case 1972 SCMR 651 rel.

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

----Ss. 302(b), 324, 148 & 149---Qatl-i-amd, attempt to commit qatl-i-amd, rioting armed with deadly weapon, unlawful assembly---Appreciation of evidence---Weapon of offence was recovered from accused---Reliance---Scope---Record showed that recovery of .12 bore gun had been affected from the house of one "B" and not from a place exclusively in possession of the accused, hence the same was of no use---Recovery was deemed to be corroborative in nature and used for support of direct evidence.

Muhammad Jamil v. Muhammad Akram and others 2009 SCMR 120 rel.

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

----Ss. 302(b), 324, 148 & 149---Qatl-i-amd, attempt to commit qatl-i-amd, rioting armed with deadly weapon, unlawful assembly---Appreciation of evidence---Motive not proved---Effect---Motive was a double edged weapon which could cut either way---Prosecution case was that there existed enmity between accused only---Complainant had opted to involve as many as six other persons besides accused-appellants, in the FIR, when there existed no earthly reasons for sharing of their intention with the principal accused.

(d) Criminal trial---

----Benefit of doubt---Principle---One circumstance which created reasonable dent in the veracity of the prosecution version could be taken into consideration for extending benefit of doubt.

Tariq Pervez v. The State 1995 SCMR 1345; Riaz Masih alias Mithoo v. The State 1995 SCMR 1730 and Muhammad Akram v. The State 2009 SCMR 230 rel.

Shahid Azeem and Uzma Razzaq for Appellant.

Rai Akhtar Hussain, D.P.G. for the State.

Nemo for the Complainant.

Date of hearing: 6th May, 2019.

JUDGMENT

ANWAARUL HAQ PANNUN, J.---Iftikhar Ahmad son of Noor Muhammad, (2) Akhtar Abbas son of Shams-ul-Haq, both Kharl by Caste, residents of Chah Ajmalwala, Mauza Kariwala, Tehsil and District Jhang, the appellants along with (i) Gulzar Ahmad, (ii) Wajid Ali (iii) Muhammad Hanif and (iv) Muhammad Fazil (since acquitted) and (v)

Muhammad Waris and (vi) Muhammad Asif (since P.Os) were involved in case FIR No.312/2012, dated 14.08.2012, offence under Sections 302, 324, 148, 149, P.P.C., registered with Police Station Qadirpur, District Jhang. The local police carried out investigation in which Akhtar Abbas (condemned prisoner), Wajid Ali and Muhammad Hanif (both since acquitted), accused were found innocent and their names were placed in column No.2 of the report under section 173, Cr.P.C. The challan of the case was submitted before the court of competent jurisdiction, however, subsequently Naseer Ahmad complainant being dissatisfied with the aforesaid investigation preferred to file a private complaint titled as:-

"Nazeer Ahmad

versus

Iftikhar Ahmad, etc."

under Sections 302, 324, 148, 149, P.P.C. in which the trial has been held. After recording of evidence and taking into consideration the material available on record, learned trial court vide judgment dated 28.06.2016 has convicted/sentenced the appellants in the following terms:-

Sr.#	Name of the appellant	Conviction/sentence
(1)	Iftikhar Ahmad	> Under Section 302(b), P.P.C., sentenced to death as Ta'zir with direction to pay Rs. 1,00,000/- as compensation to legal heirs of the deceased Ghulam Farid in terms of Section 544-A, Cr.P.C. and in case of default in payment thereof, to undergo S.I. for six months.
(2)	Akhtar Abbas	> Under Section 302(b) P.P.C., sentenced to death as Ta'zir with direction to pay Rs.1,00,000/- as compensation to legal heirs of

		the deceased Qasim Ali in terms of Section 544-A, Cr.P.C. and in case of default in payment thereof, to further undergo S.I. for six months.

2. Feeling aggrieved by the judgment of the learned trial court, the appellants have jointly assailed their conviction and sentence by filing Crl. Appeal No.1612 of 2016 while learned trial court forwarded Murder Reference No.348 of 2016 for confirmation or otherwise of sentence of death inflicted upon both the appellants/convicts in terms of Section 374, Cr.P.C. As both the matters are arising out of one and the same judgment of the learned trial court, therefore, both are being disposed of through consolidated judgment.

3. As stated above, firstly the crime report (Exh.CW-1/1) was lodged on the complaint (Exh.PE) of Nazir Ahmad, a Zamindar by profession alleging that during the intervening night of 13/14.08.2012 at about 1.00 O'clock night he along with Khalil Ahmad, Qasim Ali, Ghulam Farid and Muhammad Nawaz were sleeping in the courtyard of house, having no boundary walls, of his uncle Ghulam Farid, the electric bulb was on in the courtyard, on the foot-falls of some persons, suddenly they woke up and saw, in the light of bulb, that accused persons armed with firearms came. Accused (1) Iftikhar Ahmad made fire shot with his .12 bore gun hitting uncle of the complainant on his head whose brain matter came out of his head, accused (2) Waris made fire shot hitting Ghulam Farid, uncle of the complainant on his left thigh. The complainant along with his companions ran away in order to save their lives whereupon all the accused followed Qasim Ali (deceased). When Qasim Ali reached at the road near the Dera of Bashir Ahmad Gujjar, the accused persons caught hold Qasim Ali and fall him on ground. All the accused gave beating to him with butts. Accused Akhtar Ali with torn his 'Qameez', strangulated him with said 'Qameez' whereas rest of the accused caught hold his arms and legs tightly. They witnessed the occurrence with their own eyes, however,

could not step forward due to fear. The accused by committing murder of Qasim Ali, and by throwing him went towards Mauza Ramana.

Motive behind the occurrence as disclosed in the crime report is that accused Iftikhar has previous enmity with Qasim Ali deceased. Due to this grudge, all the accused committed this occurrence. They took care of Qasim Ali who succumbed to the injuries. They left Nawaz near the dead body of Qasim Ali. The complainant and Khalil Ahmad went to the house of Ghulam Farid and brought him to DHQ Hospital, Jhang, in an injured condition. The doctors due to his precarious condition referred him to Allied Hospital, Faisalabad. Further alleged that all the accused in prosecution of their common object/intention injured uncle of the complainant namely Ghulam Farid and committed murder of his cousin namely Qasim Ali.

4. The investigation was encapsulated into a report under section 173, Cr.P.C., which was duly submitted, the learned trial Judge took the cognizance, supplied the requisite statements under section 265(c), Cr.P.C., framed the charge against the appellants and their co-accused on 24.03.2015 to which they pleaded not guilty and claimed trial.

5. We feel it appropriate, at the cost of a little repetition, let "the bare facts of the case, in brief, be enumerated as under:--

Two persons namely Ghulam Farid and Qasim Ali had been murdered in this occurrence, under discussion, out of them one Ghulam Farid died as a result of fire-arm injuries on his body whereas the other Qasim Ali (deceased) was strangulated, when he had been reduced, helpless while catching hold of him from different parts of his body by the acquitted co-accused near the Dera of Bashir Ahmad Gujjar. The occurrence, allegedly, took place in the darkness, during intervening night at 1.00 AM on 13/14.08.2012. It was reported on 14.08.2012, at 7.30 AM, through a complaint (Exh.PE), followed by post-mortem examination over the dead of

deceased Qasim Ali by Dr. Muhammad Rehan, M.O., (PW.7) on 14.08.2012 at 5.30 PM, who had stated that "the time between injury and death was immediate and between death and postmortem was about 10/12 hours". He noticed six injuries i.e. multiple contusions on the dead body. The other deceased namely Ghulam Farid though was allegedly shifted to hospital but surprisingly there is no MLC, available on record to show he had even been attended to medically in between 14.8.2012 till his mortem report i.e. 22.08.2012. Dr. Asif Nawaz, M.O. (PW-1) while conducting post mortem, observed two firearm injuries on the dead body. Ocular account in this case consists of the evidence of Nazir Ahmad, complainant (PW-3) who is uncle of Ghulam Farid deceased and Muhammad Nawaz (PW-4). He is the cousin of complainant. Rest of the eye-witness has been given up. Since he has been declared innocent during investigation, therefore, no recovery has been effected on the pointing out of appellant Akhtar Abbas. The recovery of .12 bore gun from appellant Iftikhar Ahmad was made on 09.11.2012 vide recovery memo. (Exh. PH). The crime empties (P-7) which had already been taken into possession vide recovery memo. (Exh.CW-8/3) was followed by its corresponding report (Exh.PO) issued by the Punjab Forensic Science Agency, in positive. Motive behind the occurrence has been alleged a previous enmity inter se between the parties. Interrogation of the case was carried out by Mushtaq Ahmad, S.I (CW-8), Amanullah, SI (CW-9), and Muhammad Ishfaq Anjum, SI (CW-10). Rest of the evidence is of formal in nature.

6. Learned counsel for the complainant on instructions of the complainant gave up Khalil Ahmad since deceased and Shabbar Abbas being unnecessary vide his statement dated 03.05.2016 and closed the prosecution evidence.

7. The appellants were examined under Section 342, Cr.P.C. wherein they gainsaid the charge and professed their innocence. They opted neither to appear as their own witness in terms of Section 340(2), Cr.P.C. nor they opted to adduce evidence in their defence. While replying to the question why this case against him and why the PWs deposed against him, the appellant Iftikhar Ahmad made the following deposition:--

"All the PW's are related inter se and have deposed against me due to enmity. In fact, I have developed illicit relation with Mst. Halima Bibi mother of PW Khalil (since dead). We were found together and were caught by Khalil PW (since deceased) who fired at me, injured me and he also cut my ear. Khalil PW (since dead) forcibly abducted my sister and raped with her and a case was registered against him. Qasim Ali (since deceased) committed murder of Halima Bibi and a case of murder of his mother/wife of Ghulam Farid (since deceased) was registered against Qasim (since deceased). Relation between Ghulam Farid and Qasim deceased became very strained and Ghulam Farid (since deceased) deserted Qasim Ali (since deceased) from his house. Qasim Ali (since deceased) was of the view that illicit relation of Mst. Halima Bibi his mother with me was the result of free hand given to the Halima Bibi by Ghulam Farid. It was talk of the village and surrounding areas that it was Qasim Ali (since deceased) who killed at his father Ghulam Farid and hidden himself in the Jantar crop. Ghulam Farid (since deceased) was sleeping at his house and no male member was present on the fateful night. The complainant party had been tracing out Qasim (since deceased) and on the next morning at about 8.00 a.m. he was found sitting in the Jantar and was done to death by Khalil PW (since dead). The complainant party has killed two birds with one stone. They have saved Khalil PW from legal punishment and have involved me and my co-accused due to previous grudge because they were of the view that

all three murders of Halima Bibi, Ghulam Farid and Qasim were the result of my illicit relations with Mst. Halima Bibi. It is very pertinent to submit that it was Khalil PW (since deceased) who had caused fire-arm injuries to me, had cut my ear and had also dishonoured my sister. If he was present at the time of occurrence and had witnessed the occurrence, I should have killed him instead of Ghulam Farid. Another important fact fortifies my submission that it is the story of prosecution during trial that Ghulam Farid father of Khalil PW (since deceased) was shifted to DHQ Hospital Jhang. Khalil PW did not bother to accompany his father to Hospital which shows that talk of village is correct. I am innocent. I have no animosity with Qasim and Ghulam Farid (since deceased). I may be acquitted from the false charges leveled against me".

Appellant Akhtar Abbas in reply to the same question has made the following deposition:-

"All the PW's are related inter se and have deposed against me due to enmity. In fact, the occurrence had taken place as narrated by my accused Iftikhar in my presence and I endorsed the answer of Iftikhar accused".

8. Learned trial court after evaluating the evidence available on record, found version of the prosecution proved beyond shadow of reasonable doubt against the appellants, which resulted into their conviction in the afore-stated terms whereas their co-accused namely Gulzar, Muhammad Fazil, Wajid Ali and Muhammad Hanif have been acquitted.

9. Learned counsel for the appellants submits that Akhtar Abbas appellant was declared innocent during the course of investigation, no recovery has been effected on his pointing out; that co-accused namely Gulzar, Muhammad Fazil, Wajid Ali and Muhammad Hanif who allegedly participated with their effective role in the occurrence along

with the appellant Akhtar Abbas have since been acquitted while disbelieving, prosecution evidence, therefore, his conviction in absence of no other independent corroboration on record cannot be maintained. So far as case or the appellant Iftikhar Ahmad is concerned, learned counsel contends that occurrence took place during intervening night of 13/14.8.2012, at 1.00 a.m., post mortem of the deceased Ghulam Farid was conducted on 22.8.2012. During, the above interregnum where did the said deceased remained in an injured condition, is a mystery. No Medico Legal Certificate has been brought on record. The unexplained delay in lodging the FIR has also been highlighted by learned counsel by adding that all the circumstances of the case appears to be a mystery. Learned counsel for the appellants submitted that complainant Nazir Ahmad (PW-3) while appearing in the witness box has not given any explanation for "his presence" at the time of occurrence which took place during night hours, likewise he has referred to the statement of Muhammad Nawaz (PW-4) who is also not the resident of the house i.e. the place of occurrence as he during his cross-examination has admitted that he lives in a different and separate house, situated two acres away from the place of occurrence, therefore, presence of this PW-4 at the relevant time at the place of occurrence also appears to be highly doubtful; that the prosecution has failed to prove the case against the appellants; that recovery effected from appellant Iftikhar is immaterial and has thus craved for acquittal of the appellants by way of acceptance of appeal.

10. On the other hand, learned Law Officer though while defending, the impugned judgment has opposed the contentions of learned counsel for the appellants yet he could not advance plausible explanation as to where, Ghulam Farid (deceased) remained after receipt of injuries till his death. He has not been able to defend that after disbelieving prosecution evidence qua acquitted co-accused namely Gulzar, Muhammad Fazil. Wajid Ali and Muhammad Hanif, how the same evidence can be relied

upon for maintaining conviction of the appellants, particularly, when appellant Akhtar Abbas was also declared innocent during the course of investigation.

11. Arguments heard. Record perused.

12. It is trite a law that, in a case of, direct evidence/ocular account, it is the bounden duty of prosecution to establish the presence of PWs, at the place of occurrence so that their deposition may be believed. Judging the evidence of PW-3 Nazir Ahmad complainant and PW-4 Muhammad Nawaz, who have furnished the ocular account, through the prism of above cardinal principle criminal dispensation of justice, we are of the view that the presence of the PWs, at the place of occurrence is doubtful, for more than one reasons viz:

i) Delay in lodging the FIR.

ii) unnatural demeanour and conduct of the PWs.

iii) non-advancing of any of the reasons for presence of the PWs at the spot.

Nazir Ahmad complainant (PW-3) while facing test of cross-examination has stated that that "we did not try to inform rescue 15 or rescue 1122 through cell phone". In cross-examination he further deposed that "during the days of occurrence, sun rises at 5/5.30 a.m. Police reached at the place of occurrence at 8/8.30 a.m. I got drafted the application for registration of the case from a person who was present there. His name was Allah Ditta. Allah Ditta is not PW of this case". The occurrence took place at 1.00 AM night, the FIR was lodged at 7.30 AM at the spot through Exh.PE. During this period, it appears some guess work continued for nominating the accused. During cross-examination PW-3 has further stated that "I have not stated any reasons for staying at the house of Ghulam Farid deceased". He further deposed that "house of Muhammad Nawaz PW is situated at the distance of 02 acre from the house of

Ghulam Farid deceased and not two square as suggested". He further deposed that "when we awoke up, the accused were present at the distance of 2/3 acre from us. When we started running the first place of occurrence, accused did not fire on us. The place of murder of Qasim since deceased is at the distance of 7/8 acre from the first place of occurrence and not one kilometer as suggested. We did not raise hue and cry to seek help from the surrounding 'abadi' while running, toward south-east. We did not run from the place of occurrence to save our life. The PWs volunteered that the accused were running behind Qasim deceased and we were chasing the accused. When we started chasing, the accused neither stopped us for chasing them nor made any fire on them. The house of Nawaz PW is toward north of first place of occurrence. The 8/10 houses of mall tribe situated on the western side or first place of occurrence".

PW-4 Muhammad Nawaz in his cross-examination has stated that "the complainant is my cousin". He further deposed in cross-examination that "my statement was recorded by the I.O. under section 161, Cr.P.C. I got recorded in my statement under section 161, Cr.P.C. that Nazeer Ahmad was also present in the house of Ghulam Farid. Confronted with Exh.DA wherein it is not so recorded. I got recorded the names of Gulzar Ahmad, Wajid Ali, Muhammad Hanif, Muhammad Asif and Fazil accused in my statement under section 161, Cr.P.C. Confronted with Exh.DA wherein these names are not recorded". He further deposed in his cross-examination that "I got recorded in my statement under section 161, Cr.P.C. that Nazeer complainant was also with us when we ran to save our lives. Distance between the accused and us was about 8/10 karam. Confronted with Exh.DA wherein name of Nazeer is not mentioned. I have not stated in my examination in chief that all the accused after falling of Qasim gave him butt blows". He further stated in his examination in chief that "we are three brothers. We all the brothers live in separate houses. PW volunteered but we live in the some killa adjacent

to each other. House of Nazeer is situated near our house", Adjudging evidence of PW-3 and PW-4 who have furnished ocular account, it is observed that Nazir Ahmad complainant (PW-3) though claimed to have seen the occurrence in the light of electric bulb, which was lit at the time of occurrence but during the course of investigation, no bulb had even been taken into possession by the Investigating Officer. This fact has been admitted by PW-3 in his statement while facing test of cross-examination in the following words:--

> "I have not shown the electric meter to the police at the time of inspection of place of occurrence. I.O. did not take into possession the electric bulb".

Keeping in view the time of occurrence, the non-production of any of the source of light, it is safely concluded that due to darkness, the identity of the accused appears to be doubtful. Respectful reliance is placed upon case titled Haroon Shafique v. The State and others (2018 SCMR 2118). Even in the second part of occurrence, in which Qasim Ali (deceased) has been done to death, through strangulation, taken place outside village (in complete darkness), near the Dera of one Bashir Ahmad Gujjar. The behavior of the deceased as well as the PWs, as stated, appears to be very strange. Feeling danger at the hands of the accused not only the deceased but also the PWs, instead of rushing towards populated area for seeking some shelter/asylum had started running/going out of the village, which is against the common sense. No accused fired at them when the PWs were chasing them. As per prosecution, firstly the acquitted co-accused had caught hold of Qasim Ali (deceased) reducing him helpless, then the appellant Akhtar strangulated him with his torn 'qameez' which compels us to hold that without the alleged assistance/help of the acquitted co-accused apparently it was not possible for the appellant Akhtar single handedly to strangulate Qasim (deceased). The learned trial court while disbelieving evidence of the prosecution has acquitted the co-accused, which had also caused serious repercussion upon the veracity of the

evidence of PWs. Applying the principle of falsus in uno, falsus in omnibus, the same evidence is liable to be disbelieved once again. It is reiterated that occurrence has taken place in the darkness of night, claim of the PWs having seen the occurrence by chasing/running after the accused who were following the deceased appears to be preposterous and unbelievable, therefore, the same is accordingly disbelieved.

13. So far as recovery is concerned, the ocular account regarding the main occurrence has since been disbelieved by us, therefore, recovery alone is of no consequences. Moreover, recovery of .12 bore gun has been effected from the house of one Bashir Ahmad and not from a place, exclusively in possession of the accused, hence the same is of no use. Even otherwise, the recovery is deemed to be corroborative in nature and it is used for support of direct evidence and as per dictates of justice whenever direct evidence is disbelieved it would not be safe to maintain conviction on confirmatory evidence. In the case of Muhammad Jamil v. Muhammad Akram and others (2009 SCMR 120) the august Supreme Court of Pakistan had held as under:-

> "----S.302(b)---Appreciation of evidence---Principle---In a case of direct evidence other pieces of evidence are used for corroboration or in support of direct evidence---When direct evidence is disbelieved, then it would not be safe to base conviction on corroborative or confirmatory evidence."

14. As far as motive is concerned, it is double edged weapon which can cut either way. It is the prosecution's own case that there exists enmity between appellant Iftikhar Ahmad only, the complainant has opted to involve as may as six other persons besides appellants, in the FIR when, there exists no earthly reasons for sharing of their intention with the alleged principal accused.

15. Fact also remains that in the crime report besides the appellants, Gulzar Ahmad, Wajid Ali, Muhammad Hanif, Muhammad Faazal,

Muhammad Waris, Muhammad Asif were also arrayed as accused out of them Gulzar Ahmad, Wajid Ali, Muhammad Hanif, Muhammad Faazal, were acquitted of the charge on the same set of evidence. It is settled principle of law that if evidence of the prosecution is disbelieved qua bulk of accused it cannot be believed qua the other in the absence of very strong corroboration, which is squarely missing in the case in hand. Respectful reliance in this regard is placed on the ratio decidendi of august Supreme Court of Pakistan in the cases of Akhtar Ali and others v. The State (PLJ 2008 SC 269), Shera alias Sher Muhammad's case (1999 SCMR 697) and Sher Bahadur's case (1972 SCMR 651).

16. All the above narrated facts and circumstances when evaluated on judicial parlance reflect that the prosecution has failed to establish culpability a the appellants in the instant case through reliable, trustworthy and confidence inspiring evidence. It is established principle of law that for extending the benefit of doubt in favour of the accused, so many circumstances are not required, rather one circumstance which creates reasonable dent in the veracity of the prosecution version, can be taken into consideration for the purpose, not as a matter of grace, rather as a matter of right. Respectful reliance in this regard is placed on the ratio decidendi of august Supreme Court of Pakistan in the cases of "Tariq Pervez v. The State" (1995 SCMR 1345) "Riaz Masih alias Mithoo v. The State" (1995 SCMR 1730) and "Muhammad Akram v. The State (2009 SCMR 230). In the case of "Tariq Pervez v. The State" (1995 SCMR 1345), the august Supreme Court of Pakistan has held as under:-

> "----Art.4---Benefit of doubt, grant of---For giving benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubts---If a simple circumstance creates reasonable doubt in a prudent mind about the guilt of accused, then he will be entitled to such benefit not as a matter of grace and concession but as a matter of right".

17. From the facts and circumstances narrated above, we are persuaded to hold that conviction passed by the learned trial Court against the appellants in the circumstances is against all canons of law recognized for the safe dispensation of criminal justice. As per dictates of law benefit of every doubt is to be extended in favour of the accused. Moreover, it is golden principle of law that the Court may err in letting off 100 guilty but should not convict one innocent person on the basis of suspicion. Resultantly while setting aside the conviction and sentence recorded by the learned trial court vide impugned judgment dated 28.06.2016, Crl. Appeal No.1612 of 2016 filed jointly by both the appellants is allowed as a consequence whereof they are ordered to be acquitted of the charge framed against them by extending them the benefit of doubt. They are in jail, directed to be released in this case forthwith if not required in any other case.

18. Murder Reference No.348 of 2016 is answered in negative. Death sentence is not confirmed.

JK/I-13/L **Appeal allowed**.

2019 P Cr. L J 412

[Lahore (Multan Bench)]

Before Anwaarul Haq Pannun and Farooq Haider, JJ

MUHAMMAD AMEEN---Appellant

Versus

The STATE---Respondent

Criminal Appeal No. 23 of 2018, decided on 26th November, 2018.

Control of Narcotic Substances Act (XXV of 1997)---

----Ss. 9(c) & 48---Qanun-e-Shahadat (10 of 1984), Art. 114---Criminal Procedure Code (V of 1898), S. 510--- Recovery of narcotics--- Appreciation of evidence--- Estoppel against law--- Principle--- Applicability---Forensic Science Agency, report of---Scope---Accused was apprehended for possessing heroin and Charas, whereafter report was obtained from Forensic Science Agency---Copy of such report was produced in court after objection was withdrawn by accused and petitioner was convicted and sentenced by Trial Court---Validity--- Withdrawal of objection by accused did not amount to waiving of right of questioning admissibility of report during evidence---No concept of waiver or estoppel existed against question of law and especially in criminal law---Such objection could be agitated as and when occasion arose---Court was to decide the case strictly in accordance with law as question of life and liberty of accused was to be decided---Prosecution had failed to bring on record original report of Forensic Science Agency through which prosecution had to confirm that alleged recovered material from appellant was contraband for seeking conviction and sentence of accused---Such report of Forensic Science Agency was neither a legal document nor it carried any sanction of law and same could not be read against accused as a piece of evidence---Trial Court was not justified in recording conviction against accused on basis of such inadmissible

document---High Court set aside conviction and sentence awarded to accused awarded by Trial Court and acquitted accused---Appeal was allowed in circumstances.

Ghayour Abbas v. The State 2018 YLR 2494 rel.

Fayyaz Ahmad Khan Lakhwera for Appellant.

Muhammad Ali Shahab, Deputy Prosecutor-General with Farhat Waseem, ASI for Respondent.

Date of hearing: 26th November, 2018.

JUDGMENT

ANWAARUL HAQ PANNUN, J.---Through this appeal under section 48 of The Control of Narcotic Substances Act, 1997 (CNSA, 1997), the appellant Muhammad Ameen has challenged his conviction and sentence awarded to him, vide judgment dated 20.12.2017 in case/FIR No.355/2016, dated 16.06.2016, offence under section 9(c) of CNSA, 1997, registered at Police Station Luddan, District Vehari by the learned Addl. Sessions Judge/Judge Special Court CNS, Vehari, whereby the appellant has been convicted and sentenced as under:-

Under section 9(c) of CNSA, 1997

"to undergo rigorous imprisonment for four (04) years and six (06) months and fine of Rs.20,000/-, in default of payment thereof, the convict shall further undergo for five (05) months' (S.I)."

Under section 9(a) of CNSA, 1997

"to undergo rigorous imprisonment for seven (07) months and fine of Rs.5000/-, in default of payment thereof, the convict shall further undergo for two (02) months and fifteen (15) days S.I."

Both the sentences shall run concurrently and benefit of section 382-B, Cr.P.C. is also extended to the convict."

2. Concise facts forming the background of the prosecution's case are to the effect that on 16.06.2016, Muhammad Khalid SI/SHO (PW-3) along with Munawar Hussain ASI, Zahoor Ahmad 1212/C, Ali Shair 1196/C, Riaz Ahmad 861/C and Munir Ahmad PQR was present at RHC Luddan, on official vehicle bearing Registration No. 1561/VRP, being driven by Waqar Hussain 706/C, he received spy information that if raided, a notorious narcotic drug peddler Muhammad Amin (present appellant) selling narcotic near graveyard of Luddan, may be apprehended and contraband could be recovered from his possession. Consequently a raid was conducted by a raiding party under his supervision and the accused/appellant was apprehended. Upon search of shopper, the accused/appellant was carrying in his hand, charas (P-1) weighing 1300 grams was recovered whereas upon his personal search, "Heroin" (P-2) weighing 25 grams was recovered from the right side pocket of his shirt coupled with cash/sale proceed worth Rs.700/-. The complainant prepared two sealed parcels of recovered "charas" and "Heroin" and took into possession vide recovery memo (Exh.PB) and sale proceed was also taken into possession vide recovery memo (Exh.PC).

3. On receiving report under section 173, Cr.P.C., the learned trial Judge took the cognizance, supplied the copies of the statements of witnesses recorded under section 161, Cr.P.C. to the appellant under section 265-C, Cr.P.C., framed the charge, to which, the appellant pleaded not guilty, proceeded to record the evidence of the prosecution witnesses i.e. PW-1 to PW-5, where-after the leaned Prosecutor submitted photocopies of different FIRs as Mark-A to Mark-N and copy of report of Punjab Forensic Science Agency, Lahore (Exh.PF) under objection instead of original, which was positive in nature. Thereafter, the appellant was examined under section 342, Cr.P.C. wherein he pleaded his innocence. In reply to the question that why this case and why the PWs deposed against him, the appellant replied as under:-

"The instant case was lodged with mala fide, because my wife Razia Bibi moved an application against one Safdar Hussain ASI who is subordinate and colleague of the complainant and P.Ws."

The appellant did not examine himself under section 340(2), Cr.P.C., however, produced newspaper clipping daily Pakistan Multan dated 30.12.2015 as Mark-A, and closed defense evidence. The trial Judge convicted and sentenced the appellant, as alluded to in para No.1 of the instant judgment. Hence, this appeal.

4. The prime contention of learned counsel for the appellant is that copy of report of Punjab Forensic Science Agency, Lahore (Exh.PF) in lieu of original produced by prosecution is not admissible in evidence under section 510, Cr.P.C., hence learned trial Court has erred in law while passing the impugned judgment, hence accepting the instant appeal, the appellant may be acquitted of the charge.

5. On the other hand, learned Prosecutor has not been able to controvert the above contention of learned counsel for the petitioner except that since the defence waived its objection before the trial Court subsequently, therefore, in the appeal, the abovesaid argument of learned counsel for the appellant is not available for pressing into service and prayed for dismissal of the instant appeal.

6. Arguments heard and record perused.

7. For ready reference, section 510, Cr.P.C. is reproduced as under:-

"[510. Report of Chemical Examiner, Serologist, etc. Any document purporting to be a report, under the hand of any Chemical Examiner or Assistant Chemical Examiner to Government [or of the Chief Chemist of Pakistan Security Printing Corporation, Limited] or any Serologist, finger print expert or fire-arm expert appointed by Government upon any matter or thing duly submitted to him for examination or analysis and report in the course of any

proceeding under this Code, may without calling him as a witness, be used as evidence in any inquiry, trial or other proceeding under this Code:

Provided that the Court may [if it considers necessary in the interest of justice] summon and examine the person by whom such report has been made.]"

8. In the instant case, admittedly the original report of Punjab Forensic Science Agency (Exh.PF) has not been produced and only copy of report of PFSA (Exh.PF) has been brought on record. It is interesting to note that on 23.11.2017, learned DDPP for the State produced the copy of report of PFSA (Exh.PF) which was exhibited under objection raised by learned defence counsel and the case was adjourned to 23.11.2017 for recording of statement of the accused/appellant under section 342, Cr.P.C. on which date, learned DDPP for the state moved an application under section 540, Cr.P.C. for summoning of a PW without mentioning the name or official nomenclature of the person to be summoned for proving the report of PFSA (Exh.PF) on which no order could be passed till 05.12.2017. On said date, the following order was passed by the learned trial Judge:-

"Learned counsel for the accused stated that he wants to withdraw his objection regarding report of PFSA. Learned counsel for the accused has made signature in this regard. In view of the statement of learned counsel for the accused, the petition under section 510, Cr.P.C. regarding summoning of witness along with record is hereby dismissed being infructuous. Now to come up on 09.12.2017 for recording the statement of accused under section 342, Cr.P.C."

Thereafter, the statement of the accused/appellant under section 342, Cr.P.C. and other defence evidence was recorded and the case was decided as discussed supra through the impugned judgment.

9. The above resume of facts indicate at least two interesting points:-

(1) That the learned prosecutor moved an application in a very abstract manner for summoning of PWs without mentioning the name or the nomenclature of the person to whom he wanted to summon for proving report of PFSA (Exh.PF).

(2) On withdrawal of objection regarding report of PFSA (Exh.PF) by learned defence counsel, the learned trial Court simplicitor dismissed the application for summoning of witnesses.

10. The learned trial Judge in our estimation proceeded in the case in a very casual manner being oblivious of its own duty because it was the Court which has to decide about the admissibility or otherwise of any piece of evidence being produced before it. On account of waiver/withdrawal of objection by the learned defence counsel on the report of PFSA (Exh.PF), the same could not have been qualified to be an admissible piece of evidence under section 510, Cr.P.C. Mere withdrawal of the objection by learned defence counsel would not amount to waiving of right of questioning the admissibility of this piece of evidence. There is no concept of waiver or estoppel against question of law and especially in criminal law. It can be agitated as and when occasion arises. It is the Court, which has to decide the case strictly in accordance with law as the question of life and liberty of the accused is to be decided by it. In this case, we have found as observed earlier that the prosecution has failed to bring on record the original report of PFSA through which the prosecution had to confirm that the alleged recovered material from the appellant was a contraband for seeking conviction and sentence of the accused. For our above view, we also seek support from the case titled "Ghayour Abbas v. The State" (2018 YLR 2494) wherein it is observed that:-

"However, the report of the concerned quarter available on file as Exh.PE reflects that it is neither original report nor it is true/certified copy of the report rather it is a duplicate copy, which was issued on 13.01.2017 i.e. four years after the occurrence.

Moreover, it does not carry signature of the Bio-Chemist or Chemical Examiner and only signatures of one Additional Medical Superintendent (Admn.), Benazir Bhutto Hospital, Rawalpindi, are affixed on it and underneath his stamp it is mentioned ex-Chemical Examiner. No doubt the report of Chemical Examiner is to be brought on record in terms of section 510, Cr.P.C. and that could be without summoning its author, however, admittedly it should be in original form and in case its original is not available, then on the basis of very cogent reasons then its certified copy should be presented for consideration by the learned trial court. However, perusal of Exh.PE reflects that neither it is original report nor it qualifies to be a certified/true copy, hence, it cannot be read in evidence against the appellant to connect him with the case. Moreover, there is no provision of law to deviate from the requisite mode of proof of a document. Respectful reliance in this regard is placed on the ratio decidendi of august Supreme Court of Pakistan in Province of Punjab case reported as 2017 SCMR 172; wherein following principle was laid down:--

"---Chap. V [Arts. 72 to 101]---Documents brought on record---Mode of proof---Provisions governing the mode of proof could not be compounded or dispensed with, nor could the Court, which had to pronounce a judgment, as to the proof or otherwise of the document be precluded to see whether the documents had been proved in accordance with law and could, as such, form basis of a judgment."

When facts of the case in hand are examined on the touchstone of the case law referred to above, we have been persuaded to hold that the report of Chemical Examiner (Exh.PE) in this case is neither a legal document nor it carries any sanction of law, hence the same being vague/invalid document could not be read against the appellant. Therefore, the learned trial court was not justified in

recording conviction against the appellant on the basis of such a indistinct document."

11. For what has been discussed above, we are persuaded to hold that the report of PFSA (Exh.PF) in this case is neither a legal document nor it carries any sanction of law, hence the same could not be read against the appellant as piece of evidence. The learned trial Court was not justified in recording conviction against the appellant on the basis of such inadmissible document. Resultantly, the instant appeal is allowed, as a consequence whereof, conviction and sentence recorded through the judgment dated 20.12.2017 passed by learned Addl. Sessions Judge/Judge Special Court CNS, Vehari is set aside. The appellant is acquitted of the charge and he is directed to be released forthwith, if not required in any other case.

MH/M-188/L **Appeal allowed.**

PLJ 2019 Lahore (Note) 146

[Multan Bench, Multan]

Present **: MUJAHID MUSTAQEEM AHMED AND ANWAARUL HAQ PANNUN, JJ**

MUHAMMAD IDREES--Petitioner

versus

SPECIAL JUDGE, ANTI-TERRORISM COURT, etc--Respondents

Writ Petition No.15442 of 2018, decided on 19.11.2018

Constitution of Pakistan, 1973--

----Art. 199--Anti-Terrorism Act, 1997, Ss. 2(a), 6, 6(2)(n), 7 & 23--Registration of FIR under Sections 302/324A--Application for addition of Section 7 of Anti-Terrorism Act--Dismissed--Object of Act--Question of--Whether or not, instant occurrence attracts by Anti-Terrorism Court--Determination--Exercise of jurisdiction--Challenge to—Transfer of record—Direction to--We have no hesitation to hold, while keeping in view object of Act expressed in preamble, that provisions of Sections 6(2)(n) of Act can only be attracted where a person belonging to Forces mentioned supra is targeted with violence while discharging his duties, performing his official functions or action complained of is designed with object of creating a sense of fear and insecurity, except in cases where propelling force behind occurrence is private motive--Main occurrence, which took place at 7:00 p.m., was sequel of motive which had taken place 2-½ hours before due to personal grudge nourished in mind of Qaiser, who had allegedly persuaded his co-accused, to commit crime, in furtherance of their common intention i.e. to avenge quarrel--We are of opinion that in order to attract provisions of Act, act complained of must have a serious nexus with provision of Section 6--To exercise jurisdiction under Act ibid, ‘design’ or ‘purpose’ behind action coupled with mens-rea

to constitute offence of terrorism is sine-qua-non but same has not been taken into consideration by learned Court below while deciding application of petitioner--There is also nothing on record to show that life and liberty of large number of persons in village was put in danger because of firing of accused party--In absence of solid and admissible evidence, mere conjectures and surmises, how so strong may be, cannot substitute reality--In instant case, as observed above, occurrence had taken place as a result of private motive inter-se parties, hence, addition of Section 7 of Act in FIR and submission of challan before Anti-Terrorism Court is declared to be illegal and without lawful authority--Application of the petitioner moved under Section 23 of the Act is accepted and addition of aforesaid Section is declared to be illegal, improper and of no legal effect. Learned Special Judge Anti-Terrorism Court-II, Multan is directed to transfer the record of the aforesaid case to the Court of ordinary jurisdiction for further proceedings in accordance with law--Petition was allowed. [Para 10, 12, 14, 15] A, B, C, D & E

PLD 2018 SC 178, PLD 2016 SC 951, 2002 SCMR 908,
2002 MLD 1433 & 2002 YLR 203, *ref.*

Sardar Mehboob, Advocate for Petitioner.

Mr. Iftikhar-ul-Haq, Additional Prosecutor General for State.

Mr. Mudassir Altaf Qureshi, Advocate for Respondent No. 2.

Date of hearing: 19.11.2018.

ORDER

Through this Constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner has challenged the vires of order dated 08.10.2018, passed by the learned Judge, Anti-Terrorism Court-II, Multan (Respondent No.1) whereby application

filed by the petitioner under Section 23 of the Anti- Terrorism Act, 1997 (hereinafter to be referred as 'the Act') in case FIR No.381 dated 16.06.2018, registered at Police Station Gaggo, District Vehari, for offences under Sections 302, 324 & 34 PPC read with Section 7 of the Act, stood dismissed.

2. Briefly stating, the facts of the case, leading to the filing of the instant writ petition are that Respondent No. 2 had lodged the aforesaid criminal case against the petitioner and others with the allegation that on 16.06.2018, at about 7:00 p.m., he alongwith his son namely Ali Raza, nephew Muhammad Nawaz and other relatives, was sitting on a 'Thara' in front of their house when the petitioner alongwith his co-accused, armed with fire arm weapons, came there, while making firing and creating panic in the area. Due to fear, they tried to rush to their house in order to save their lives but in the meanwhile, accused Shafiq made a fire shot with his pistol 30- bore at the chest of Muhammad Nawaz, who after receiving injury, fell down on the ground. Idrees (petitioner) made fire shot with his rifle which landed at the chest of his son Ali Raza who also fell down on the ground. The complainant and other PWs tried to rescue the injured persons but they succumbed to the injuries at the spot. Accused Qaiser made fire shot with his pistol 30-bore hitting Muhammad Ramzan at his little finger of right hand, Khalil inflicted butt blows of his pistol to Allah Rakha causing injuries on his head.

The motive behind the occurrence has been stated to be a quarrel taken place between Muhammad Nawaz (deceased) and Qaiser accused during the cricket match at about 4:30 p.m., on the same day.

3. Learned counsel for the petitioner submits that bare reading of the FIR transpires that the occurrence has taken place on account of a private motive inter-se the parties and the learned Special Judge Anti-Terrorism Court-II, Multan has failed in taking into consideration that there exist

neither any circumstance nor any material available on the record for attracting Section 6 of the Act, hence the impugned order is not sustainable under the law. He prayed for acceptance of the writ petitioner while relying upon *"Waris Ali and 5 others vs. The State"* (2017 SCMR 1572).

4. On the other hand, learned counsel appearing for Respondent No. 2 as well as learned Additional Prosecutor General have submitted that since one of the deceased namely Muhammad Nawaz was an army personnel, therefore, keeping in view the provision of Sections 2 (a) & 6 (2) (n) of the Act, the impugned order has rightly been passed. Learned counsel for Respondent No. 2 has relied upon the cases reported as *Province of Punjab through Secretary Punjab Public Prosecution Department and another vs. Muhammad Rafique and others* (PLD 2018 Supreme Court 178), *Kashif Ali vs. The Judge, Anti-Terrorism Court, No.II, Lahore* (PLD 2016 Supreme Court 951) and *Mst. Raheela Nasreen vs. The State and another* (2002 SCMR 908) and has prayed for dismissal of the instant petition.

5. Arguments heard. Record perused.

6. The question, pithily, before us in the instant proceedings, requiring its determination, is whether or not, the instant occurrence attracts the provisions of Section 7 of the Act rendering the case to be cognizable by the Anti-Terrorism Court, in which murder of Muhammad Nawaz deceased, member of the Armed Forces, had taken place on account of private motive inter-se the parties.

7. In order to appreciate the contentions raised at bar, It will be convenient to firstly reproduce the preamble and other relevant provisions of the Act which are as under:--

> ***"An Act to provide for the prevention of terrorism, sectarian violence and for speedy trial of heinous offences."***

2(a). "armed forces' means the Military, Naval and Air Forces of Pakistan and the Reserves of such Forces.

(b). "Civil armed forces" means the Frontier Constabulary, Frontier Corps, Pakistan Coast Guards, Pakistan Rangers or any other civil armed force notified by the Federal Government as such.

6(2)(n). Involves serious violence against a member of the police force, armed forces, civil armed forces, or a public servant."

8. The contention of learned counsel for Respondent No. 2 that since one of the deceased namely Muhammad Nawaz was a member of the Armed Forces, therefore, combine reading of Sections 2(a), 2(b) & 6(2)(n) of the Act will bring the case of the prosecution, without any further qualifying factor, automatically within the cognizance of Anti-Terrorism Court, does not commensurate with the facts and circumstances of the instant case.

9. The Anti-Terrorism Act, 1997 was promulgated on 20th August 1997, as the legislation felt it expedient because the terrorist of different colours and creeds, backed by various inimical quarters, motivated by different ideologies, were desperately attacking not only the civilian populace but also the men in uniform, public servants and institutions creating a sense of fear, despair and insecurity amongst the public at large apart from degrading the image of the country abroad. It appears that intention of the legislature for enactment of the Act was to give clear message to the terrorists, hitting even the men in uniform, who were duly trained and equipped with sophisticated weapons to combat such nasty elements for internal and external security of the country, that they will be dealt with iron hand under the aforesaid provisions of the Act by the Anti-Terrorism Courts.

10. The law was supposed to work as a moral boosting factor not only for the civilians but also for the men in uniform, therefore, taking into consideration the facts and circumstances of the case, we have no hesitation to hold, while keeping in view the object of the Act expressed in the preamble, that the provisions of Sections 6(2)(n) of the Act can only be attracted where a person belonging to the Forces mentioned supra is targeted with violence while discharging his duties, performing his official functions or the action complained of is designed with the object of creating a sense of fear and insecurity, except in the cases where the propelling force behind the occurrence is private motive.

11. The august Supreme Court, in case *Waris Ali* (supra), while discussing the same question, has held as under:--

> "24. True, that in section 6 read with section 7 of the Special Act, offences of murder, attempted murder or causing bodily hurt or injury have been made cognizable by the Special Court, however, from the qualifying words, preceding the description of offences under subsection (1) of section 6 read with the provisions of section 7 the intention of the legislature becomes perceivable/visible that in committing these crimes essentially the element of "terrorism" shall be persuasive factor however other category of crimes duly specified and listed in Special Act shall fall within the ambit of provision of same being act of terrorism in that regard. The manifest intent of the Legislature does not leave behind any doubt for debate."

12. Bare perusal of the FIR shows that the complainant has set up his case with the narration that the motive behind the occurrence was a quarrel, taken place earlier at 4:30 p.m., between deceased Muhammad Nawaz and accused Qaiser during the cricket match on the same day. Therefore, we feel no difficulty in concluding that the main occurrence, which took place at

7:00 p.m., was sequel of the motive which had taken place 2-½ hours before due to personal grudge nourished in the mind of Qaiser, who had allegedly persuaded his co-accused, to commit the crime, in furtherance of their common intention i.e. to avenge the quarrel. No other inference regarding the cause of murder can be drawn in the circumstances of this case. Even during investigation, nothing adverse has come on the surface of record. We are of the opinion that in order to attract the provisions of the Act, the act complained of must have a serious nexus with the provision of Section 6. To exercise the jurisdiction under the Act ibid, 'design' or 'purpose' behind the action coupled with mens-rea to constitute the offence of terrorism is sine-qua-non but the same has not been taken into consideration by the learned Court below while deciding the application of the petitioner. There is also nothing on record to show that life and liberty of large number of persons in the village was put in danger because of the firing of the accused party. In absence of solid and admissible evidence, mere conjectures and surmises, how so strong may be, cannot substitute the reality.

13. In a judgment passed by learned Division Bench of this Court reported as *Nazim Khan vs. Special Judge, Anti-Terrorism Court* (2002 MLD 1433), it has been held as under:--

> "---incident having sparked off over a triviality bearing no nexus with the discharge of the official duty being the sine qua non in the contest of things for assumption of jurisdiction by the Special Court constituted under the Anti-Terrorism Act, 1997 in terms of section 6 read with section 2(e) ibid…."

Similar view has been taken in case *Muhammad Riaz vs. Mian Khadim Hussain, Additional Sessions Judge, Mianwali and 11 others* (2002 YLR 203) Lahore (Full Bench Judgment).

14. In the instant case, as observed above, the occurrence had taken place as a result of private motive inter-se the parties, hence, addition of Section 7 of the Act in the FIR and submission of challan before the Anti-Terrorism Court is declared to be illegal and without lawful authority.

15. In view of what has been discussed above, the instant petition is allowed, impugned order dated 08.10.2018 is set aside, the application of the petitioner moved under Section 23 of the Act is accepted and addition of aforesaid Section is declared to be illegal, improper and of no legal effect. Learned Special Judge Anti-Terrorism Court-II, Multan is directed to transfer the record of the aforesaid case to the Court of ordinary jurisdiction for further proceedings in accordance with law.

(Y.A.) **Petition Allowed.**

PLJ 2019 Cr.C. (Note) 11

[Lahore High Court, Multan Bench]

***Present*: ANWAARUL HAQ PANNUN, J.**

MUHAMMAD SALEEM--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 5972-B of 2018, decided on 6.11.2018.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 324/399/402/353/186/148/149--Arms Ordinance, 1965, S. 13--Post arrest bail--Grant of--Further inquiry--Petitioner himself had received injuries therefore, at this stage; it is difficult to say that he has committed the offence u/S. 324, PPC--Sections 186 & 353, PPC & 13/20 of Arms Ordinance, 1965 are bailable--From contents of FIR, *prima facie,* ingredients of Sections 399 & 402, PPC are not made out--Petitioner is behind the bars since his arrest--Facts do constitute a case of further enquiry--Post arrest bail granted. [Para 3] A

Mr. Muhammad Irfan Aarbi, Advocate for Petitioner.

Mr. Abdul Wadood, Deputy Prosecutor General for Respondents.

Date of hearing: 6.11.2018.

ORDER

Muhammad Saleem, the petitioner has sought post arrest bail in case FIR No. 185 dated 17.3.2018, registered at Police Station Jatoi, District Muzaffargarh in respect of offences under Sections 324, 399, 402, 353, 186, 148 & 149 read with Section 13/20 of Arms Ordinance, 1965 wherein it has been alleged that on 17.3.2018, when the police party, on spy information that some persons while sitting in the house of the petitioner having fire-arm weapons, are planning to commit dacoti, conducted raid to arrest them, they

started blind firing at the police party due to which, the petitioner was injured. Hence, this case was registered.

2. Arguments heard. Record perused.

3. It has been observed that during occurrence, the petitioner himself had received injuries therefore, at this stage, it is difficult to say that he has committed the offence under Section 324, PPC. So far as Sections 186 & 353, PPC & 13/20 of Arms Ordinance, 1965 are concerned, the same are bailable. From the contents of the FIR, *prima facie,* ingredients of Sections 399 & 402, PPC are not made out. The petitioner is behind the bars since his arrest i.e. 17.03.2018. The above facts do constitute a case of further enquiry. Admittedly, the petitioner is previously non-convict.

4. In view of above, the petition in hand is **allowed** and the petitioner is admitted to post arrest bail subject to his furnishing bail bonds in the sum of Rs. 2,00,000/- (rupees two lac) with one surety in the like amount to the satisfaction of learned trial Court.

(K.Q.B.) **Bail allowed.**

PLJ 2019 Cr.C. (Note) 20

[Lahore High Court, Multan Bench]

Present: **ANWAARUL HAQ PANNUN, J.**

ABDUL SATTAR--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 6596-B of 2018, decided on 20.11.2018.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), S. 337-F(v), 337-F(i), 337-L(ii) & 34--Post-arrest bail, grant of--Allegation of--Petitioner gave hatchet blow hitting on left be of injured and co-accused caused injuries on different part of his body--Injury attributed to petitioner falls within domain of Section 337-F(v), PPC which entails punishment for five years, hence same does not fall within prohibitory clause of Section 497 Cr.P.C--There is a contradiction between medical evidence and contents of FIR, petitioner gave hatchet blow hitting on left leg of injured, whereas in Medico Legal report, kind of weapon used for causing injury is mentioned as blunt edged weapon--Render case of petitioner within ambit of further inquiry--Petitioner is previous non-convict, behind bars since his arrest and no more required for purpose of investigation--Petition is allowed. [Para 3] A

Mr. Naeem Ullah Khan, Advocate for Petitioner.

Mr. Shaukat Ali Ghauri, APG for State.

Date of hearing: 20.11.2018.

ORDER

After having been unsuccessful before the learned inferior Court, the petitioner has tried his luck, for his release on post arrest bail through this

petition under Section 497, Cr.P.C in case FIR No. 130/2015 dated 17.08.2015, offence under Sections 337-F(v)/337-F(i)/337-L(ii)/34 PPC, registered at Police Station Wahova, Tehsil Taunsa Sharif, District Dera Ghazi Khan, in which it is alleged that on 17.07.2015 at about 4.30 p.m., the petitioner while armed with hatchet alongwith his co-accused came at the land of Manzoor injured, brother-in-law of the complainant. The petitioner gave hatchet blow hitting on left leg of aforesaid Manzoor whereas other co-accused caused injuries on different parts of his body.

2. Arguments heard and record perused.

3. Perusal of the record shows that the alleged occurrence took place on 17.7.2015 whereas the matter was reported to the police *vide* Rappat No. 10 dated 17.8.2015, after delay of about one month. The injury attributed to the petitioner falls within the domain of Section 337-F(v), PPC which entails punishment for five years, hence same does not fall within the prohibitory clause of Section 497 Cr.P.C. There is a contradiction between medical evidence and the contents of FIR, the petitioner gave hatchet blow hitting on left leg of the injured Manzoor Ahmad, whereas in Medico Legal report, the kind of weapon used for causing injury is mentioned as blunt edged weapon. The above referred factors render the case of the petitioner within the ambit of further inquiry. The petitioner is previous non-convict, behind the bars since his arrest and no more required for the purpose of investigation. Resultantly, the instant petition is allowed and the petitioner is admitted to post-arrest bail, subject to his furnishing bail bond in the sum of Rs. 1,00,000/- (Rupees one hundred thousand only) with one surety in the like amount to the satisfaction of learned trial Court.

(A.A.K.) **Bail allowed.**

PLJ 2019 Cr.C. (Note) 27

[Lahore High Court, Multan Bench]

***Present*: ANWAARUL HAQ PANNUN, J.**

FAHEEM IQBAL KHAN and 3 others--Petitioners

versus

STATE and another--Respondents

Crl. Misc. No. 6705-B of 2018, decided on 5.12.2018.

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

----S. 498--Pakistan Penal Code, (XLV of 1860), Ss. 302, 324, 337-F(iii), 148 & 149--Bail before arrest was dismissed by Court below--Petitioners seek confirmation of their ad-interim pre-arrest bail granted by High Court--Confirmation of--Allegation of--Role of ineffective firing--Role of alleged ineffective firing renders the case to be one of further inquiry--So far as the question of sharing the common object of the petitioners with their co-accused is concerned, the same is to be determined by the trial Court after recording of evidence--Bail was confirmed. [Para 3] A

Syed Jaffar Tayyar Bukhari, Advocate with Petitioners.

Syed Nadim Haider Rizvi, Deputy Prosecutor General for State.

Date of hearing: 5.12.2018.

ORDER

Faheem Iqbal Khan, Waseem lqbal Khan, Nadeem Mumtaz and Zaffa r Iqbal, the petitioners, after dismissal of their pre-arrest bail by the Court below, seek confirmation of their ad-interim pre-arrest bail granted to them by this Court *vide* order dated 13.11.2018, in case FIR No. 191 dated 27.07.2018, registered at Police Station Bahadar Shah, District Sahiwal under Sections 302, 324, 337-F(iii), 148 & 149, PPC with the allegation that they alongwith their co-accused persons, while armed with fire-arms, in furtherance of their common object, assaulted upon the

complainant party and committed the murder of son-in-law of the complainant, hence this case.

2. Arguments heard. Record perused.

3. The petitioners have been assigned the role making indiscriminate firing at the complainant party during the occurrence but there is nothing on record that as a result of their firing, anybody had received injury. Perusal of FIR reveals that almost ten persons have been involved in this case so, the possibility of falsely implicating the petitioners by throwing the net wide cannot be ruled out. The petitioners have joined the investigation, therefore, role of alleged ineffective firing in the above facts renders the case to be one of further inquiry. So far as the question of sharing the common object of the petitioners with their co-accused is concerned, the same is to be determined by the learned trial Court after recording of evidence.

4. In view of above, this petition is **allowed** and ad-interim pre arrest bail already granted to the petitioners *vide* aforesaid order stands confirmed subject to their furnishing fresh bail bonds in the sum of Rs. 100,000/- (one lac) each with one surety each in the like amount to the satisfaction of the trial Court.

(A.A.K.**)** **Bail confirmed.**

PLJ 2019 Cr.C. 91

[Lahore High Court, Multan Bench]

***Present*: ANWAARUL HAQ PANNUN, J.**

***Mst.* BALQEES--Appellant**

versus

STATE and another--Respondents

Crl. Appeal No. 786 of 2011, heard on 14.11.2018.

Pakistan Penal Code, 1860 (XLV of 1860)--

----S. 302(b)--Criminal Procedure Code, (V of 1898), S. 410--Criminal appeal--Conviction and sentence--Challenge to--Benefit of doubt--Deadbody was lying on the cot in the Courtyard and there was blackish abrasion around his neck that suspected murdered by strangulation, while putting rope or cloth around his neck--Complainant made supplementary statement before police and raised suspicion that accused persons had committed the murder of deceased because it was the talk of the town that accused had illicit relations with appellant--Co-accused, who infact strangulated the deceased has since been acquitted of the charge and according to the prosecution, the appellant has only provided a dopatta for strangulation leaves no room for sustaining the impugned judgment--No appeal against acquittal of co-accused has been filed by the complainant, thus same has attained finality to his extent--Benefit of doubt--Acquitted. [Pp. 92, 93 & 97] A & D

Extra Judicial confession--

----Extra Judicial confession is weak type of evidence and such like confession can easily be procured whenever direct evidence of crime is not available. Until and unless extrajudicial confession is not corroborated by any other independent piece of evidence, no reliance can be placed on

and it would not be safe to maintain conviction of appellant on basis of such type of evidence. [P. 97] B

2006 SCMR 231; 1996 SCMR 188; 2010 PCr.LJ 1730 and 2015 SCMR 155, *ref.*

Expert evidence--

----In absence of direct evidence, evidence of experts do not point finger towards the culprit, although the post mortem report confirms the death of the deceased and report of Chemical Examiner suggests the administration of poison to the deceased but cannot pinpoint the person who administered the same. [P.] C

M/s. Kh. Qaiser Butt and Ch. M. Imran, Advocates for Appellant.

Mr. Abdul Wadood, D.P.G. for State.

Nemo for Complainant.

Date of hearing: 14.11.2018.

JUDGMENT

Through this criminal appeal, the appellant has called in question the judgment dated 24.06.2011, passed in case/F.I.R. No. 490, dated 28.12.2010, offence under Section 302/34, PPC, registered at Police Station Kot Sultan, District Layyah, whereby while acquitting co-accused Muhammad Yameen, the appellant has been convicted under Section 302(b), PPC and sentenced to life imprisonment alongwith compensation of Rs. 50,000/- under Section 544-A, Cr.P.C. payable to the legal heirs of the deceased and in default, whereof compensation shall be recovered as arrears of land revenue and in case of failure to recover the same, the accused will suffer six months imprisonment. Benefit of Section 382-B, Cr.P.C. was extended to the convict/appellant.

2. Precisely, the prosecution's case as set out in the FIR (Exh.PA/2) on the basis of complaint (Exh.PA) lodged by Riaz Hussain, complainant/Khaluzad of the deceased (PW-13) is to the effect that the deceased Manzoor Hussain had been married to the convict/appellant *Mst.* Balqees about 9/10 years ago and was living with his in-laws; that on 28.12.2010 at about 8.00 p.m. he received information that Manzoor Hussain had died upon which, he alongwith Saeed Ahmad, his brother and Ashiq Hussain s/o Ghulam Qasim reached at the spot and saw that the dead body of Manzoor Hussain was lying on the cot in the Courtyard and there was blackish abrasion around his neck; that they suspected that Manzoor Hussain has been murdered by strangulation, while putting rope or cloth around his neck.

3. On 30.12.2010, the complainant made supplementary statement before police and raised suspicion that *Mst.* Balqees Bibi and Muhammad Yamin accused persons had committed the murder of deceased Manzoor Hussain because it was the talk of the town as Manzoor Hussain deceased had also told them in his life time that Muhammad Yamin accused had illicit relations with *Mst.* Balqees Bibi. Complainant further stated in his supplementary statement that on 1.1.2011, Muhammad Rasheed PW informed him on telephone at evening time that *Mst.* Balqees Bibi accused had confessed before him that she along with Muhammad Yameen accused had committed the murder of Manzoor Hussain and at that time he was on his field duty far away, so he asked Rasheed PW that on the next day he would meet him; that on the next day, Rasheed and Ehsannullah PWs met him and he took them to the police station where their statements were recorded.

4. The investigation encapsulated into submission of report under Section 173, Cr.P.C., the learned trial Judge took the cognizance, supplied

the copies of the statements of witnesses recorded under Section 161, Cr.P.C. to the accused under Section 265(c), Cr.P.C., framed charge, which was denied by the accused while professing innocence and claimed trial. The learned trial Judge ordered the prosecution to produce evidence for establishing the charge.

5. In order to prove the charge against the accused/appellant, the prosecution has produced Amir Abbas T/ASI (PW-1), Aftab Ahmad ASI (PW-2), Shabbir Hussain 293/C (PW-3), Imam Bakhsh 425/C (PW -4), Abdul Hameed Patwari Halqa (PW-5), Dr. Qamar Bashir (PW-6), Fazal Hussain SI (PW-7), Saeed Ahmad (PW-8), Muhammad Waqar Ahmad (PW-9), Ahmad Bakhsh (PW-10), Rasheed Ahmad (PW-11), Ehsanullah (PW-12), Riaz Ahmad, complainant (PW-13) and Abdul Hameed SI (PW-14). Beside the above, complaint (Exh.PA), rappat No. 13 (Exh.PA/1), FIR (EXh.PA/2), site-plan (Exh.PB, Exh.PB/1 & Exh.PB/2), post-mortem report (Exh.PC), Diagrams (Exh.PC/1 & Exh.PC/2), injury map (Exh.PD), inquest report (Exh.PE), report of chemical Examiner (Exh.PF), final report of doctor (Exh.PG), recovery memos. or apparels, dupatta, CNIC and Wattan Card etc. (Exh.PH, Exh.PJ & Exh. PK), site-plan of place of occurrence, dupatta, CNIC Card etc. (Exh.PL to Exh.PN) had been produced. Dr. Qamar Bashir (PW-6) who conducted-post mortem on the dead body of the deceased has observed as under:

> "There was a signal ligature mark around the neck which was 18 cm x 2 cm. It was 4 cm above supra sternal notch and 8 cm below the chin. A mark of knot was present on the back of the neck. On dissection of neck, all the underlying tissues beneath the ligature mark were cyanosed. Petechial hemorrhage was present in the brain. Membrane and spinal card were normal. Scalp, skull and vertebrae were normal, healthy and intact. Larynx was normal but two tracheal

rings at level of ligature were depressed. Left and right lung were cyanosed. Other thorax organs were normal, healthy and intact. Stomach was normal, healthy and intact and was full of semi-digested food. Small intestine was normal and healthy and it contained digested food and gases. Large intestine was normal and healthy and contained fecal matter and gases. The bladder was normal, healthy and contained about 100 m.l. of urine. All the other abdominal organs were normal, healthy and intact. Stomach with its contents, piece of small intestine, piece of large intestine, piece of liver, piece of spleen, piece of left kidney were taken and sealed in jars for sending the same to the Chemical Examiner, Lahore for detection of poison.

According to the opinion of doctor, the injury was ante-mortem in nature and it was sufficient to cause death in ordinary course of nature due to asphyxia (supply of oxygen and blood was stopped). The probable time between injury and death was 5 to 10 minutes and between death and post mortem examination was 12 to 14 hours.

He has seen the report of Chemical Examiner Exh. PF and according to the said report tranquilizer belong to benzodiazepine was detected in the viscera sent for analysis and in view of the above, he is of the opinion that the deceased was first sedated and after that he was killed by ligation causing the asphyxia leading to death."

6. After closure of prosecution evidence, the convict/ appellant was examined under Section 342, Cr.P.C. wherein she pleaded her innocence. In reply to the question that why this case and why the PWs deposed against her, the convict/appellant replied as under:

"I am innocent. I was married with Manzoor Hussain deceased who was brought up in my home by my parents. My mother belong to other family. The relatives of my father hated with my mother. The

complainant's family want to marry their sister *Mst.* Naseem with Manzoor Hussain deceased but when my marriage was solemnized with Manzoor Hussain deceased, the complainant's family became inimical to me. On the sudden death of Manzoor Hussain deceased, I and my family members informed all the relatives of the deceased. It was a blind murder. Previously my father had enmity with Rasheed PW regarding dispute of BANA and due to that dispute, we were not visiting terms with Rasheed PW and therefore, I have been falsely involved in this case to deprive me from my property and to take revenge of that enmity. The witnesses closely related to each other. No independent witness has been produced. The complainant has concocted baseless story of extra-judicial confession to involve me in this false case.

On receipt of report of Chemical Examiner and opinion of Doctor, complainant and the PWs made a concocted and baseless story of extra-judicial confession to involve me in this occurrence. I was married with Manzoor Hussain deceased. We never use to quarrel with each other during our matrimonial life. We were living a happy life and during our wedlock three children were born. I am gentle and pious lady. I had no illicit relations with my coaccused Yamin. I never fell in love with Yamin my co-accused."

The convict/appellant neither examined herself under Section 340(2), Cr.P.C. nor produced defence evidence and on the conclusion of trial, learned trial Judge convicted and sentenced the appellant through the impugned judgment as alluded to in earlier Para No. 1 of the judgment.

7. Learned counsel for the appellant has submitted that the co-accused namely Muhammad Yameen, who strangulated the deceased, had since been acquitted of the charge disbelieving the evidence, hence, in

absence of any independent evidence, the conviction against the appellant cannot sustain. The evidence of extra-judicial confession allegedly made by the appellant, being weak type of evidence, can easily be procured whenever direct evidence of crime is not available; that conviction cannot be passed only on the basis of report of Chemical Examiner or the medical evidence and prayed for her acquittal from the charges.

8. On the other hand, learned Deputy Prosecutor General supported and defended the impugned judgment and prayed for dismissal of this appeal.

9. Arguments heard and record of the case has been perused.

10. After hearing learned counsel for the parties and going through the record and reappraisal of evidence, it is observed that there is no direct evidence available against the appellant in this case and the case rests upon circumstantial evidence. The evidence, which was available against the appellant can be categorized into three type of evidence.

(i) The extra judicial confession allegedly made by the appellant before PW-11 and PW-12 on 1.1.2011 in the "Baithak" of Rashid Ahmad (PW-11) at about Degar Wela.

(ii) Muhammad Waqar Ahmad (PW-9), claims to have witnessed the recovery of Dopatta P-3 allegedly recovered on pointing out the complainant from the room of her house lying in the pitcher, which was taken into possession by the I.O *vide* recovery memo. Exh.PJ, attested by him and Shahid Iqbal PW.

(iii) The medical evidence coupled with Chemical Examiner report.

Therefore, in order to decide this appeal, suffice it to observe that after going through the evidence of PW-11 and PW-12 I am convinced that apart from being a weak type of evidence, the circumstances, in which it is claimed by the prosecution that the appellant had made extra judicial confession do not inspire confidence. Admittedly both the PWs i.e. PW-11 and PW-12 are the relatives of the complainant as well as of the deceased. Their evidence is contradictory on very material particulars. According to the prosecution story, the appellant made extra judicial confession before Rasheed Ahmad (PW-11) and Ehsan Ullah (PW-12) on 1.1.2011 to the effect that on 7.8.2010 at about Ishawela, Muhammad Yameen, co-accused (since acquitted) came to her house, provided sleeping pills to her, she mixed 3/4 sleeping pills in a cup of tea, administered the same to Manzoor Hussain, deceased, who after taking tea went under deep slumber, she called upon Muhammad Yameen, co-accused (since acquitted), gave her Dopatta to him, who strangulated Manzoor Hussain, deceased with said Dopatta and she herself boarded on the chest of the deceased caught hold him from his arm in order to avoid any resistance, who died. During crossexamination, Rashid Ahmad (PW-11) stated that his statement was recorded by the police on 2.1.2011, he has a mobile phone and he has also the number of the complainant, he made call to the complainant at that time but he was not available at home and he replied that on the next day he will meet him. He further admitted in cross-examination that after the confession of *Mst.* Balqees Bibi, he did not inform the police, rather he informed the complainant. Ehsanullah (PW-12) during cross-examination contradicted PW-11 by stating that at that time, they have not informed the complainant or police on mobile phone rather after departure of *Mst.* Balqees Bibi, they went to Riaz complainant, who was not available at his house. Riaz Ahmad, complainant (PW-13) deposed that on 1.1.2011, Muhammad Rashid, PW informed him on telephone at evening time that *Mst.* Balqees Bibi, accused had confessed before him that she

alongwith Muhammad Yameen, accused had committed the murder of Manzoor Hussain. At that time, he was on his field duty far away, so he asked Rashid, that on next day he will meet him. On the next day, Rashid and Ehsan Ullah, PWs met him and he took them to the police station where their statements were recorded. The statements of aforesaid three PWs are not in line with each-other, hence not confidence inspiring. Furthermore, despite making of extra judicial confession by the appellant before them, they did not overpower her for producing before the police and allowed her to go escort free, hence making of extra judicial confession by the appellant before them is unbelievable. Even otherwise, it has been held by the apex Court in various judgments that extra judicial confession is weak type of evidence and such like confession can easily be procured whenever direct evidence of crime is not available. Until and unless extra judicial confession is not corroborated by any other independent piece of evidence, no reliance can be placed on and it would not be safe to maintain conviction of appellant on basis of such type of evidence. Reliance is placed upon case titled *"Sajid Mumtaz and others versus Basharat and others"* (2006 SCMR 231)", *"Sarfraz Khan vs. State and 2 others"* (1996 SCMR 188), *"Nizam-ud-Din versus The State"* (2010 P.Cr.LJ 1730) and *"Imran alias Dully and another versus The State and others"* (2015 SCMR 155).

11. Furthermore, in absence of direct evidence, evidence of experts do not point finger towards the culprit, although the post mortem report confirms the death of the deceased and report of Chemical Examiner suggests the administration of poison to the deceased but cannot pinpoint the person who administered the same. Riaz Ahmad, complainant (PW-13) is neither the eye-witness of the alleged occurrence nor had any first-hand knowledge about the occurrence from any other source. His supplementary statement is based upon extra judicial confession alleged made by the appellant before PW-11 and PW-12, which is weak type of evidence as

alluded to in para No. 10 of the judgment. It is pertinent to mention here that the co-accused Muhammad Yameen, who in-fact strangulated the deceased has since been acquitted of the charge and according to the prosecution, the appellant has only provided a Dopatta P-3 for strangulation leaves no room for sustaining the impugned judgment. No appeal against acquittal of co-accused Muhammad Yameen has been filed by the complainant, thus same has attained finality to his extent.

12. For what has been discussed hereinabove, the instant appeal is accepted and conviction judgment dated 24.6.2011 is set aside. The appellant is on bail. Her surety stands discharged from the liability of her bail bonds.

(S.K.B.) **Appeal accepted.**

PLJ 2019 Cr.C. 155

[Lahore High Court, Multan Bench]

***Present*: ANWAARUL HAQ PANNUN, J.**

SHER ZAMAN--Appellant

versus

STATE, etc.--Respondents

Crl. Appeal No. 35-J of 2013, heard on 3.12.2018.

Pakistan Penal Code, 1860 (XLV of 1860)--

----S. 302(b)--Criminal Procedure Code, (V of 1898), S. 302(b)--Appreciation of evidence--Benefit of doubt--There is no direct evidence available against the appellant in this case and the prosecution's case rests upon circumstantial evidence--Appellant had made extra judicial confession, do not inspire confidence--Admittedly neither both the PWs are Lumberdar or the prominent personalities of the area, nor the relatives of the deceased--Despite making of extra judicial confession by the appellant before them; they did not overpower him for producing before the police and to go escort free; hence making of extra judicial confession by the appellant before them is unbelievable--Even otherwise, extra judicial confession is week type of evidence and such like confession can easily be procured whenever direct evidence of crime is not available--Recovery of weapon of offence i.e. wooden rod and Seiko wrist watch was effected from an open place *i.e.* wheat crop field, which is accessible to every person--Wooden rod is of common pattern and easily available in market--Medical evidence may confirm the ocular evidence with regard to the seat of injuries, nature of injury, kind of weapon used in the occurrence but it would not connect the accused with the commission of crime--Supplementary statement is based upon extra judicial confession

allegedly made by the appellant before PW's, which is weak type of evidence--Conviction is set aside and appeal is accepted.

[Pp. 159 & 160] A & C

Extra judicial confession--

----Extra judicial confession is week type of evidence and such like confession can easily be procured whenever direct evidence of crime is not available. [P. 159] B

2006 SCMR 231; 1996 SCMR 188; 2010 PCrLJ 1730;
2015 SCMR 155 *ref.*

Medical evidence--

----Medical evidence may confirm the ocular evidence with regard to the seat of injuries, nature of injury, kind of weapon used in the occurrence but it would not connect the accused with the commission of crime. [P. 160] D

2009 SCMR 1410; PLD 2009 SC 53 *ref.*

Supplementary statement--

----Supplementary statement is based upon extra judicial confession allegedly made by the appellant before PW's, which is weak type of evidence… [P. 160] E

Mr. Shafqat Raza Thaheem, Advocate with Appellant.

Syed Nadeem Haider Rizvi, D.P.G. for State.

Nemo for Complainant.

Date of hearing: 3.12.2018.

JUDGMENT

Through this criminal appeal, the appellant has called in question the judgment dated 28.03.2009, passed in case/F.I.R. No. 93, dated 13.04.2008,

offence under Section 302, PPC, registered at Police Station Karor, District Layyah, whereby, the appellant has been convicted under Section 302(b), PPC and sentenced to life imprisonment along-with compensation of Rs.50,000/-under Section 544-A, Cr.P.C. payable to the legal heirs of the deceased and in default, whereof the convict will suffer six months simple imprisonment. Benefit of Section 382-B, Cr.P.C. was extended to the convict/ appellant.

2. Precisely, the prosecution's case as set out in the FIR (Exh.PA) on the basis of complaint (Exh.PA/1) lodged by Azhar Iqbal, complainant (PW-10) is to the effect that his brother Athar Iqbal, an electrician by profession, was residing at Darbar Sawag Sharif. On 13.04.2018 he alongwith his maternal uncle Shahadat Ali came at Darbar Sawag Sharif to meet his brother Athar Iqbal. Sahibzada Mehboob-ul-Hassan told him that on 12.04.2008, his brother Athar Iqbal went Layyah to purchase electronics and returned at about 10.00 p.m. After gossiping with Mumtaz Hussain, Ashiq Hussain and Gul Muhammad, at about 12.00 p.m. he slept on a cot in front of guest room whereas Ghulam Hussain and Mazhar Abbas slept on their cots nearby at guest-room. On 13.04.2018, at about 6.30 a.m., Zafar Iqbal, PW told him that someone had murdered his brother Athar Iqbal and his dead body was lying on a cot. On hue and cry of Zafar Iqbal Langari PW Mumtaz Hussain, Gul Muhammad, Sahibzada Noor-ul-Hassan and other people attracted at the spot and saw the dead body of Athar Iqbal soaked in blood. The motive behind the occurrence is that on 12.04.2018 at morning time, fight took place between the accused Sher Zaman who is working at Darbar Sharif and Athar Iqbal, deceased.

3. On 14.04.2008, the complainant made supplementary statement before police and implicated the appellant for committing murder of his brother Athar Iqbal. Complainant further stated in his supplementary statement that at about 8.00 a.m. Dost Muhammad alongwith Muhammad

Jahangir and Hafiz Muhammad Hanif, came there and Dost Muhammad Khan informed him that the appellant had confessed before them that he had committed the murder of Athar Iqbal.

4. The investigation encapsulated into submission of report under Section 173, Cr.P.C., the learned trial Judge took the cognizance, supplied the copies of the statements of witnesses recorded under Section 161, Cr.P.C. to the accused under Section 265(c), Cr.P.C., framed charge, which was denied by the accused while professing innocence and claimed trial. The learned trial Judge ordered the prosecution to produce evidence for establishing the charge.

5. In order to prove the charge against the accused/appellant, the prosecution has produced as many as 12 prosecution witnesses and after tendering report of Chemical Examiner and Seroligist (Exh.PL & Exh.PM) closed the prosecution evidence. Dr. Mehboob Hasnain Qureshi (PW-5), who conducted post-mortem on the dead body of the deceased has observed the bellowing injuries:

1. Depressed crushed injury right check, nose, teeth and mandible. Mandible crushed in three pieces on right side, maxillary bone crushed into pieces, depressed teeth in right side upper and lower jaw into pieces, nozel bone broken into pieces. Injury No. 1 also fractured right temporal bone, brain matter coming out. Teeth have crushed right angle of mouth, puncturing it on three places.

2. Lacerated wound on left side of back of skull, measuring 5 cm x 4 cm. Skull bone broken. Brain matter coming out. Membrane ruptured. Both cars filled with clotted blood.

3. Lacerated wound on right side of chin 6 cm x 1 cm into bone deep.

In my opinion, Injury No. 1 & 2 injured vital organs brain and brain matter was coming out. These injuries caused cardiopulmonal arrest and death. The time lapsed between death and post-mortem was about between 12 to 16 hours and the time between injury and death was 10 to 30 minutes about.

6. After closure of prosecution evidence, the convict/appellant was examined under Section 342, Cr.P.C. wherein he pleaded his innocence. In reply to the question that why this case and why the PWs deposed against him, the convict/appellant replied as under:

> "PWs deposed under the influence of Sahabzada Ahmad Hassan, as he had to pay labour amount valuing Rs.2,00,000/- of mine which was demanded by me from 'Sahabzada Ahmad Hassan in presence of his "Mureedain" so many times but he was putting it off for the next day or the other. One day prior to occurrence, I strictly demanded wages mentioned above from Sahabzada Ahmad Hassan in presence of PWs and "Mureedain" and he felt his disgrace and became inimical towards me. It was a blind murder committed by some unknown person but I was roped in it at the behest of Sahabzada Ahmad Hassan. I had never made any confessional statement before the PWs and was not having any enmity with the deceased rather he was on friendly terms with me. Motive alleged by the prosecution is absolutely false and has been introduced to strengthen the prosecution case. I was an outsider and was having no relative there due to which I have been falsely roped in this case."

The convict/appellant first opt to produce defence evidence but thereafter on 13.02.2009, he recorded his statement that he does not want to produce defence evidence and closed the same. The convict/appellant did not examine himself under Section 340(2), Cr.P.C. On conclusion of trial,

learned trial Judge convicted and sentenced the appellant through the impugned judgment as alluded to in earlier Para No. 1 of the judgment.

7. Arguments heard and record of the case has been perused.

8. After hearing learned counsel for the petitioner, Deputy Prosecutor General and going through the record and reappraisal of evidence, it is observed that there is no direct evidence available against the appellant in this case and the prosecution's case rests upon circumstantial evidence. The evidence, which was available against the appellant can be categorized into three type of evidence:-

(i) The extra judicial confession allegedly made by the appellant before Dost Muhammad (PW-8) and Hafiz Muhammad Hanif (PW-9) on the intervening night of 13/14.4.2008 at about 11.00 p.m. (night) at the Dera of Dost Muhammad.

(ii) Zafar Iqbal (PW-4), claims to have witnessed the recovery of weapon of offence i.e. wooden rod(P-9) and Seiko Wrist Watch (P-10) allegedly recovered on pointing out the complainant from the wheat crop field near Darbar Sharif Chak No. 102/TDA, which were taken into possession by the I.O. *vide* recovery memo Exh.PC, attested by him and Gul Muhammad PW.

(iii) The medical evidence coupled with Chemical Examiner report.

Therefore, in order to decide this appeal, suffice it to observe that after going through the evidence of PW-8 and PW-9, I am convinced that apart from being a weak type of evidence, the circumstances, in which it is claimed by the prosecution that the appellant had made extra judicial confession do not inspire confidence. Admittedly neither both the PWs are *lumberdar* or the prominent personalities of the area nor the relatives of the deceased.

Furthermore, despite making of extra judicial confession by the appellant before them, they did not overpower him for producing before the police and allowed him to go escort free, hence making of extra judicial confession by the appellant before them is unbelievable. Even otherwise, it has been held by the apex Court in various judgments that extra judicial confession is weak type of evidence and such like confession can easily be procured whenever direct evidence of crime is not available. Until and unless extra judicial confession is not corroborated by any other independent piece of evidence, no reliance can be placed thereon and it would not be safe to maintain conviction of appellant on basis of such type of evidence. Reliance is placed upon case titled *"Sajid Mumtaz and others versus Basharat and others"* (2006 SCMR 231), *"Sarfraz Khan vs. State and 2 others"* (1996 SCMR 188), *"Nizam-ud-Din versus The State"* (2010 PCr. L.J 1730) and *"Imran alias Dully and another versus The State and others"* (2015 SCMR 155).

9. So far as recovery of weapon of offence is concerned, as per prosecution case, the appellant on 25.4.2008, got recovered blood stained wooden rod (P-9) and Seiko wrist Watch (P-10) from the wheat crop field near Darbar Swag Sharif, Chak No. 102/TDA *vide* recovery memo (Exh.PC). Admittedly, recovery of weapon of offence i.e. wooden rod (P-9) and Seiko wrist watch (P-10) was effected from an open place i.e. wheat crop field near Darbar Swag Sharif, which is accessible to every person. Furthermore, wooden rod (P-9) is of common pattern and easily available in market. Keeping in view the above referred facts, the recoveries are of no help and support to the prosecution evidence and as such, of no consequence.

10. The medical evidence has been furnished by Dr. Mehboob Hasnain Qureshi (PW-5). The medical evidence may confirm the ocular evidence with regard to the seat of injuries, nature of injury, kind of weapon used in the occurrence but it would not connect the accused with the

commission of crime. Reliance is placed upon case titled *"Mursal Kazmi alias Qamar Shah and another vs. The State"* "(2009 SCMR 1410) and *Muhammad Tasaweer vs. Hafiz Zulkarnain and 2 others"* (PLD 2009 SC 53). Furthermore, in absence of direct evidence, evidence of experts do not point finger towards the culprit, although the post-mortem report confirms the death of the deceased and report of Chemical Examiner suggests the possibility of human blood but cannot pinpoint the person who caused the incident. Azhar Iqbal, complainant (PW-10) is neither the eye-witness of the alleged occurrence nor had any first-hand knowledge about the occurrence from any other source. His supplementary statement is based upon extra judicial confession allegedly made by the appellant before PW-8 and PW-9, which is weak type of evidence.

11. For what has been discussed hereinabove, the instant appeal is accepted and conviction judgment dated 28.03.2009 is set aside. The appellant is on bail. His surety stands discharged from the liability of his bail bonds.

(S.N.K.) **Appeal accepted.**

PLJ 2019 Cr.C. 664

[Lahore High Court, Multan Bench]

Present: **ANWAARUL HAQ PANNUN, J.**

SAEED AHMAD--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 7049-B of 2018, decided on 13.12.2018.

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

----S. 497--Control of Narcotic Substances Act, (XXV of 1997), S. 9(c) & 9(b)--Bail after arrest, grant of--Allegation of--1300 grams charas was recovered--Allegedly, charas weighing 1300-grams alongwith sale proceed of Rs. 470/- were recovered from the petitioner at the time of his apprehension by the police which, as per prosecution's version, is marginally above the upper limit of Section 9(b) of the Control of Narcotic Substances Act, 1997 but there is nothing on record to suggest that the contraband material recovered from the petitioner was put on the scale with or without wrapper and removal thereof might have reduced its actual weight--Report of Chemical Examiner has not been received so far--The investigation of this case has already been completed, the petitioner is behind the bars since his arrest and is no more required for further investigation--Bail was allowed. [P. 665] A

Barrister Muhammad Rehan Khalid Joiya, Advocate for Petitioner.

Syed Nadim Haider Rizvi, Deputy Prosecutor General for State.

Date of hearing: 13.12.2018.

ORDER

Saeed Ahmad, the petitioner has sought post-arrest bail in case FIR No. 348 dated 04.10.2018, registered at Police

Station Saddar Jalalpur Pirwala, District Multan for an offence under Section 9-C of the Control of Narcotic Substances Act, 1997 facing the allegation that on 04.10.2018 at 05:00 p.m., he was apprehended by the police contingents on suspicion and on his personal search, 1300-grams charas alongwith sale proceed of Rs. 470/- were recovered. Hence, this case was registered.

2. Arguments heard. Record perused.

3. Allegedly, charas weighing 1300-grams alongwith sale proceed of Rs. 470/- were recovered from the petitioner at the time of his apprehension by the police which, as per prosecution's version, is marginally above the upper limit of Section 9(b) of the Control of Narcotic Substances Act, 1997 but there is nothing on record to suggest that the contraband material recovered from the petitioner was put on the scale with or without wrapper and removal thereof might have reduced its actual weight. The report of Chemical Examiner has not been received so far. The investigation of this case has already been completed, the petitioner is behind the bars since his arrest and is no more required for further investigation. In an identical unreported case bearing Criminal Petition No. 1344 of 2016, the Hon'ble Supreme Court of Pakistan, *vide* order dated 01.03.2017, has observed as under:

> "The record reveals that the petitioner has been found in possession of 1350 grams of charas. Since the substance recovered marginally exceeds 1 k.g. we doubt petitioner could be awarded maximum sentence provided by the statute. The fact that he has been in jail for more than seven months and his trial is not likely to be concluded in the near future would also tilt in favour of grant of bail rather than refusal."

4. In view of above, the petition in hand is **allowed** and the petitioner is admitted to bail subject to his furnishing bail bonds in the sum of **Rs. 100,000/-** (rupees one lac) with one surety in the like amount to the satisfaction of learned trial Court.

(A.A.K.) **Bail allowed.**

PLJ 2019 Cr.C. 1160

[Lahore High Court, Multan Bench]

***Present*: ANWAARUL HAQ PANNUN, J**

***Mst.* SEHAR GULL--Petitioner**

versus

STATE, etc.--Respondent

Crl. Revision No.399-M of 2019, decided on 25.4.2019.

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

----S. 561-A--Inherent Powers of High Court--Petitioner is accused of case offence under section 380, 457, 34 PPC at P.S.--Undeniably, CDR data was not collected by Investigating Officer during course of investigation--Perusal of order impugned reveals that said CDR data finds specifically mentioned in complaint--In such circumstances, its collection was duty of I.O. being relevant to extent of rendering opinion on completion of investigation either in affirmative or negative as case may be and as such complainant cannot be allowed to suffer due to inaction of police/I.O, same evidence was otherwise never a surprise evidence rather finds clearly mentioned in contents of complaint--Impugned order further evinces that complainant has also accordingly, deposed while appearing in witness box as PW.1--However, it would be a matter of appreciation of evidence: as legal and factual aspects of intended evidence--Perusal of provisions of Section 94 Cr.P.C. read with Section 540 Cr.P.C. clearly reflect that learned trial Court is under obligation to adjudicate matter in interest of justice while affording opportunities to prosecution to substantiate its version and defence to cross examine it--In such circumstances, Revisional Court/ASJ has passed impugned orders while taking into consideration material available on record in its true perspective, hence, is well-versed, well-reasoned and quite in accordance

will, law, therefore, same call for no interference by High Court--Further, counsel for petitioner has failed to point out any illegality or perversity in impugned order. [P. 1162] A

Malik Zafar Mehboob Langrial, Advocate for Petitioner.

Mr. Abdul Wadood, DPG for State.

Mr. Rasheed Ahmad Khan Chandia, Advocate for Respondent No.4.

Date of hearing : 25.4.2019.

ORDER

By means of instant petition filed under section 561-A. Cr.P.C. petitioner has made following prayer: -

> *"Under the above submissions, it is therefore, most respectfully prayed that this petition may very kindly be accepted/allowed and the impugned judgment/order dated 06.12.2018 (Annex-G) passed by the learned ASJ, Mozaffargarh, may very graciously be quashed by declaring the same as null and void unwarranted by law, and the dismissal order of the learned Area Magistrate dated 07.11.2018 may very kindly be restored in the interest of justice.*
>
> *Any other relief that may be just and due may also be granted.*"

Facts relevant for the disposal of the instant petition are that Respondent No.4 Sarfraz got registered a case FIR No.401/16 dated 23.08.2016, offence under Section 380, 457, 34 PPC at P.S City Mozaffargarh against the petitioner and Respondents No. 5 & 6 in which evidence of six PWs was recorded. On 27.10.2018 the Respondent No.4 moved an application for granting permission to place on record CDR which he has obtained from a mobile company, also collected by the local police which was dismissed by the learned trial court/Magistrate *vide* order dated 07.11.2018. Subsequently, Respondent No.4 challenged the said order before the Court of learned Revisional Court/ASJ who while allowing the said

revision petition set aside the order of learned trial Magistrate in terms of order dated 6.12.2018 and granted permission to place on record the privately collected mobile data as evidence, the same order has been impugned by the petitioner through the instant petition.

3. Arguments advanced pro and contra have been heard and record available on file perused.

4. Admittedly, the petitioner is accused of case FIR No.401/16 dated 23.08./2016, offence under section 380, 457, 34 PPC at P.S. City Mozaffargarh. Undeniably, CDR data was not collected by the Investigating Officer during the course of investigation. The perusal of the order impugned reveals that the said CDR data finds specifically mentioned in the complaint Exh.PA. In such circumstances, its collection was the duty of the I.O. being relevant to the extent of rendering opinion on completion of investigation either in affirmative or negative as the case may be and as such the complainant cannot be allowed to suffer due to inaction of the police/I.O, the same evidence was otherwise never a surprise evidence rather finds clearly mentioned in the contents of the complaint Exh.PA. The impugned order further evinces that complainant has also accordingly, deposed while appearing in the witness box as PW.1. However, it would be a matter of appreciation of evidence: as legal and factual aspects of the intended evidence. The perusal of provisions of Section 94 Cr.P.C. read with Section 540 Cr.P.C. clearly reflect that learned trial Court is under obligation to adjudicate matter in the interest of justice while affording opportunities to the prosecution to substantiate its version and the defence to cross examine it. In such circumstances, the learned Revisional Court/ASJ has passed the impugned orders while taking into consideration the material available on the record in its true perspective, hence, the same is well-versed, well-reasoned and quite in accordance will, law, therefore, the same call for no interference

by this Court. Further, learned counsel for the petitioner has failed to point out any illegality or perversity in the impugned order.

5. For the foregoing reasons, the petition in hand being patently devoid of any force is hereby dismissed.

(A.A.K.) **Petition dismissed.**

PLJ 2019 Cr.C. 1166 (DB)

[Lahore High Court, Multan Bench]

Present **: ANWAARUL HAQ PANNUN AND SADIQ MAHMUD KHURRAM, JJ.**

RASHID ALI--Appellant

versus

STATE--Respondents

Crl. Appeal No. 107 of 2018, decided on 17.4.2019.

Control Narcotic Substances Act, 1997 (XXV of 1997)--

----S. 9(c) & 29--Conviction and sentence--Challenge to--Benefit of doubt--No evidence available on record--Prosecution has failed to establish its case against appellant--Though there is a slight difference in manner and standard of proof in cases registered under Control of Narcotic Substances Act, 1997 but prosecution is always bound to discharge initial onus of proof--Undoubtedly, in terms of Section 29 of Control of Narcotic Substances Act, 1997, some departure to this general principle has been introduced, still prosecution cannot be absolved from its duty to discharge onus of proof--Initial onus of proof always lies upon prosecution and when once it is discharged, then accused would be burdened to prove contrary in terms of principles laid down in Section 29 of Control of Narcotic Substances Act, 1997--Case of prosecution is fraught with doubts and for earning acquittal, accused is not obliged to establish number of circumstances creating doubts but even a single circumstance, creating a reasonable doubt in prudent mind is sufficient to extend benefit of doubt to accused. [P. 1170] A

Ch. Shakeel Ahmad, Advocate for Appellant

Mr. Hassan Mehmood Khan Tareen, Deputy Prosecutor General for Respondent/State

Date of hearing : 17.4.2019.

JUDGMENT

Anwaarul Haq Pannun, J.--Through this appeal under Section 48 of The Control of Narcotic Substances Act, 1997(CNSA, 1997), the appellant Rashid Ali has challenged his conviction and sentence awarded to him, *vide* judgment dated 10.10.2013 in case/FIR No.361/2011 dated 28.11.2011, offence under Section 9 (c) of CNSA, 1997, registered at Police Station Alpa, District Multan, passed by learned Addl. Sessions Judge/Special Court (CNS), Multan, whereby the appellant has been convicted and sentenced as under:--

Under Section 9(c) of CNSA, 1997

"Imprisonment for life and fine Rs.2,00,000/- and in default thereof, he shall further undergo simple imprisonment for six months. The benefit of Section 382-B Cr.P.C is extended to the convict."

2. Precisely the facts as embodied in the FIR (Exh.PB/1), lodged on the complaint (Exh.PB) of Muhammad Akram S.I (PW-3) are that on 28.11.2011, during interrogation of case/FIR No.359/2011 dated 26.11.2011, offence under Section 380 PPC, registered at Police Station Alpa, Multan, the accused/appellant disclosed that he is dealing in the business of Poast and opium and he had electric Chakki for grinding Poast which he can get recovered from his house. On disclosure of the accused, the complainant and other police officials alongwith the accused reached at the house of the accused. The accused led them towards the Western room of his house and pointed out the Poast kept inside the room and the Poast was weighed which became 08 mounds and 30 Kilogrms (P-1). Out of the recovered Poast, 500 grams was separated and sealed in the parcel and the accused also led them towards recovery of electric Chakki kept in the courtyard. The sample, electric Chakki, and rest of the recovered Poast was taken into possession by the complainant *vide* recovery memo Exh.PA, which was attested by Manzoor Ahmad ASI and Shahbaz 1278/C. The accused could not produce any license regarding the buying and selling of recovered Poast.

3. After investigation and on receiving the report under section 173 Cr.P.C, the learned trial Judge took the cognizance, supplied the copies of the statements of witnesses recorded under Section 161 Cr.P.C to the appellant, framed charge, to which the appellant pleaded not guilty, proceeded to record the evidence of the prosecution witnesses (PW-1 to PW-5). The learned Prosecutor submitted positive report of Chemical Examiner, Multan (Exh.PD). Thereafter, the appellant was examined under Section 342 Cr.P.C wherein he pleaded his innocence. In reply to the questions that why this case and why the PWs deposed against him, the appellant replied as under:--

> "The story of the prosecution is fake and fictitious. Nothing was recovered from my possession. I have no shady past. I have no previous record in such like cases. It is fact that I was arrested by the local police on 22.11.2011 in case FIR No.275/11 dated 28.8.2011 u/S. 337-A(ii)/337-L(ii) PPC, registered at P.S Alpa, Multan because my pre-arrest bail was dismissed due to non-prosecution from the Court of Mr. Dawar Zaffar Ali, learned ASJ, Multan, on 21.11.2011, then local police implicated me in case FIR No.359/11 dated 26.11.2011 u/s 380/411 PPC registered at P.S Alpa, Multan, then local police implicated me in the above said case while I have no concern with alleged house from where alleged narcotics was recovered. The story of the FIR is fake because my arrest never recorded in the roznamcha of said police station. As per record, no arrest was shown on 28.11.2011 and further no raiding party was constituted as per roznamcha. It is also fact that when I was produced before the learned Ilaqa Magistrate by the I.O. on 29.11.2011 in case FIR No.275/11, he did not narrate about the recovery of narcotics so I am innocent, all the PWs are the police officials they deposed against me on the asking of high ups with the fear that if they would not depose against me then they will be kicked out from the service."

The appellant did not examined himself under Section 340(2) Cr.P.C. However, in defence evidence, he produced photocopies of roznamcha of police station dated 28.11.2011, FIR No.275/11. 359/11, petition for physical remand in case FIR No.275/11 and order of the Court as Mark-A to Mark-D/1. On the conclusion of trial, learned trial Judge convicted and sentenced the appellant through the impugned judgment as alluded to in para No.1 of the instant judgment. Hence, this appeal.

4. Arguments heard. Record perused.

5. Perusal of complaint (Exh.PB) reveals that the complainant Muhammad Akram SI (PW-3) did not depose about the sealing of the case property at the spot and he simply mentioned that the sample and bags of remaining poast alongwith electric Chakki was taken into possession through recovery memo. Muhammad Akram SI, complainant/I.O (PW-3) and Manzoor Ahmad ASI, another recovery witness (PW-5) are also silent about sealing of the remaining case property at the spot. The recovery memo (Exh.PA) and the complaint (Exh.PB) are also silent about the number of bags of the rest of the recovered poast. However, in cross-examination, Muhammad Akram SI (PW-3) deposed that the Poast was packed in nine toras. Ahmad Nawaz ASI (PW-1) who was officiating as Moharrir at the relevant time did not depose about the toras/bags, however, he stated that 1.0 handed over to him one sealed parcel said to contain Poast as sample and rest of the case property poast weighing 08 mounds 29/1/2 k.g for keeping the same in Malkhana in safe custody. During cross-examination, he deposed that *"the remaining bulk which was handed over to him in the P.S. was consisted of nine toras of plastic bag. The name of the accused as well as other particulars was written on the parcels but nothing was written on the remaining nine toras. Nothing was printed on each tora."* Muhammad Akram SI/complainant/I.O (PW-2) stated that he did not collect the sample from each tora as he separated the sample from the bulk of poast. Hence, in view of above, the safe custody of the remaining case property is not proved from the material available on record. It has been held in case titled "The

State through Regional Director *ANF Vs.Imam Bakhsh and others*"(2018 SCMR 2039) that:--

> *"The chain of custody begins with the recovery of the seized drug by the Police and includes the separation of the representative sample(s) of the seized drug and their dispatch to the Narcotics Testing Laboratory. This chain of custody, is pivotal, as the entire construct of the Act and the Rules rests on the Report of the Government Analyst, which in turn rests on the process of sampling and its safe and secure custody and transmission to the laboratory. The prosecution must establish that the chain of custody was unbroken, unsuspicious, indubitable, safe and secure. Any break in the chain of custody or lapse in the control of possession of the sample, will cast doubts on the safe custody and safe transmission of the sample(s) and will impair and vitiate the conclusiveness and reliability of the Report of the Government Analyst, thus, rendering it incapable of sustaining conviction. This Court has already held in Amjad Ali v. State (2012 SCMR 577) and Ikramullah v. State (2015 SCMR 1002) that where safe custody or safe transmission of the alleged drug is not established, the Report of the Government Analyst becomes doubtful and unreliable.*

Furthermore, Muhammad Saeed 582/C (PW-2) stated that on 01.12.2011, Moharrar handed over to him one sealed parcel of Poast as sample, which he deposited in the office of Chemical Examiner, Multan on the same day, intact. When report of the Chemical Examiner, Multan (Exh.PD) was perused, contrary to that the name of Forwarding Officei has been mentioned as E.T.O and not by the local police. When confronted to Deputy Prosecutor General for the State, he has felt himself to be in a cauldron and conceded that there is no evidence whatsoever available on record that how these samples were handed over to E.T.O. for onwards transmission to the office of Chemical Examiner. Hence, in view of this situation, safe custody of the; recovered substance or its samples is not discemable from the record of this

case. Reliance in this regard is placed upon case titled *"Muhammad Abbas versus The State"* (2006 YLR 2378).

6. In view of above, we are of the view that prosecution has failed to establish its case against the appellant. Though there is a slight difference in the manner and standard of proof in the cases registered under The Control of Narcotic Substances Act, 1997 but the prosecution is always bound to discharge the initial onus of proof. Undoubtedly, in terms of Section 29 of The Control of Narcotic Substances Act, 1997, some departure to this general principle has been introduced, still the prosecution cannot be absolved from its duty to discharge the onus of proof. The initial onus of proof always lies upon the prosecution and when once it is discharged, then the accused would be burdened to prove the contrary in terms of principles laid down in Section 29 of The Control of Narcotic Substances Act, 1997. The case of the prosecution is fraught with doubts and for earning the acquittal, the accused is not obliged to establish number of circumstances creating doubts but even a single circumstance, creating a reasonable doubt in the prudent mind is sufficient to extend the benefit of doubt to the accused. Reliance in this regard is placed upon case titled *"Muhammad Ashraf and others v. The State and others"* (PLD 2015 Lahore 1) and *"Muhammad Zaman v. The State and others"* (2014 SCMR 749).

7. For what has been discussed above, we are inclined to observe that the prosecution has failed to discharge its onus for upholding the conviction recorded by the learned Addl. Sessions Judge/Judge Special Court (CNS), Multan, against the appellant. We thus, while allowing this appeal, set aside the judgment dated 10.10.2013 and acquit the appellant from the charges. The appellant is in jail, he be released forthwith if not required in any other case.

(A.A.K) **Appeal allowed.**

PLJ 2019 Cr.C. 1325 (DB)

[Lahore High Court, Lahore]

***Present*: SHEHRAM SARWAR CH. & ANWAARUL HAQ PANNUN, JJ.**

MUHAMMAD RAFIQUE--Appellant

versus

STATE & another--Respondents

Crl. Appeal No.1574 of 2016 & Murder Reference No.398 of 2016, heard on 6.5.2019.

Pakistan Penal Code, 1860 (XLV of 1860)--

----S. 302(b)--Death sentence and payment of compensation--Challenge to--Allegations--Straight fire shot, landed on deceased aorta (shah rag)--Shifted to Hospital--Succumbed to injuries on reaching in Hospital--Motive behind occurrence was stated to be quarrel and clash of appellant with deceased and her husband--pivotal question, in this case, requiring its answer, in light of established principle for dispensation of criminal justice and for deciding criminal cases consisting upon direct evidence / eye witness account casting a foremost duty on prosecution to establish, while excluding all hypotheses of their being a chance witness, presence of witnesses at relevant time at place of occurrence besides proving that they had witnessed occurrence with their own eyes. [P. 1329] A

Pakistan Penal Code 1860 (XLV of 1869)--

----S. 302(b)--Convicted and sentenced--Challenge to--Motive of occurrence--Although motive has specifically been attributed to appellant yet prosecution remained fail to substantiate its version regarding same through trust worthy and confidence inspiring documentary evidence--Prosecution has not been able to prove charge of homicide death of deceased against appellant through cogent, convincing, reliable, trust

worthy and confidence inspiring evidence--Evidence of complainant and eye witnesses has been shattered on almost all major aspects of case and their presence at venue of occurrence at relevant time has not been established--Motive as to what was actual cause of murder of deceased remained shrouded in mystery--Prosecution story as ascribed by claimed eye witnesses does not coincide with real facts of case--**Held:** It is also settle, principle by now that once their appears a single doubt as to presence of claimed eye witnesses at crime scene it would be sufficient to discard his testimony as a whole--In nutshell, appeal allowed, conviction and sentence awarded by trail Court was set aside and appellant was acquitted of charge by giving him benefit of doubt. [P. 1331] B

2017 SCMR 596, *ref.*

Shafqat Parveen Mughal, Defence Counsel, appointed at State expense.

Nemo for Complainant.

Mr. Humayoun Aslam, Deputy Prosecutor General for State.

Date of hearing : 16.5.2019

JUDGMENT

Anwaarul Haq Pannun, J.--Through this single judgment, we propose to decide Criminal Appeal No.1574 of 2016 & Murder Reference No.398 of 2016 filed against judgment dated 27.08.2016, passed, on the conclusion of trial, in case FIR No.309, dated 27.09.2015, for an offence under Section 302 PPC, registered at Police Station Piplan, District Mianwali, by the learned Additional Sessions Judge, Piplan whereby he has been convicted and sentenced as under:-

"Under Section 302(b) PPC

Death and compensation of Rs. 2,50,000/- payable to legal heirs of deceased Mst. Zakia Naheed and in case of default, to undergo six months S. I.

2. Precisely, prosecution's webpage, the FIR (Exh.PA), lodged on the complaint (Exh.PA/1) of Hakim Khan (PW-1), is that on 27.09.2015 at about 08:30 a.m., he along with his brother Saif Ullah (given up PW) and paternal cousin Abdul Chaffer (PW-2) came to see *Mst.* Zakia Naheed (deceased) on the occasion of Eid and were sitting in the Courtyard of her Rafique (appellant) while armed with rifle 7-MM came out from his residential room and raised *Lalkara* to Zakia Naheed, his daughter, that he will teach a lesson for causing quarrel and clash in the house, made a straight fire shot on her which landed on her aorta (shah rag) due to which she fell down on the ground. The complainant and the witnesses attended her whereas the accused rain towards eastern side. *Mst.* Zakia Naheed was shifted to THQ Hospital, Piplan through a Dala but she succumbed to the injuries on reaching in the hospital.

3. The motive behind the occurrence was stated to be the quarrel and clash of appellant with the deceased *Mst.* Zakia Naheed and Muhammad Latif her husband.

4. Registration of the case after its usual investigation encapsulated into a report under Section 173 Cr.P.C which was duly submitted before the learned trial Court, the appellant, after supplying him with the copies of incriminating material under Section 265(c) Cr.P.C, was charged sheeted to which he denied and pleaded not guilty, while professing his innocence and claiming trial, the prosecution was directed to produce evidence.

5. The prosecution has produced as many as ten witnesses besides tendering, in evidence, reports of Punjab Forensic Science Agency Firearms

& Toolmarks Examination and Forensic DNA & Serology Analysis as Exh.PQ & Exh.PR.

6. Lady Dr. Misbah Maqbool, W.M.O, THQ Hospital, Piplan (PW-7), on 27.09.2015, conducted the post-mortem examination over the dead body of deceased and observed the following injuries:--

1. Entry wound of 1 x 1 cm present on back (posterior surface of right shoulder close to neck having inverted margins. No blackening, tattooing present. Blood mixed serum oozing out.
2. Exit wound of 7 x 6 cm present on front of neck everted margins. No blackening tattooing present. Blood mixed serum oozing out of wound.

In her opinion, death occurred due to injury No. 1 passing through major vessels of neck causing ruptured of major vessels leading to hemorrhage, shock and death in ordinary course of nature. Both the injuries were ante-mortem in nature.

Probable time that elapsed between injuries and death was immediate and between death and post-mortem was about 3 to 6 hours.

7. The ocular account in this case has been furnished by Hakim Khan (PW-1) and Abdul Ghaffar (PW-2). Muhammad Akram S.I/Investigation officer has appeared as PW-9. Rest of the witnesses are formal in nature and not of much importance, therefore, in order to avoid repetition of account, the detail of the same is not being given.

8. When examined under Section 342 Cr.P.C, the appellant denied every bit of incriminating material produced against him by the prosecution through its evidence. While replying the question that as to why this case against him and why the prosecution witnesses had deposed against him, he stated as under:--

"Actually the murder of the deceased was committed in a mysterious way. I had divorced sister of PW Abdul Ghaffar and Zulfiqar and complainant has close relationships with PW-2 and PW-3 and due to this grudge as well as in order to take revenge, they in connivance with complainant, falsely roped me in this false case. The rest of the PWs are police officials and they deposed against me just to show their efficiency before their high ups. Moreover, the PWs remained fail to prove their stance by producing cogent and convincing evidence. The complainant remained fail to prove the motive part of the occurrence as I have no reason to murder my sister in law just on alleged hot words for which no witness has come forward to prove the same."

9. The appellant neither opted to appear as his own witness under Section 340(2) Cr.P.C nor produced any defence evidence. On the conclusion of trial, he has been convicted and sentenced as aforesaid, hence the aforementioned criminal appeal as well as connected Murder Reference.

10. Arguments heard. Record perused.

11. The pivotal question, in this case, requiring its answer, in the light of established principles for dispensation of criminal justice, for deciding criminal cases consisting upon direct evidence/eye-witness account casting a foremost duty on the prosecution to establish, while excluding all hypotheses of their being a chance witnesses, the presence of the witnesses at the relevant time at the place of occurrence besides proving that they had witnessed the occurrence with their own eyes. The demeanor and behavior of the PWs at the time of occurrence and little thereafter is also relevant for believing their evidence. After undertaking judicial scrutiny of the evidence, if the Court concludes that the presence of the eye-witnesses at the relevant time is established, their evidence is normally relied upon for recording

conviction but in case it is found that the witnesses are chance witnesses, their evidence, for the safe administration of justice is rejected/disbelieved and accused is acquitted.

12. The prosecution has produced Hakim Khan, complainant as PW-1 and Abdul Ghaffar as PW-2 as eye-witness. According to the prosecution's version, they alongwith a given up PWs, reached the house of deceased i.e. the place of occurrence, at about 08:30 a.m., they were sitting in the Courtyard when the occurrence took place at about 09:00 a.m. i.e. after 1/2 an hour of their arrival. The motive behind the occurrence is stated that there were strained relations between the appellant and the deceased and one day prior to the occurrence, hot words and abuses were exchanged between them and due to this grudge, the appellant had committed the murder of *Mst.* Zakia Naheed daughter of the complainant. Although both the PWs have narrated the story in their examination-in-chief, like a parrot, as contained in the FIR yet while facing the test of cross-examination, the real test in order to judge the veracity of a witness, it has come on the record that both the eye witnesses are actually residents of 'near Railway Station Samand Wala Tehsil & District Mianwali. PW-1 is father of the deceased whereas PW-2 is paternal cousin of PW-1. In his cross-examination, PW-1 has deposed as under:--

> "I am land owner at Samand Wala District Mianwali. It is correct that Saif Ullah PW is real uncle of deceased *Mst.* Zakia Naheed. It is correct that about 07/08 years ago Muhammad Rafiq divorced Nasrcen Bibi sister of Abdul Ghaffar s/o Ghulam Qadir.--The distance between my house and alleged place of occurrence is 65/66 K.Ms. We were on two motorcycles. I was on a separate motorcycle whereas Abdul Ghaffar and Saifullah were on another motorcycle. I

do not remember the registration numbers of above said motorcycles."

13. Similarly, PW-2 during cross-examination, has deposed as under:-

"I am private driver of tractor. I along with Hakim Saifullah left Samand Wala for Piplan at about 07:00 a.m. We were on motorcycle. I and Saifullah were on one motorcycle and Hakim was on another motorcycle. Samand Wala is situated at a distance of 65 K.Ms, from the place of occurrence. *Mst.* Zakia Naheed deceased was my cousin. It is correct that *Mst.* Naseem Bibi was divorced by Muhammad Rafique accused about 07 years ago. One of the sister of accused is wife of my brother Zulfiqar PW."

14. The above excerpts from the evidence of PW-1 & 2 have convinced us to doubt the presence of witnesses at the place of occurrence at the crime time for the reason that (i) it is admitted position that the said PWs are the residents of 60/65 Kilometers away from the place of occurrence. According to the said PWs, they all travelled on two motorcycles. Amazingly none of them remained able to tell the numbers of the motorcycles. Moreover, the motorcycles have not been produced before the investigating officer during investigation. Even otherwise, it is not believable that all of them had covered a long distance on motorcycles which is not safe means of conveyance. They reached at the place of occurrence at 08:30 a.m. and the occurrence had taken place just after half an hour of their arrival. The motive behind the occurrence is stated to be the quarrel taken place one day prior to the occurrence. Had there been any strength in the motive, there was sufficient time for the appellant to commit the murder of the deceased prior to the occurrence. Moreover, none of the PWs was present at the time of said quarrel. Sufficient time had already elapsed from the point of time when the

earlier occurrence of motive had taken place. Therefore, the anger, if any, must have subsided during this interregnum. There is another reason for us to disbelieve the presence of the said witnesses at the place of occurrence. Admittedly, sister of PW-2 namely *Mst.* Naseem Bibi was divorced by the appellant about seven years ago. Therefore, keeping in view the admitted factum of divorce by the appellant to the real sister of PW-2, his presence at the place of occurrence cannot be believed, hence we unanimously have concluded that the real test, for making a Court to believe the evidence of the witnesses has not been sufficiently established by the prosecution. Moreover, the appellant and the deceased were residing in the same house, thus, there was no reason for the appellant to commit the murder of the deceased in the presence of the witnesses. After going through the evidence, we have come to the conclusion that the prosecution has failed to establish the presence of the aforesaid PWs at the place of occurrence at the relevant time.

15. Now, coming to the motive of the occurrence which is stated to be the quarrel allegedly took place between the appellant and the deceased one day prior to the occurrence but as such, no evidence has been brought on record to establish that a quarrel took place as alleged by the prosecution witnesses and there existed strained relations between the appellant and the deceased. Although the motive has specifically been attributed to the appellant but the prosecution remained fail to substantiate its version regarding the same through trustworthy and confidence inspiring documentary evidence. The motive as set up by the prosecution remained unsubstantiated and far from being proved by the prosecution.

16. The investigating officer (PW-9) secured empty of 7-MM rifle at the time of his first visit of the place of occurrence on the same day of occurrence on 27.09.2015 in the presence of witnesses and took into possession the same through recovery memo Exh.PC. The appellant had

been arrested on 06.10.2015 and during physical remand on 09.10.2015, weapon of offence i.e. rifle 07-MM (P-5) along with two live cartridges (P-6/1-2) was recovered from a room of his residential house on his pointing out, taken into possession through recovery memo Exh.PF and sent to office of Punjab Forensic Science Agency on 15.10.2015. Though the report of Serologist is also positive yet the same alone, being corroboratory piece of evidence, is not sufficient to convict the appellant.

17. In view of the entire discussion, we are of the considered view that the prosecution has not been able to prove the charge of homicide death of the deceased against the appellant through cogent, convincing, reliable, trustworthy and confidence inspiring evidence. The evidence of the complainant and eye-witness has been shattered on almost all major aspects of the case and the their presence at the venue of occurrence at the relevant time has not been established. The motive as to what was the actual cause of murder of deceased remained shrouded in mystery. The prosecution, story as ascribed by the claimed eye witnesses does not coincide with the real facts of the case. The role assigned to the appellant is highly doubtful, and the benefit of doubt, even slightest, always goes in favour of the accused, which is sufficient to tilt the scale of justice in his favour. It is also well-settled principle by now that once there appears a single doubt as to the presence of the claimed eye witnesses at the crime scene, it would be sufficient to discard his testimony as a whole. Reliance in this regard is placed on case titled "*Mst. RUKHSANA BEGUM and others versus SAJJAD and others"* (2017 SCMR 596), wherein it has been held as under:--

> "A single doubt reasonably showing that a witness/witnesses' presence on the crime spot was doubtful when a tragedy takes place would be sufficient to discard his/their testimony as a whole. This principle may be pressed into service in cases such witness/witnesses

are seriously inimical or appears to be a chance witness because judicial mind would remain disturbed about the truthfulness of the testimony of such witnesses provided in a murder case, is a fundamental principle of our criminal justice system."

18. The nutshell of above discussion is that *Criminal Appeal No. 1574 of 2016* filed by appellant Muhammad Rafique is ***allowed***, his conviction and sentence awarded by the learned trial Court are set aside and he is acquitted of the charge by giving him the benefit of doubt. He is directed to be released from jail forthwith, if not required to be detained in connection with any other case.

19. **Murder Reference No.398 of 2016** is answered in the **NEGATIVE** and the Death Sentence awarded to appellant Muhammad Rafique is **not confirmed.**

(Z.A.S.) **Appeal allowed.**

PLJ 2019 Cr.C. 1493 (DB)

[Lahore High Court, Lahore]

Present **: SHEHRAM SARWAR CH. & ANWAAR UL HAQ PANNUN, JJ.**

SAJJAD AHMAD & others--Appellants

versus

STATE--Respondent

Crl. Appeal No.75452-J & 59484-J of 2017 decided on 23.05.2019

Control of Narcotic Substances Act, 1997 (XXV of 1997)--

----Ss. 9(c) & 15--Convicted and sentenced to rigorous imprisonment--Challenge to--Recovery of opium weighing 3.6-kgs from beneath seat of Appellant/Accused opium weighing 1.2-Kgs from beneath driving seat of co-accused and heroin weighing 2.5-kgs from lap of other co-accused--All accused / appellants were reported to come along with heavy consignment of narcotic from Peshawar to Faisalabad via motorway by a motor car--On secret information a raiding party was constituted and reached near Toll Plaza motorway Faisalabad--Three persons alighted from car were apprehended--Case of prosecution is not free of doubt and for earning acquittal, accused is not obliged to establish number of circumstances creating doubt but even a single circumstance, creating a reasonable doubt in prudent mind is sufficient to extend benefit of doubt to accused. [P. 1497] A

Control of Narcotic Substances (Government Analysts) Rules, 2001--

----R. 6--Convicted and sentenced to rigorous imprisonment--Challenge to--Recovery of opium and heroin--NIH reports--case of prosecution is hit by rule 6 of CNS (Govt. Analysts) Rules, 2001 as it is well settled by now that any report failing to describe in it, details of full protocols, test applied will be in conclusive, unreliable, suspicious and untrustworthy,

will not meet evidentiary presumption attached to a report of government Analyst under Section 36(2) of Act--Moreover, these reports did not contain protocols and tests applied for--Reports of NIHDC are suffering from legal and incurable flaws and cannot be considered as conclusive proof of recovered material to be contraband and would not be termed are considered as admissible in evidence--Non-conclusive and non-speaking laboratory report, which was not in accordance with law and rules cannot be relied upon for sustaining conviction. [P. 1497] A & B

Control of Narcotic Substances Act, 1997 (XXV of 1997)--

----Ss. 29(c) and 15--Convicted and sentenced to rigorous imprisonment--Challenge to--Recovery of opium and heroin--Under Section 29 of Act ibid, some departure has been introduced to this general principle yet prosecution cannot be absolved from its duty to discharge onus of proof--**Held** : Case of prosecution is not free of doubt and for earning acquittal, accused is not obliged to establish number of circumstances creating doubt but even a single circumstance, creating a reasonable doubt in prudent mind is sufficient extend benefit of doubt to accused--Acquittal of--Appeals allowed. [P. 1498] C & D

2018 SCMR 2039, *Ref.*

PLD 2015 Lahore 01, 2014 SCMR 749, *Reliance*

Mr. Amjad Iqbal Qureshi Advocate and *Ms. Shafkat Parveen Mughal,* Advocate, learned defence counsel for Appellants.

Mr. Irfan Ahmad Malik, Special Prosecutor for ANF State.

Date of hearing : 23.5.2019

JUDGMENT

Anwaarul Haq Pannun, J.--This single judgment shall decide Criminal Appeal No.75452-J of 2017 *(Sajjad Ahmad and another Vs. The State)* and Criminal Appeal No.59484 of 2017 *(Mujahid Vs. The State)* filed under Section 48 of The Control of Narcotic Substances Act, 1997 (CNSA, 1997), by the appellants Sajjad Ahmad, Muhammad Shafi and Mujahid, calling in question the vires of judgment dated 26.04.2017, passed in case/FIR No.24/2016, dated 17.07.2016, offence under Sections 9(c) and 15 of CNSA, 1997, registered at Police Station ANF, Faisalabad by the learned Addl. Sessions Judge/Special Judge (CNS), Faisalabad, whereby the appellants have been convicted and sentenced as under:--

Under Section 9(c) of CNSA, 1997

(a) The accused/appellant Mujahid

"Sentenced to undergo rigorous imprisonment for a period of four years alongwith fine of Rs.3000/- and in default whereof, he shall further undergo SI for two months."

(b) The accused/appellant Muhammad Shafi

"Sentenced to undergo rigorous imprisonment for a period of seven years alongwith fine of Rs.30,000/- and in default whereof, he shall further undergo SI for six months."

(c) The accused/appellant Sajjad Ahmad

"to undergo rigorous imprisonment for a period of six years alongwith fine of Rs.8000/- and in default whereof, he shall further undergo SI for five months."

"The period continuously undergone by the convicts in judicial lock up shall be counted toward imprisonment."

2. Precisely the facts as embodied in the FIR (Exh.PA/1), lodged on the complaint (Exh.PA) of Sajid Ali Khan S.I (PW-3) are that on 17.07.2016,

higher officer of Police Station ANF, Faisalabad received secret information that the drug paddlers Sajjad Ahmad, Muhammad Shafi and Mujahid, appellants would come along-with heavy consignment of narcotic from Peshawar to Faisalabad via motorway by a motor car No.GAA 1629. On this information, a raiding party consisting of Sajid Ali Khan SI, Tanveer Ahmad Naib Subedar, Ahmad Aftab, Shahid Iqbal, Abdul Rehman constables, Asif Ali, Nazir Hussain Sipahies was constituted and reached near Toll Plaza motorway Faisalabad. At about 5.30 a.m. the said car took exit from Toll Plaza, which was stopped. Three persons alighted from this car, who were apprehended. Car driver disclosed his name as Mujahid while other person sitting on the back of driving seat disclosed his name as Muhammad Shafi. The person sitting on front seat told his name Sajjad Ahmad. On interrogation about the narcotic, Mujahid after some reluctance got recovered one packet containing opium weighing 1200 grams from beneath the driving seat, Sajjad Ahmad got recovered three packets of opium (each weighing 1200 grams total 3.6 kilograms) from beneath his seat and Muhammad Shafi got recovered three packets of heroin (two packets weighing 01 Kg and one packet 500 grams, total weighing 2.5 KG) from his lap. Sample of 10 grams from each packet was separated. The sample parcel and the case property were sealed into separate parcels and were taken into possession vice recovery memos. Exh.PB, Exh.PC and Exh.PD.

3. After investigation and on receiving the report under Section 173, Cr.P.C, the learned trial Judge took the cognizance, supplied the requisite copies under Section 265(c), Cr.P.C, framed the charge against the appellants, to which they pleaded not guilty. The learned trial Court proceeded to record the evidence of the prosecution witnesses. The prosecution has produced as many as four prosecution witnesses (PW-1 to PW-4), in order to prove the charge against the accused/appellants. Abu Zar Muhammad Afzal ASI (PW-1) chalked out formal FIR (Exh.PA/1). He also deposed about keeping of the sample parcels and case property in safe

custody in the malkhana. Farid Ullah Constable (PW-2) deposed about transmission of the sample parcels to the office of NIH Islamabad. Sajid Ali Khan SI (PW-3) is the complainant and Investigating Officer of the case. Ahmad Aftab Constable (PW-4) is the recovery witness. The learned Special Public Prosecutor gave up PWs Shahid Iqbal Constable being unnecessary and tendered positive reports issued by NIH Islamabad (Exh.PN/1-3, Exh.PQ/1-3 and Exh.PR and closed the prosecution's evidence. The appellants when examined under Section 342, Cr.P.C, refuting the prosecution's evidence, pleaded their innocence and in reply to the questions as to why this case and why the PWs deposed against them, they replied as under:--

Accused/appellant Sajjad Ahmad

"PWs are all police officials due to which they deposed against me to assist ANF officials who involved me in this case just to show their efficiency and they made me a escape goat only to score the points."

Accused/appellant Muhammad Shafi

"I am guilty(inadvertently written instead of innocent), but ANF officials did not bother to arrest the actual culprit inspite of my information."

Accused/appellant Mujahid

"PWs are all police officials due to which they deposed against me to assist ANF officials who involved me in this case just to show their efficiency and they made me a escape goat only to score the points."

The appellants themselves neither appeared under Section 340(2), Cr.P.C, as their own witnesses nor produced any evidence in their defence. On the conclusion of trial, the learned trial Judge convicted and sentenced the appellants through the impugned judgment as alluded to in Para No. 1 of the instant judgment. Hence, this appeal.

4. Arguments heard. Record perused.

5. After hearing learned counsel for the appellants, Special Prosecutor for ANF and perusing the record, it is straightaway observed by us that the case of the prosecution is hit by Rule 6 of The Control of Narcotic Substances (Government Analysts) Rules, 2001 as it is well settled by now that any Report failing to describe in it, the details of the full protocols, the test applied will be inconclusive, unreliable, suspicious and untrustworthy and will not meet the evidentiary presumption attached to a Report of the Government Analyst under Section 36(2) of the Act. In the present case, we have minutely gone through the reports issued by National Institute of Health Drugs Control and Traditional Medicines Division Islamabad (Ex.PN/1-3), (Exh.PQ/1-3) and (Exh.PR) and found that these reports did not contain the protocols and the test applied for. It has been held in case titled *"The State through Regional Director ANF Vs. Imam Bakhsh and others"* (2018 SCMR 2039) that:--

> *16. Non-compliance of Rule 6 can frustrate the purpose and object of the Act, i.e. control of production, processing and trafficking of narcotic drugs and psychotropic substances, as conviction cannot be sustained on a Report that is inconclusive or unreliable. The evidentiary assumption attached to a Report of the Government Analyst under Section 36(2) of the Act underlines the statutory significance of the Report, therefore details of the test and analysis in the shape of the protocols applied for the test become fundamental and go to the root of the statutory scheme. Rule 6 is, therefore, in the public interest and safeguards the rights of the parties. Any Report (Form-II) failing to give details of the full protocols of the test applied will be inconclusive, unreliable, suspicious and untrustworthy and will not meet the evidentiary assumption attached to a Report of the Government Analyst under Section 36(2).*

Resultantly, it will hopelessly fail to support conviction of the accused. This Court has already emphasized the importance of protocols in Ikramullah's case (supra).

6. Resultantly, the reports issued by National Institute of Health Drugs Control and Traditional Medicines Division Islamabad (Ex.PN/1-3), (Exh.PQ/1-3) and (Exh.PR) are suffering from legal and incurable flaws and cannot be considered as conclusive proof of recovered material to be contraband and would not be termed or considered as admissible in evidence. Thus, the non-conclusive and non-speaking laboratory report, which was not in accordance with law and rules, cannot be relied upon for sustaining the conviction. Moreover, the fact that the appellants were facing trial for possessing/transporting heavy quantity of narcotic is also not sufficient to maintain their conviction judgment.

7. In view of the above, we are of the view that prosecution has failed in establishing its case against the appellants beyond any shadow of doubt. Though there is a slight difference in the manner and standard of proof in the cases registered under The Control of Narcotic Substances Act, 1997 but the prosecution is always burdened to discharge the initial onus of proof. Though under Section 29 of The Control of Narcotic Substances Act, 1997, some departure has been introduced to this general principle, yet the prosecution cannot be absolved from its duty to discharge the onus of proof. The initial onus of proof always on the prosecution and when once it is discharged, then the accused would be burdened to prove the contrary in terms of principles laid down in Section 29 of The Control of Narcotic Substances Act, 1997. The case of the prosecution is not free of doubt and for earning the acquittal, the accused is not obliged to establish number of circumstances creating doubts but even a single circumstance, creating a reasonable doubt in the prudent mind is sufficient to extend the benefit of doubt to the accused. Reliance in this regard is placed upon case

titled *"Muhammad Ashraf and others v. The State and others"* (PLD 2015 Lahore 1) and *"Muhammad Zaman v. The State and others"* (2014 SCMR 749).

8. For what has been discussed above, we are of the considered view that the prosecution has failed to discharge its onus for upholding the conviction recorded by the learned Addl. Sessions Judge/Special Judge (CNS), Faisalabad, against the appellants. Consequently, while allowing these appeals, we set aside the judgment dated 26.04.2017 and acquit the appellants Sajjad Ahmad, Muhammad Shafi and Mujahid of the charge. The appellants are in jail, they be released forthwith if not required in any other case.

(Z.A.S) **Appeal allowed.**

PLJ 2019 Cr.C. 1710
[Lahore High Court, Multan Bench]

Present: **ANWAARUL HAQ PANNUN, J**

TAHIR--Appellant

versus

STATE and another--Respondents

Crl. Misc. No. 01 of 2018 in Crl. Appeal No. 735-J of 2018,
decided on 2.5.2019

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

----S. 426--Pakistan Penal Code, 1860 (XLV of 1869), S. 302(b), 324, 148 & 149--Private complaint--Suspension of sentence--Role of inflicting fire arm injury--In FIR as well as in private complaint petitioner has not been attributed role of inflicting any fire arm injury to deceased--Perusal of record reveals that co-accused of petitioner, who have been attributed specific role of making fire arm injuries on different parts of body of deceased, have been acquitted by trial Court--Nothing is available on record to show that petitioner is desperate or hardened criminal--Petitioner is entitled to relief of suspension of his sentence as question qua his involvement in instant case requires serious reappraisal of evidence at time of deciding appeal--Petition allowed.

[Pp. 1711 & 1712] A & B

2017 SCMR 397, *reference*.

Prince Rehan Iftikhar Sheikh, Advocate for Petitioner.

Mr. Muhammad Abdul Wadood, Deputy Prosecutor General for State.

Date of hearing: 2.5.2019.

ORDER

Through this petition under Section 426, Cr.P.C. petitioner-appellant Tahir S/o Allah Wasaya has sought the suspension of sentence awarded to him by the learned Additional Sessions

Judge, Kehror Pacca *vide* judgment dated 28.02.2018, in private complaint filed for offences under Sections 302, 324, 148 & 149, PPC within the area of Police Station City, Kehror Pacca, whereby he has been convicted and sentenced as under:--

Under Sections 302(b) & 149, PPC

Imprisonment for life as Taz'ir along -with compensation of Rs. 2,00,000/- to be paid to the legal heirs of deceased under Section 544-A, Cr. P. C and in case of default, to undergo 06 months S.I

The petitioner was held entitled to the benefit of Section 382-B, Cr.P.C.

2. Arguments heard. Record perused.

3. It is straightaway observed that in the FIR as well as in the private complaint the petitioner has not been attributed the role of inflicting any fire arm injury to the deceased. Perusal of record reveals that co-accused of the petitioner, namely, Allah Ditta and Siddique, who have been attributed specific role of making fire arm injuries on different parts of body of the deceased have been acquitted by the learned trial Court *vide* impugned judgment dated 28.02.2018. Nothing is available on record to show that the petitioner is a desperate or hardened criminal. In these circumstances, in the light of case-law reported as *"Maqsood Ahmad versus The State"* (2017 SCMR 397) the petitioner is entitled to the relief of suspension of his sentence as the question qua his involvement in the instant case requires serious reappraisal of evidence at the time of deciding the appeal.

4. In view of what has been discussed above, the petition in hand is ***allowed***, impugned judgment dated 28.02.2018 to the extent of conviction and sentence of the petitioner is hereby suspended till the final decision of his appeal subject to his furnishing bail bonds in the sum of Rs.200,000/- (rupees two lac) with one surety in the like amount to the satisfaction of the Deputy Registrar (J) of this Court. The petitioner is directed to appear before the Court on each and every date of hearing in the appeal.

(Z.A.S.) **Petitoin allowed.**

2019 Y L R Note 73

[Lahore (Multan Bench)]

Before Anwaarul Haq Pannun, J

MUSHTAQ AHMAD---Appellant

Versus

The STATE and another---Respondents

Criminal Appeal No. 73 of 2016, decided on 5th December, 2018.

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

----Ss. 302(b) & 449---Qatl-i-amd, house-trespass in order to commit offence punishable with death---Appreciation of evidence---Accused was charged that he while being highly intoxicated, coming on his motorcycle, was hurling abuses---Brother of complainant restrained him to do so whereupon he made straight fire with his pistol, piercing through his neck and he succumbed to injury---Motive behind the occurrence was stated to be altercation few days ago between the deceased and the accused---Scanning of record revealed that no direct evidence had been produced by the prosecution to establish the motive part of the occurrence---Testimony of eye-witnesses for establishing the motive at the most, could be said to be evidence of hearsay which was not admissible in evidence.

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

----Ss. 302(b) & 449---Qatl-i-amd, house-trespass in order to commit offence punishable with death---Appreciation of evidence---Recovery of weapon of offence from accused--- Reliance---Scope---In the present case, weapon of offence i.e. 9-MM licensed pistol along with three cartridges produced through father of the accused along with licence was taken into possession by Investigating Officer---Said recovery had not

been proved as the empty, which was taken into possession had not matched with the said weapon---Recovery was inconsequential.

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

----Ss. 302(b) & 449---Qatl-i-amd, house-trespass in order to commit offence punishable with death---Appreciation of evidence---Statement of eye-witness showed that the accused was under the influence of alcohol at the time of making fire---Date, time and place of occurrence were undisputed---Both sides had admitted that the accused was under the influence of intoxication at the time of occurrence---Question had arisen as to whether accused had done the act complained of being incapable of knowing the nature of the act being under the influence of intoxication or that he was doing something which was either wrong or contrary to law which provided that the thing which intoxicated him was administered to him without his knowledge or against his will---Inference, in circumstances, could be drawn that, at the time of the occurrence, the accused was under the influence of intoxication---In order to extract the benefit and advantage of being intoxicated, the accused had to establish that he was administered the intoxicant against his will and without his knowledge, which rendered him incapable to understand the consequences of act committed by him---Nothing was on record to show that the accused was administered intoxicant without his knowledge and will---Prosecution had been able to prove the charge against the accused beyond reasonable doubt, in circumstances---Accused had already been extended the benefit of mitigating circumstance by the Trial Court with regard to the quantum of sentence---Conviction and sentence of accused awarded by the Trial Court was quite justified and had been passed after proper appreciation the evidence available on record---No legitimate exception was available to differ with the conclusion arrived at by the Trial Court and the judgment impugned herein called for no interference by High Court---Appeal was dismissed accordingly.

Zeeshan alias Shani v. The State PLD 2017 SC 164; Muhammad Asif v. Muhammad Akhtar 2016 SCMR 2035; Azmat Ullah v. The State 2014 SCMR 1178; Azhar Iqbal v. The State 2013 SCMR 383; Tariq Ahmad v. The State 2004 SCMR 957 and Muhammad Ramzan v. The State 2008 YLR 1556 ref.

Muhammad Usman Sharif Khosa for Appellant.

Sardar Mehboob for the Complainant.

Abdul Wadood, Deputy Prosecutor General for the State.

Date of hearing: 7th November, 2018.

JUDGMENT

ANWAARUL HAQ PANNUN, J.---Through this appeal under section 410 Cr.P.C., appellant Mushtaq Ahmad has challenged the vires of judgment dated 13.01.2016 in case FIR No. 506 dated 04.10.2012, in respect of offences under Sections 302 and 499, P.P.C., registered at Police Station, Basti Malook, Multan passed by a learned Additional Sessions Judge, Multan whereby he has been convicted and sentenced as under:-

Under Section 302(b), P.P.C.

Rigorous imprisonment for life and compensation of Rs.3,00,000/- payable to the legal heirs of deceased under Section 544-A, Cr.P.C. and in case of default, undergo four months S.I. Benefit of Section 382-B, Cr.P.C was extended to the appellant.

2. The prosecution story unfolded through FIR (Ex.PA) lodged on the written complaint (Ex.PA/1) based of Muhammad Mansha (PW-6) is to the effect, that on 03.10.2012, his brothers namely Muhammad Sajid (deceased), Ghulam Abbas (PW-7) (eye-witness) along with Muhammad Akmal and Muhammad Akhtar (not produced) were sitting in his Baithak when at 09:00 p.m, after he heard some commotion, he saw that Mushtaq

Ahmad (appellant), highly intoxicated, after coming on his motorcycle, was hurling abuses, Muhammad Sajid restrained him to do so whereupon he made straight fire with his pistol, piercing through his neck, he along with Ghulam Abbas and Mukhtar Hussain tried to nab the appellant, who while brandishing and threatening that if they tried to come near, will also be done to death, fled away.

The motive behind the occurrence was stated to be an altercation taken place few days ago between the deceased and the appellant.

3. The registration of the case after its usual investigation encapsulated into report under Section 173, Cr.P.C., eventuating into its submission before the court, which on taking cognizance, after supplying copies of the incriminating statements to the appellant, charged sheeted him and upon his denial and professing innocence and claiming trial, directed the prosecution to produce evidence for proving the charge.

4. The prosecution has produced as many as 12-witnesses besides tendering, in evidence, report of Serologist (Ex.PO).

5. Dr. Asif Jameel Ansari, Assistant Professor Forensic Medical Department, Nishtar Medical Hospital, Multan (PW-3) stated that on 08.10.2012, he medically examined injured Muhammad Sajid brought under the surveillance of Hashim 4166/C Police Station Basti Malook, Multan. The injured was admitted to hospital.

6. Dr. Muhammad Saeed (PW-4) provided medical treatment to the injured (deceased). He also tendered in evidence Ward Report as Ex. P.C.

7. Dr. Habib-ur-Reman, Deputy District Health Officer, Head Quarter Multan (PW-5), on the demise of the injured, conducted the post-mortem on his dead body on 21.10.2012 and observed the following injuries:-

"There is stitched wound 2-1/2 x 1 cm on the base of neck. Circular wound 1-1/2 X 1 cm on the back of chest. 06 cm from the base of

the neck and 2-1/2 from the right scapula. He was wearing while shirt with black lining. Sharwar was gray in colour. There was no blood stain on the clothes.

There was stich wound on the front of the base of the neck, 2-1/2 x 1 cm. On dissection, hyoid and thyroid/arytenoids cartilages were found intact but the trachea ruptured. Scalp, skull and membranes were healthy, brain congested and vertebrae was not open, Thorax walls, sternum, cartilages and ribs were healthy, pleurae congested, larynx healthy and trachea ruptured, right lung congested and ruptured in upper zone, Left lung congested, pericardium congested and full of clotted blood, blood vessels, no aorta ruptured nor major vessels ruptured but minor blood vessels ruptured on the passage of built.

He did not find any abnormality except liver, which was found to be congested and kidney was healthy. Upper and lower limbs nothing was found abnormal.

In his opinion, injury No.1 led to cause death due to rupture of the trachea and lungs due to fire arm and patient goes to cardio pulmonary arrest.

Probable time between injury and death was 18-days whereas between death and post-mortem examination was eight hours.

8. The ocular account in this case has been furnished by Muhammad Mansha/complainant (PW-6) and eye-witness Ghulam Abbas (PW-7). Husnain Abbas/Investigation officer has appeared as PW-11. Rest of the witnesses are not of much importance, therefore, in order to avoid unnecessary account, the detail of the same is not being given. Needless to reiterate the exhibits.

9. When examined under Section 342 Cr.P.C., the appellant denied every bit of incriminating material he was confronted with, and while

replying the question that as to why this case against him and why the prosecution witnesses had deposed against him, he replied as follows:-

"This is a false case. I was dealing in the sale and purchase of cotton along with shareholders, Shabbir Hussain and Muhammad Ashraf and we purchased cotton from Muhammad Sajid deceased. They went to the Kanda (scale) for weighing the cotton purchased by us. Prior to that, I along with my partners Ashraf and Shabbir Hussain had purchased twice cotton from Muhammad Sajid deceased Muhammad Sajid became friends to each others. On the day of occurrence, Muhammad Sajid deceased persuaded me to have meal with him on his residence in the evening and thus at that time, I-Mushtaq Ahmad, Muhammad Akhtar, Muhammad Akmal and Muhammad Sajid deceased were sitting in the baithak when the occurrence took place. The investigation officer his cross-examination has also deposed that he had not written any police zimni with regard to presence of both the witnesses Ghulam Abbas and Mukhtar Hussain in the baithak. Their presence at the time of occurrence being present in the baithak was not proved. The investigating officer neither interrogated Muhammad Akmal and Muhammad Akhtar nor he had recorded their statements under section 161, Cr.P.C. which shows that the investigation has not been conducted honestly. The complainant has also suppressed the actual facts and story in his application Ex.PA/1. Actually, I-Mushtaq Ahmed, deceased-Muhammad Sajid, Muhammad Akhtar and Muhammad Akmal took liquor while sitting in the baithak on the invitation of deceased Muhammad Sajid and became over drowsy. During this process, I-Mushtaq Ahmad placed my pistol in between all the persons which was also seen by Muhammad Sajid deceased and above mentioned persons but it could not be transpired that who made the fire among us at that time. The alleged witnesses who were real brothers of the deceased were not

present at the place of occurrence nor they knew nothing with regard to the occurrence and in order to strengthen the prosecution case they were falsely shown as eye-witnesses by the I.O., which fact has been proved during the course of investigation that they were neither present nor saw the occurrence. It was also proved that the occurrence took place when all were sitting but it could not be proved that fire was made by me or somebody else. It is also in the evidence that empty was allegedly secured by the police on 04.10.2012 and pistol 9-MM was allegedly recovered after my arrest. Till the moment, I was not arrested, empty was not sent to Forensic Science Laboratory, Lahore. In order to take favourable report after my arrest, by making fire by the police, it was sent to the Forensic Science Laboratory. I am innocent. The case is false."

10. Learned trial Court, on conclusion of the trial, proceeded to convict the appellant as aforesaid. Hence, the appeal.

11. Learned counsel for the appellant, with reference to findings contained in Paragraphs 10 and 11 of the impugned judgment, submits that so called recovery and motive have not been believed by the learned trial court. He has, apart from referring the FIR (Ex.PA) and certain portion of evidence of the eye-witnesses, had whole heartedly read the evidence of the investigation officer and statement under Section 342, Cr.P.C. of the appellant to contend that although in this case, the time and place of occurrence are not disputed by the defence but the mode of occurrence is seriously disputed. He has submitted that if the entire material of the case is considered in its totality, the conviction of the appellant under Section 302(b), P.P.C. is not sustainable and his case squarely falls within the ambit of Section 302(c), P.P.C. He has relied upon the judgments reported as Zeeshan alias Shani v. The State (PLD 2017 Supreme Court 164), Muhammad Asif v. Muhammad Akhtar (2016 SCMR 2035), Azmat Ullah v.

The State (2014 SCMR 1178) and Azhar Iqbal v. The State (2013 SCMR 383).

12. On the other hand, learned Deputy Prosecutor General appearing for the State assisted by learned counsel for the complainant, while relying upon Tariq Ahmad v. The State (2004 SCMR 957) and Muhammad Ramzan v. The State (2008 YLR 1556) has contended that since the appellant has taken a specific plea of being under intoxication at the time of occurrence, onus under the law, lay upon him for proving his plea, which has not been discharged by him, hence not entitled to any relief.

13. Arguments heard. Record perused.

14. Scanning of record reveals that no direct evidence has been produced by the prosecution to establish the motive part of the occurrence. At the most, testimony of PW-6 and PW-7 for establishing the motive can be said to be evidence of hearsay which is not admissible in evidence. So far as the recovery of weapon of offence i.e. 9-MM licensed pistol (P-5) along with three cartridges (P-1 to 1/3) produced through father of the appellant along with license No.1974, taken into possession vide recovery memo Ex.PL is concerned, the same is not proved as the empty was taken into possession vide Ex.PH had not matched with the said weapon, hence of no importance.

15. Now, I undertake the judicious exercise of analyzing rest of the prosecution evidence, i.e. PWs-6 and 7, the witnesses duly corroborated by PWs-3 to 5 i.e. the medical evidence, the trend of cross-examination, evidence of the investigating officer and the plead taken by the appellant in his statement under Section 342, Cr.P.C.

16. After examining the above referred material available on record, this Court is of the view that it was the complainant who himself, while recording his statement under Section 154, Cr.P.C. (Ex.PA) has stated

that "at about 9:00 p.m., at once, on hearing the noise, when he came in the baithak, he saw Mushtaq Ahmad son of Muhammad Bashir, who came on his own motorcycle, in a drunken position, was abusing and when his brother Muhammad Sajid forbade him, he with his pistol, fired at Muhammad Sajid and the built piercing his neck crossed the same."

17. While facing the test of cross-examination, the complainant (PW-6), also denied the friendship inter-se the deceased and the appellant and stated that "It is incorrect to suggest that Mushtaq and Sajid both were friends of each other and accused had purchased the cotton from him twice and also made the payment---I do not know if I had mentioned that Mushtaq accused was over-drinking and due to alcohol. He was just acting like over-drinkered."

18. The defence has trigged happily suggested that "It is incorrect that it also transpired in the investigation that my deceased brother was habitual drinkered ---- I did not submit any application against the investigating officer that he had wrongly held that the accused and the deceased and others had drunk alcohol and they were under the influence of alcohol and the fire was suddenly made by the deceased himself hitting his neck."

19. The browsing of statement of PW-7, who also narrated about the occurrence, indicates that he was also suggested that the appellant was under the influence of alcohol at the time of making fire. The investigating officer, whose findings have not been challenged by the complainant, as referred above, has deposed as under:--

> "Taking a dinner was not brought in my notice when the occurrence took place and before taking dinner they started drinking alcohol."

20. It is important to mention here that date, time and place of occurrence are undisputed. It is admitted from both sides that the appellant was under the influence of intoxication at the time of occurrence. Now, the

question for determination by this Court would be, as to whether the case of the appellant, for the purpose of his conviction and sentence, will come within the purview of Sections 302(b), P.P.C. or 302(c), P.P.C. For convenience of reference, Sections 85 and 86 of Pakistan Penal Code, 1860 which specifically deal with the issue under discussion, are reproduced as under:-

"85. Act of a person incapable of Judgment by reason of intoxication caused against his will.---Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong, or contrary to law; provided that the thing which intoxicated him was administered to him without his knowledge or against his will.

21. Keeping in view the verbatim of aforesaid section, plea of the appellant would place him under burden of proving that he had done the act complained of being incapable of knowing the nature of the act being under the influence of intoxication or that he is doing something which is either wrong or contrary to law provided that the thing which intoxicated him was administered to him without his knowledge or against his will. It can be concluded that under this section, an offence committed by a person, who at the time of occurrence, is incapable of knowing the nature of the act by reason of intoxication, is excused provided that the intoxication has been administered to him without his knowledge or against his will.

86. Offence requiring a particular intent or knowledge committed by one who is intoxicated.--In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he

had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.

22. The afore-quoted sections apply only to cases of intoxication and do not cover a case where what is alleged is an inherent defect or infirmity of mind. This provision also deals with "state of intoxication" which renders a person incapable of knowing the nature of the act in question or that he is doing what is either wrong or contrary to law what he is doing.

23. The close analysis of this section indicates that a person complained against or who has done some particular criminal act under intoxication, will be dealt as if he had the same knowledge as he would have had, if he had not been intoxicated unless the thing which intoxicated him was administered to him without his knowledge or will.

24. According to Section 85, P.P.C., nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong, or contrary to law; provided that the thing which intoxicated him was administered to him without his knowledge or against his will. This provision plainly defines that in case, an offence is committed by a person who is under intoxication and unable to understand its nature and consequences, can seek his absolvement of the liability of the offence, if he discharges the heavy burden that his being under intoxication, was not result of his voluntary intoxication, rather the same was administered to him without his knowledge or against his will, whereas the provision of Section 86, P.P.C. has a distinction as under this provision, it is clarified the consequences that in case an accused fails in discharging the onus to prove upon him that, at the time of commission of offence, though he was under intoxication but the same was without his knowledge and against his will. It is, thus, clear that an act having been done under voluntarily intoxication is not covered under these provisions

of law for giving any benefit to an accused unless the heavy burden is shed by the accused that he was under the influence of intoxication but without his knowledge and against his will.

25. From the aforesaid discussion, it can clearly be inferred that, at the time of the occurrence, the appellant was under the influence of intoxication. In order to extract benefit and advantage of the same, the appellant had to establish that he was administered the intoxicant against his will and without his knowledge which rendered him incapable to understand the consequences of act committed by him. There is no evidence on record to show that the appellant was administered the intoxicant without his knowledge and will. Had it been the situation that the appellant could have proved on record through some evidence that he was administrated the intoxicant by someone against his will and wishes under the circumstances beyond his control, surely he could have earned full benefit encapsulated in Section 85, P.P.C.

26. In view of above discussion, I am of the firm view that the prosecution has been able to prove the charge against the appellant beyond reasonable shadow of doubt. The appellant has already been extended the benefit of mitigating circumstances by the learned trial court with regard to the quantum of sentence. The conviction and sentence of the appellant awarded by the trial court is quite justified and has been passed after proper appreciation the evidence available on record. I have no legitimate exception to differ with the conclusion arrived at by the learned trial court in this regard and the judgment impugned herein calls for no interference by this Court.

27. For what has been discussed above, the appeal in hand is devoid of any force, the same stands dismissed.

JK/M-62/L **Appeal dismissed.**

2019 Y L R Note 101

[Lahore]

Before Anwaarul Haq Pannun, J

IMTIAZ AHMAD---Petitioner

Versus

COMMON SERVICE CO-OPERATIVE HOUSING SOCIETY LTD. and others---Respondents

Writ Petition No. 12869 of 2019, heard on 21st May, 2019.

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

----Preamble---Criminal justice system---Scope---Scheme behind Criminal Procedure Code, 1898 is to streamline, channelize and facilitate smooth running of system of criminal justice---Object is to provide machinery for punishment of offenders against substantive criminal law under court.

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

----S. 265-K---Acquittal of accused---Stage---Power vested under S. 265-K, Cr.P.C. can be exercised by Trial Court at any stage of trial.

(c) Illegal Dispossession Act (XI of 2005)---

----Ss. 3, 4, 5, 6, 7 & 8---Criminal Procedure Code (V of 1898), S. 265-K---Constitution of Pakistan, Art. 175(2)---Illegal dispossession---Acquittal of accused---Locus standi---Petitioner was not arrayed as accused in criminal complaint but he sought dismissal of compliant under S. 265-K, Cr.P.C.---Trial Court dismissed application on grounds that he had no locus standi to file such application---Validity---Trial Court, under S. 265-K, Cr.P.C., was vested with wide power enabling it to see through wall on its other end---Petitioner was neither an accused nor complainant rather was a stranger to proceedings---Application filed by petitioner could not be entertained by Trial Court and same was rightly rejected---

Criminal courts were conferred on jurisdiction under Criminal Procedure Code, 1898 quite in line with Art.175(2) of the Constitution---High Court declined to interfere in matter and maintained order passed by Trial Court---Constitutional petition was dismissed in circumstances.

Muhammad Akram and 9 others v. Muhammad Yousaf and another 2009 SCMR 1066; Mst. Gulshan Bibi and others v. Muhammad Sadiq and others PLD 2016 SC 769; Dossan Travels Pvt. Ltd. and others v. Messrs Travels Shop (Pvt.) Ltd. and others PLD 2014 SC 1 and S.M. Waseem Ashraf v. Federation of Pakistan through Secretary, M/O Housing and Works, Islamabad and others 2013 SCMR 338 rel.

Captain S.M. Aslam v. The State and 2 others PLD 2006 Kar. 221; Maqsood Ahmed Qureshi v. Muhammad Azam Ali Siddiqui and 8 others PLD 2009 Kar. 65; H.M. Saya and Co., Karachi v. Wazir Ali Industries Ltd., Karachi and another PLD 1969 SC 65; Qazi Munir Ahmed v. Rawalpindi Medical College and Allied Hospital through Principal and others 2019 SCMR 648; Alamgir Khan v. Ghulam Rasul and others 2015 YLR 2512; Nazir Ahmed v. Asif and 4 others PLD 2009 Kar. 94; Noor Zada v. Muhammad Khalid and others 2007 PCr.LJ 891; Fazil Khan v. Additional Sessions Judge, Sialkot and others 2006 YLR 1791; Samandar Khan and another v. Haji Abdul Rehman and others PLD 2008 Quetta 21; Sahib Khan v. Saadullah Khan and another PLD 2008 Pesh. 49; Ssajawal Khan and 4 others v. Amir Sultan and 11 others 2016 Cr.LJ 929; Ghulam Raza v. Samo Khan and 25 others 2016 YLR 2138 and Muhammad Saleem v. Muneeza Begum and 6 others 2019 PCr.LJ 364 ref.

Munir Ahmad Bhatti for Petitioner (in Writ Petition No.12871 of 2019).

Agha Intizar Ali Imran and Ali Hassan Rana for Respondents.

Date of hearing: 21st May, 2019.

JUDGMENT

ANWAARUL HAQ PANNUN, J.---Through this Constitutional petition, the petitioner (who has not been arraigned as an accused in the complaint) calls in question the order dated 10.12.2018 passed by the learned Addl. Sessions Judge, Lahore whereby he had dismissed the application of one Imtiaz Ahmad, petitioner seeking dismissal of the complaint titled "Common Services Co-operative Housing Society Ltd v. Badar Munir and others" filed through its President under sections 3, 4, 5, 6, 7 and 8 of Illegal Dispossession Act, 2005, pending trial before the court of learned Addl. Sessions Judge, Lahore.

2. At the very outset, learned counsel for respondent No.1 submits that since the petitioner has not been arraigned as an accused in the pending criminal complaint, therefore, being alien to the proceedings, neither his application seeking dismissal of the complaint was maintainable nor he is an aggrieved person, therefore, being a stranger, the learned trial Judge has rightly dismissed his application of the petitioner holding that petitioner has no locus standi to file this application.

3. Learned counsel for the petitioner has argued that the impugned order dated 10.12.2018, is nullity in the eyes of law. Learned counsel for the petitioner has, therefore, relied upon the case law reported in Captain S. M. Aslam v. The State and 2 others (PLD 2006 Karachi 221), Maqsood Ahmed Qureshi v. Muhammad Azam Ali Siddiqui and 8 others (PLD 2009 Karachi 65), H. M. Saya & Co., Karachi v. Wazir Ali Industries Ltd., Karachi and another (PLD 1969 SC 65), Qazi Munir Ahmed v. Rawalpindi Medical Colleze and Allied Hospital through Principal and others (2019 SCMR 648), Alamgir Khan v. Ghulam Rasul and others (2015 YLR 2512), Nazir Ahmed v. Asif and 4 others (PLD 2008 Karachi 94), Noor Zada v. Muhammad Khalid and others (2007 PCr.LJ 891), Fazil Khan v. Additional Sessions Judge, Sialkot, and others (2006 YLR 1791); Samandar Khan and another v. Haji Abdul Rehman and others (PLD 2008

Quetta 21), Sahib Khan v. Saadullah Khan and another (PLD 2008 Peshawar 49), Sajawal Khan and 4 others v. Amir Sultan and 11 others (2016 Cr.LJ 929) and Ghulam Raza v. Samo Khan and 25 others (2016 YLR 2138) to argue that a person aggrieved of an order has a right to challenge it by filing an appeal and on the same analogy, since the application of the petitioner has wrongly been dismissed, this petition is, therefore, maintainable. In order to examine the legality of the impugned order in the light of arguments of the learned counsel for the petitioner, it will be appropriate to examine certain relevant provision of law in order to properly reply, the moot question arising out of the proceedings that whether an application on behalf of a person, neither a complainant nor an accused, can be entertained by a criminal court. The Illegal Dispossession Act is a special law. It has its overriding affect upon all other available laws on the statute books on the subject. Needless to observe that procedural law is concomitant with the substantive law, for its enforcement. It is also necessary to regulate the proceedings while ensuring certainty to the litigants before any court of law. The parties should get fair trial; they should also have their faith in the proceedings, being conducted by a court of competent jurisdiction.

4. The arguments advanced by the learned counsel for the parties have been heard and record perused.

5. Till 6th July, 2005 the day on which The Illegal Dispossession Act, 2005 as special law, was promulgated, the persons, without adopting due course of law and illegally dispossessed from their properties could seek certain remedies under ordinary criminal as well as civil law.

i) A remedy by way of putting the machinery of law into motion under section 154, Cr.P.C. in case of commission of criminal trespass, house trespass, lurking house trespass, lurking house trespass by night, house breaking and house breaking by night was available to the aggrieved persons.

ii) Under the provisions of section 145, Cr.P.C., a Magistrate has been empowered to restore the possession of a person, dispossessed within a period of two months of passing of order by the Magistrate on receiving an information after being satisfied from a police report or other information about the likelihood of breach of peace concerning any land, water or boundaries thereof within the local limits of his jurisdiction, after holding an inquiry, the Magistrate can restore the possession of a party so wrongfully dispossessed by the other party within two months next before the date of passing of his order. He has also been empowered to attach the property. The Magistrate, however, has not been invested with the power to entertain and decide finally the claim of title between the parties. For guidance, in the case law reported in Muhammad Saleem v. Muneeza Begum and 6 others (2019 PCr.LJ 364) wherein it is held that,

"(b) Criminal Procedure Code (V of 1898)---

---S. 145--- Procedure where dispute concerning land is likely to cause breach of peace---Power to attach subject of dispute---pendency of civil litigation----Scope--Whenever Magistrate was satisfied that dispute likely to cause breach of peace existed regarding any land and considered it a case of emergency, he could attach the subject and order for its proper custody---Section 145, Cr. P.C. nowhere provided that in presence of civil litigation Magistrate could not exercise his powers conferred on him---Mere filing of suit did not debar the Magistrate to proceed under S. 145, Cr.P.C. unless interim injunction was issued or Receiver was appointed or decree was finally passed, or possession was regulated by the Civil Court.

iii) A person illegally and without adopting due course of law dispossessed from his property, has also been provided a remedy by way of filing of a civil suit under section 8 of the Specific

Relief Act, 1877 on the basis of title in the manner provided by the Code of Civil Procedure, 1908, subject to law of limitation.

iv) Another remedy, by means of a civil suit, was also available to a person dispossessed of his immoveable property, as envisaged under section 9 of the Specific Relief Act, 1877 against the persons causing dispossession. The provisions of Section 9 of Specific Relief Act, 1877 gives a special privilege to persons in possession who takes action primary on their dispossession of immoveable property. Under section 9 of the Act, ibid, summary procedure has been provided, to persons dispossessed from immoveable properties without their consent. It is, for bringing the cause under this Section, it is required to show that the person invoking the jurisdiction of the Court had actual physical possession of immoveable property from which he was dispossessed without any consent by defendants within six months prior to the institution of the suit. It is not mandatory for the parties claiming retrieval of the possession over the property, who have dispossessed from his possession over the property, to establish his title simply it is sufficient to prove that the pretty claiming retrieval has been dispossessed within the period of six months.

crime remained an unwanted companion of man throughout history from stone ages to the modern era of information technology

6. Hike up in price of real estates, time taking process involving procedural technicalities, rendering the available legal remedies, in public perceptions almost ineffective, the dwindling state superstructure not providing swift measures, the porous and posting seeker bureaucracy pliant before their political masters, gradual decay in value system of society, alarming increase in the illegal public and private land grabbing incidents by the powerful individual and organized groups backed by

unscrupulous elements, ignoring the voice of their conscience, eager to make their fortune, without distinguishing between the right and wrong unfortunately the incidents of illegally occupying the valuable properties owned by weak segments of the society and Pakistani immigrants abroad, gained currency in absence of any deterrent remedial legislation; in this back drop, the legislature felt it expedient to enact The Illegal Dispossession Act, 2005 (hereinafter to be called as the Act) for providing protection to lawful owners and occupants of immoveable properties from their illegal and forcible dispossession therefrom by the property grabbers. The act being a special law has an over riding effect upon prevalent laws. Through the provisions of the Act "everyone" has been prohibited in clear words from entering into or upon any property to dispossess, grab, control or occupy it, without having any lawful authority to do so with the intention to dispossess, grab, control or occupy the property form the "lawful owner" or "occupier of such property". For ready reference, it will be advantageous to produce section 3 of Illegal Dispossession Act, 2005:--

3. Prevention of illegal posses-sion of property, etc.---(1) No one shall enter into or upon any property to dispossess, grab, control or occupy it without having any lawful authority to do so with the intention to dispossess, grab, control or occupy the property from owner or occupier of such property.

(2) Whoever contravenes the provisions of the subsection (1) shall, without prejudice to, any punishment to which he may be liable under any other law for the time being in force, be punishable with imprisonment which may extend to ten years and with fine and the victim of the offence shall also be compensated in accordance with the provision of section 544-A of the Code.

(3) Whoever forcibly and wrongfully dispossesses any owner or occupier of any property and his act does not fall within sub-

section (1), shall be punished with imprisonment which may extend to three years or with fine or with both, in addition to any other punishment to which he may be liable under any other law for the time being in force. The person dispossessed shall also be compensated in accordance with provisions of section 544-A of the Code.

7. It will be very important to say that through the enforcement of the Act, a contravention of subsection (1) of Section 3 has been made a punishable offence with imprisonment besides imposition of fine upon the person found guilty of commission of offence under subsections (2)(3) of section 3 ibid. Awarding of compensation has also been made permissible. In the case reported as Captain S.M. Aslam v. The State and 2 others (PLD 2006 Karachi 221) wherein it is held that,

"Subsection (1) of section 3 forbids any person from entering into or upon any property with the intention to dispossess, grab, control, or occupy any property from its owner or occupier, whereas subsection (2) of section 3 provides that any person who contravenes the provision of subsection (1) of section 3 shall be liable for a punishment of imprisonment which may extend to ten years and with fine and also provide compensation to the victim in accordance with section 544-A of the Code. The punishment provided in subsection (2) of section 3 is beside and without prejudice to any punishment provided under any other law."

8. Any act, without any lawful authority doing so by any person, in contravention of subsection (1) of Section 3, constitutes an offence under the Act ibid which according to its gravity has been made punishable under sub-sections (2) and (3) of Section 3 of the Illegal Dispossession Act, 2005. In the case of Muhammad Akram and 9 others v. Muhammad Yousaf and another (2009 SCMR 1066) it is held that,

"---S. 3(1) & (2)---Scope and application of S.3(1)(2) of the Illegal Dispossession Act, 2005---Essentials for Complainant to allege and show before the court and the defence line of the accused enumerated.

The Illegal Dispossession Act, 2005, is a special enactment which has been promulgated to discourage the land grabbers and to protect the right of owner and the lawful occupant of the property as against the unauthorized and illegal occupants. The careful examination of the relevant provisions in the Act would reveal that all cases of illegal occupants without any distinction, would be covered by the Act, except the cases which were already pending before any other forum. The purpose of this special law was to protect the right of possession of lawful owner or occupier and not to perpetuate the possession of illegal occupants.

The provisions of subsection (1) of section 3 of the Illegal Dispossession Act 2005 are in the form of preventive provisions. The section begins with the words: "no one shall .." This is a prohibitory mandate. There is no restriction as to the class of persons. All persons have been prohibited to commit the offence detailed in this provision, be he male or female. In order to constitute an offence under section 3(1) of the Illegal Dispossession Act 2005, the Complainant is to allege and show before the Court:-

(i) That the Complainant is the actual owner (or occupier i.e. in lawful possession) of the immovable property in question.

(ii) That the accused has entered into (or upon) the said property.

(iii) That the entry of the accused into (or upon) the said property is without any lawful authority.

(iv) That the accused has done so with the intention to dispossess (to grab or to control or to occupy) the Complainant.

The provision of section 3(2) is salutary and inundatory. It is with the purpose to alleviate the suffering and is also effective deterrent against crime. The Legislature has taken full care to close all doors of any injustice to the parties.

9. For quite some-time, there remained a debate in the annals of the courts that as to whether the provisions of Illegal Dispossession Act, 2005 can be invoked against the persons holding the credentials of land grabbers and "Qabza Mafia" only, the Hon'ble Supreme Court of Pakistan in its celebrated judgment reported as Mst. Gulshan Bibi and others v. Muhammad Sadiq and others (PLD 2016 SC 769) while removing the confusion, earlier caused through various shades of opinions has held as under:Legislation---

---Special law enacted to curb a crime---Scope and applicability---Category of persons who could be prosecuted---Legislature while enacting a special law for awarding punishment for a crime, in its wisdom, may or may not describe any particular category of persons who could be prosecuted----Where a special law after making a particular act an offence also described the category of persons who could be prosecuted then unless such person fell within the described category, he could not be prosecuted---Where the special law only described the offence or a set of offences and sought to punish any person and every person who was found to have committed the described offence then terms like `anyone', 'any person' whoever' and 'whosoever' were used for the offenders in order to include all offenders without any distinction---In such a case, the offender may belong to any class of offenders, he as an accused could be prosecuted under such law."

Needless to say that through the above ratio, a question of law has been decided, which has its binding effect under Article 189 of the Constitution upon all the courts.

10. In the light of arguments advanced by the learned counsel for the parties, the facts and law reiterated hereinabove, the issue seeking its determination, which will also decide the fate of this lis, is WHETHER A CRIMINAL COURT HAS A POWER TO STRIKE OUT OR ADD PARTIES, EITHER IN THE CAPACITY OF COMPLAINANT OR THE ACCUSED, IN PENDING CRIMINAL CASES. In order to examine the legality of the impugned order dated 11.07.2016 and reply the above question, let us first, examine certain relevant provisions of (i) The Illegal Dispossession Act, 2005, (ii) Code of Criminal Procedure, 1898; (iii) Code of Civil Procedure, 1908, (iv) The Punjab Civil Courts Ordinance, 1962 and (v) the relevant provisions of The Constitution of Islamic Republic of Pakistan, 1973.

11. Shorn of verbiage, I firstly propose to decide the legality of impugned order dated 11.07.2016 whereby the trial court, allowed the application of respondents Nos.2 to 10 for their impleadment as party in the pending complaint, with a direction to the complainant to file amended complaint. It will be appropriate to observe that the Pakistan Penal Code as well as the Code of Criminal Procedure, 1898 were enacted during the days of The British Raj, following Anglo Saxon jurisprudence. As to what, jurisprudence is best may be stated in the words from "Salmond on Jurisprudence":

> "The distinction between crimes and civil wrongs is roughly that crimes are public wrongs and civil wrongs are private wrongs. As Blackstone says:" 'Wrongs are divisible into two sorts or species, private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed

civil injuries; the latter are a breach and violation of public rights and duties which affect the whole community considered as a community; and are distinguished by the harsher appellation of crimes and misdemeanours.' A crime then is an act deemed by law to be harmful to society in general, even though its immediate victim is an individual. Murder injures primarily the particular victim, but its blatant disregard of human life puts it beyond a matter of mere compensation between the murder and the victim's family. Those who commit such acts are proceeded against by the State in order that, if convicted, they may be punished. Civil wrongs such as breach of contract or trespass to land are deemed only to infringe the rights of the individual wronged and not to injure society in general, and consequently the law leaves it to the victim to sue for compensation in the court."

"From a practical standpoint the importance of the distinction lies in the difference in the legal consequences of crimes and civil wrongs. Civil justice is administered according to one set of forms, criminal justice according to another set. Civil justice is administered in one set of courts, criminal justice in a somewhat different set. The outcome of the proceedings, too, is generally different. Civil proceedings, if successful, result in a judgment for damages, or in a judgment for the payment of a debt or (in a penal action) a penalty, or in an injunction or decree of specific restitution or specific performance, or in an order for the delivery of possession of land, or in a decree of divorce, or in an order of mandamus, prohibition, or certiorari, or in a writ of habeas corpus, or in other forms of relief known distinctively as civil. Criminal proceedings, if successful, result in one of a number of punishments, ranging from hanging to a fine, or in a binding over

to keep the peace, release upon probation, or other outcome known to belong distinctively to criminal law."

12. In case of commission of an offence, under Section 3 of Illegal Dispossession Act, 2005, which is public wrong, a remedy by way of filing of a complaint before the court is provided. The court upon a complaint may direct the officer in charge of the police station to investigate the complaint. The offence in this Act (under section 3 of the Act) shall be non-cognizable. The court has been empowered to direct the police to arrest the accused at any stage of the trial. It has manifestly been made clear that "notwithstanding anything contained in the Code or any laws for the time being in force", the offence shall be triable by the court of session. To regulate the court proceedings for holding trial of an accused, it has been provided under section 9 of the Act that "unless otherwise provided in this Act," the provisions of the Code of Criminal Procedure, 1898 (Act V of 1898) shall be applicable. Needless to say, the Illegal Dispossession Act is a special law, having overriding effect upon other laws. Under the provisions of Section 2, certain terms which are relevant have been defined as under:--

(a) "Court" means the Court of Session;

(b) "Code" means the Code of Criminal Procedure, 1898 (Act V of 1898);

For ready reference, the provision of section 9 of the Illegal Dispossession Act, 2005 is also reproduced hereunder:-

9. Application of Code.---Unless otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1898 (V of 1898) shall apply to proceedings under this Act.

13. In the light of above discussion, legal position emerges that besides the special provisions contained in the Act ibid, the provision of "Code of Criminal Procedure" are applicable for holding a trial of an offence under

this Act before the Court. In order to further elucidate the issue under discussion, a necessity has arisen to examine certain provision of Code of Criminal Procedure. Let's now examine the preamble of the Code of Criminal Procedure to know the purpose behind its promulgation which says that it is an act to consolidate and amend the law relating to criminal procedure. Prior to enactment and promulgation of this Code, there existed no uniform procedural law for regulating the proceeding before criminal courts during the colonial era. The scheme behind the criminal procedure code is to streamline, channelize and facilitate the smooth running of system of criminal justice. THE OBJECT IS TO PROVIDE A MACHINERY FOR PUNISHMENT OF OFFENDERS AGAINST THE SUBSTATIVE CRIMINAL LAW UNDER THE CODE.

14. I have found that under section 2(a) of the Illegal Dispossession Act, 2005 the Court has been defined, as the court of sessions. About the constitution of courts, it mention in Chapter II, Part-II as under:

Section 6. Classes of Criminal Courts Magistrates.

(1) Besides the High Courts and the Courts constituted under any law other than this Code for the time being in force, there shall be two classes of Criminal Courts in Pakistan, namely:

(i) Courts of Session;

(ii) Courts of Magistrates.

Section 9 of the Code speaks that the Provincial Government shall establish a Court of Session for every sessions division, and appoint a judge of such Court. Under subsection (3) of this section, the Provincial Government may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in one or more such Courts. It evinces that the criminal courts are constituted under the above referred provisions of Cr.P.C. A description of offences triable by each court, constituted, under the above referred provision has been given (under

sections 28 and 29 of the Code, of Chapter III). According to section 28 subject to the other provision of the Code, any offence under the Pakistan Penal Code may be tried (a) by the High Court or (b) by the court of sessions or (c) by any other court by which such offence is shown in the eighth column of II schedule to be triable. For the offences under other laws, section 29 of the Code provides as under:-

Subsection (1) 29 (1) subject to other provision of this Code, any offence under any other law shall when any court is mentioned in this behalf in such law be tried by such court.

(2)

15. The above discussion, has led to this Court to conclude that the offence under section 3 of the Illegal Dispossession Act, in view of section 29(1) of Cr.P.C., while adopting the procedure given in Cr.P.C. to regulate its proceedings, is triable by a court of sessions. As noted above, wrongs are divisible into two sorts or species, (i) personal wrong and (ii) public wrong. The crime is a public wrong, a breach and violation of pubic right affects the whole community. The crime is deemed by law to be a harm to the society in general. Irrespective of the fact that its immediate victim is an individual, therefore, even in absence of availability of any private person to be a complainant, the State functionaries himself can report a crime for bringing to book the person who had committed a crime. It may be pointed out that, any individual cognizant of the commission of crime, can put the machinery of law into motion. In doing so the individual, is not under any legal obligation to show that personally he is aggrieved of the Act complained of. This is because that the commission of crime is deemed not only a wrong against the individual but the same is deemed to be a crime against the society. The object behind putting the machinery of law against a person accused of commission of any criminal wrong is to get the person punished for the act illegal he had done. The punishment may be corporeal or in fine or in both. It is observed that (i) the provisions of Cr.P.C. constitute criminal courts, (ii) confer on the

courts, the jurisdiction to try the offences and impose the penalty upon the accused for committing, the public wrong, (iii) it also provides procedure to regulate the proceedings before criminal courts. No provision has been found in the Code enabling a criminal court, to exercise its jurisdiction for impleading any person either on his own application as a party during the proceedings while trying an offence.

16. Unlike what has been said above, the preamble of Code of Civil Procedure (Act No.V of 1908) states that it is an act to consolidate and amend the laws relating to the procedure of courts of civil judicatures. According to subsection (1) of section 2 of C.P.C., Code includes Rules. By virtue of section 121, C.P.C., the rules are to have effect as if enacted in the body of the Code. Some relevant provisions in verbatim are reproduced, for facility to grasp the point under decision.

Section 5 of Code of Civil Procedure 1908 "Application of the Code to Revenue Courts"

(1) Where any Revenue Courts are governed by the provisions of this Code in those matters of procedure upon which any special enactment applicable to them is silent, the {Provincial Government} may, by notification in the {Official Gazette}, declare that any portions of those provisions which are not expressly made applicable by this Code shall not apply to those Courts, or shall only apply to them with such modifications as the {Provincial Government} may prescribe.

(2) "Revenue Court" in sub-section (1) means a Court having jurisdiction under any local law to entertain suits or other proceedings relating to the rent, revenue or profits of land used for agricultural purposes, but does not include a Civil Court having original jurisdiction under this Code to try such suits or proceedings as being suits or proceedings of a civil nature.

Section 9 of C.P.C. Courts to try all Civil Suits unless barred.--

Jurisdiction. The maxim 'ubi jus ibi remedium' (wherever there is a right, there is a remedy), is a fundamental principle of law (a). Any person having right has a corresponding remedy to institute suits in a court unless the jurisdiction of the court is barred (ab). By virtue of the provisions of this section, civil courts are granted general jurisdiction to try all suits of a civil nature. (ac) In other words wherever the objection of proceedings is the enforcement of civil rights, a civil court has jurisdiction to entertain the suit independently of any statute unless its cognizance is either expressly or impliedly barred (ad). Though the Code does not define the term "Court", it means the forum created by the Civil Courts Ordinance, 1962 (ae).

17. It may also be quiet relevant to observe that under the Code of Criminal Procedure, which is meant for regulating the proceedings before the court of civil adjudicature powers vests with a court under Order VII, Rule 11, C.P.C. for rejection of a plaint which is reproduced herein:--

11. Rejection of plaint.---The plaint shall be rejected in the following cases:

(a) Where it does not disclose a cause of action;

(b) ..

(c) ..

(d) ..

Ordinarily, as soon as cause for rejection appears, the plaint should be rejected straightway and such a suit be taken off at its very inception and the plaintiff be allowed opportunity to retract his steps as permitted under the law. Terms cause of action means the "CAUSE" for which the suit is brought. It also means a proceeding in which a legal demand of right is

made. This power has been vested in the court with a view to burry frivoluous litigation, in the bud. In case of a plaint disclosing no cause of action in favour of the plaintiff is allowed to continue, it would amount to abuse of process of court only. This power is to be exercised by a court where the court is of the view that in absence of disclosing any cause of action in favour of the plaintiff, the entire exercise of undertaking of proceedings will be nothing but judicial exercise in futility. On the other hand, in case of criminal proceedings, apart from other remedies, an accused can make an application before the court under section 249-A (Magistrate) or 265-K (Sessions) of Cr.P.C., seeking his acquittal and termination of the criminal proceedings, a wide power has been vested with the court under the aforesaid provisions trying offences. The provisions of section 265-K, Cr.P.C. being applicable, is reproduced hereunder:--

265-K Cr.P.C. Power of Court to acquit accused at any stage:

"Nothing in this Chapter shall be deemed to prevent a Court from acquitting an accused at any stage of the case; if, after hearing the prosecutor and the accused and for reasons to be recorded, if considers that there is no probability of the accused being convicted of any offence."

The perusal of the provision clearly indicates that the power vested under section 265-K Cr.P.C. can be exercised by the learned trial court at any stage of the trial. The language "Nothing in this Chapter shall be deemed to prevent a Court from acquitting an accused at any stage of the case" adequately conveys the underlying object of the provision that there exists no impediment on the way of trial court in exercise of its powers for acquitting accused at any stage, subject to certain prerequisites, i.e.

(i) after hearing the Prosecutor and the accused both,

(ii) the reasons must be recorded for acquitting the accused,

(iii) the trial court shall exercise its powers only if it comes to the conclusion that there exists no probability of the accused being convict of any offence.

(iv) Moving of formal application by the accused is not necessarily envisaged.

(v) The court can exercise its power on its own motion.

Keeping in view the provision of section 265-K, Cr.P.C. in verbatim, I may add one thing more that the law has vested a trial court with a wide power, enabling it to see through the wall on its other end. The petitioner is, neither an accused nor a complainant, rather is a stranger to the proceedings, therefore, his application could not have been entertained by the learned trial Judge, thus he has rightly rejected the application of the petitioner through the impugned order.

18. Contrary to The Code of Criminal Procedure, 1898 (Act V of 1898), The Code of Civil Procedure, 1908 (Act V of 1908) despite recognizing through implication it does not create classes of courts. The Punjab Civil Courts Ordinance, 1962 (Ordinance II of 1962) says, that it is an Ordinance to amend and to consolidate the law relating to Civil Courts in the Province of the Punjab. Under section 3 of the Ordinance which reads as under:-

3. Classes of Courts.---Besides {a court established under the Small Claims and Minor Offences Courts Ordinance, 2002 (XXVI of 2002}, and the Courts established under any other enactment for the time being in force, there shall be the following classes of Civil Courts, namely:-

(a) the Court of the District Judge;

(b) the Court of the Additional District Judge; and

(c) the Court of the Civil Judge.

Moreover, the provisions contained in Chapter II, III and other supplemental provisions are relevant for determination of pecuniary territorial trial and appellate jurisdictions of the civil courts.

19. As noted above, the preamble of C.P.C. evinces that it has consolidated and amended the laws relating to procedure of court of civil judicature. This is a law of general application and the courts namely civil courts apply it in the enforcement of civil rights and obligations is ordinary course of civil jurisdiction. The distinguishing feature of C.P.C. is that it divides into two parts, its body which consists of sections 1 to 158 and the First Schedule which comprises over Orders 1 to 50. These Orders contain the rules which, as section 121, C.P.C. says, "shall have effect as enacted in the body of this Code until annulled or altered in accordance with the provisions of this Part (Part X C.P.C.). Unlike the Code of Criminal Procedure, 1898 the C.P.C. itself does not create any court; it does not even define the expression court. It merely is intended to regulate the procedure of civil judicature and its section 3 lays down that the District Court is subordinate to the High Court and every civil court of a grade interior to that of a District Court and every court of small causes is subordinate to the High Court and the District Court. In other words, it is only by implication that the C.P.C. recognizes civil courts of various grades. The provisions of Civil Court Ordinance, 1962 constitute the classes of courts to be established for civil justice. It also authorizes provincial Government to demarcate civil district and headquarters.

20. It will be appropriate to refer Article 175 of the Constitution of Islamic Republic of Pakistan, 197. Establishment and jurisdiction of Courts

Sub-Article (1) THERE SHALL BE A SUPREME COURT OF PAKISTAN, A HIGH COURT FOR EACH PROVINCE AND A HIGH COURT FOR THE ISLAMABAD CAPITAL TERRITORY

AND SUCH OTHER COURTS AS MAY BE ESTABLISHED BY LAW.

Sub-Article (2) No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.

Sub-Article (3) ..

21. As observed hereinabove, the criminal courts have been conferred on jurisdiction under the Code of Criminal Procedure quite in line with command contained in Article 175(2) of the Constitution of Islamic Republic of Pakistan, 1973. The criminal courts have been constituted under a law known as the Code of Criminal Procedure, 1898. The civil courts on the other hand have been constituted under the Punjab Civil Courts Ordinance (W.P. Ordinance II of 1962) and had been conferred jurisdiction in line with the above quoted Constitutional provisions also. The Code of Civil Procedure regulates the proceedings before the civil courts for the decision of the lis. The civil courts and not the criminal courts, Rule 10 C.P.C. are empowered to add or strike any person as a party in the lis before them. The application of the petitioner in absence of any provision of law enabling it to pass such order illegally has been accepted by the trial court. Reliance is placed on the case law reported in Dossan Travels Pvt. Ltd. and others v. Messrs Travels Shop (Pvt.) Ltd. and others (PLD 2014 Supreme Court 1).

(a) Constitution of Pakistan---

---Arts. 199, 175(2) & 187---Constitutional jurisdiction of High Court---Parameters of jurisdiction under Art.199 of the Constitution, enumerated.

While exercising powers under Article 199(1) of the Constitution, Courts should always keep in view the following three parameters of their jurisdiction;

(i) A High Court is the apex court in the province or in the case of Islamabad, of the capita territory, but they are the creatures of the Constitution and they have only that jurisdiction which has been conferred by the Constitution or under any law for the time being in fore. Article 175(2) specifically mandates "no court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law."

22. The above ratio has been followed in the following case laws i.e. District Bar Association, Rawalpindi and others v. Federation of Pakistan and others (PLD 2015 Supreme Court 401) and S.M. Waseem Ashraf v. Federation of Pakistan through Secretary, M/O Housing and Works, Islamabad and others (2013 SCMR 338).

23. For what has been discussed above, the learned trial court has rightly dismissed the application of the petitioner through the impugned order. The petitioner was an alien to the pending proceedings court. The case law relied upon by the learned counsel for the petitioner, since had emanated from the civil proceedings, therefore, being distinguishable on facts, the same is not applicable in the instant case, resultantly, the instant Writ Petition bearing No.12869 of 2019 is dismissed, being devoid of any force.

MH/I-17/L **Petition dismissed.**

2019 Y L R 2670

[Lahore (Multan Bench)]

Before Anwarul Haq Pannun, J

MUHAMMAD NADEEM---Appellant

Versus

The STATE and another---Respondents

Criminal Appeal No. 40 of 2013, heard on 13th March, 2019.

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

----S. 302(c)---Criminal Procedure Code (V of 1898), S. 342---Qatl-i-amd---Examination of accused---Appreciation of evidence---Chance witness---Unnatural conduct of witnesses---Effect---Motive---Scope---Non-examination of material witness---Effect---Accused was charged for committing the murder of two persons---Eye-witness, during the night of occurrence, had been sleeping in the house of complainant while his family resided in a separate house---Complainant had claimed that deceased and his other son were sleeping in the 'Ehata' on the night of occurrence---Said son of complainant was given up as a witness---Claim of eye-witnesses was belied by the fact that accused could have been overpowered by the witnesses but none of the witnesses made any effort to rescue or intervene during the occurrence in order to save the life of any of the deceased persons---Motive for the occurrence, as claimed by complainant, was that accused had suspicion of illicit intimacy between the deceased persons---Internal and external vaginal swabs of deceased lady confirmed that they were stained with semen---Investigating officer stated during cross-examination that both the deceased had illicit relations; that place of occurrence was the residential house of accused; that murder was not pre-planned; that accused saw his sister with the

deceased and in the heat of passion, due to sudden provocation, he took up the hatchet and murdered them and that accused had also taken the same stance during investigation---Deceased persons were done to death when they had indulged themselves in sexual intercourse without any legitimate relations---Trial Court, while disbelieving the version of prosecution, had only convicted and sentenced the accused on account of his plea which he had taken during investigation as well as while recording his statement under S. 342, Cr.P.C.---Accused, held, could not be convicted and sentenced on the basis of his plea taken while recording statement under S. 342, Cr.P.C. as it was the duty of prosecution to stand on its own legs and prove its case---Appeal was allowed, conviction and sentence inflicted upon the accused was set aside.

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

---S. 342---Examination of accused---Scope---Accused cannot be convicted and sentenced on the basis of his plea taken while recording statement under S. 342, Cr.P.C., as it is the duty of prosecution to stand on its own legs and prove its case.

Abdul Samad and another v. The State and another 2018 YLR 922 and Azhar Iqbal v. The State 2013 SCMR 383 rel.

Iftikhar Ibrahim Qureshi for Appellant.

Mirza Abid Majeed, D.P.G. for the State.

Nemo for the Complainant.

Date of hearing: 13th March, 2019.

JUDGMENT

ANWARUL HAQ PANNUN, J.---Muhammad Nadeem son of Salabat, caste Kharl, resident of Chak No.126/WB, Tehsil, Mailsi, District Vehari, appellant was involved in case FIR No.272/2012, dated

25.04.2012, offence under section 302, P.P.C. registered with Police Mitro, District Vehari. He was tried by learned Additional Sessions Judge, Vehari. The learned trial Court seized with the matter vide its judgment dated 22.12.2012 convicted and sentenced the appellant in the following terms:-

Under Section 302(c), P.P.C.	> Sentenced to undergo Rigorous Imprisonment for a period of twenty five years on two counts which was ordered to run concurrently. > He was also extended the benefit of Section 382-B of Cr.P.C.

2. Feeling aggrieved by the judgment of the learned trial Court, appellant has assailed his conviction and sentence through filing the captioned criminal appeal.

3. Prosecution's story as portrayed in the FIR (Exh.PU) lodged on the statement (Exh.PK) of Muhammad Yousaf son of Roshan Din, caste Gujjar (PW-8) is to the effect that he is resident of Chak No. 126 WB and is a labourer by profession. At evening time, the complainant along with his sons Muhammad Ashraf and Muhammad Asghar returned home after reaping wheat crop. The sons of the complainant namely Asghar and Ashraf were sleeping in the cattle shed. On 25.04.2012 at 12.30 a.m. (night), accused Nadeem son of Salabat came and took Muhammad Ashraf son of the complainant in his house. After some time, the complainant along with his son Asghar and his brother Muhammad Munir went in the house of Salabat in order to see him where they saw accused Muhammad Nadeem was committing murder of Muhammad Ashraf in a room. by inflicting hatchet blows on his neck. He also committed the

murder of his sister Kausar Mai by inflicting blows of hatchet on her neck as well.

The motive of the occurrence as disclosed' in the FIR is that Muhammad Nadeem accused had the suspicion of illicit intimacy of Muhammad Ashraf with his sister Kauser Mai.

4. On 25.04.2012, Zubair Anwar, SI (PW-10) posted at Police Station Mitro, on the same day on receipt of information about the occurrence, reached the place of occurrence, the complainant Muhammad Yousaf (PW-8) appeared before him and made his statement (Exh.PK), which was reduced into writing and after endorsement on it in the shape of police karvai, which was transmitted to Police Station for registration of formal FIR (Exh.PU) through Sohail Iqbal 453/C. Thereafter Investigating Officer inspected the dead bodies of (i) Muhammad Ashraf (deceased) and (ii) Mst. Kauser Mai (deceased), Prepared injury statement of Muhammad Ashraf deceased (Exh.PD), inquest report (Exh.PE) under Rule 25.35 of the Police Rules, 1934 and injury statement of Mst. Kausar Mai (Exh.PH), inquest report (Exh.PJ) and dispatched the dead bodies to mortuary under the escort of Muhammad Ashraf 936/C. He also inspected the place of occurrence and prepared its rough site-plan (Exh.PO). He secured blood-stained earth underneath the dead bodies of both the deceased vide recovery memos Exh.PL, and Exh.PM respectively. After post-mortem examination last worn clothes of the Muhammad Ashraf (deceased) blood-stained i.e. Shalwar (P-1), Qameez (P-2) and vest (P-4) as well as Kauser Mai (deceased) viz: Qameez P-5 and Shalwar P-6 were produced before the Investigating Officer, which he took into possession vide recovery memo. Exh.PA and Exh.PB respectively. On the direction of Investigating Officer and pointing out of PWs Muhammad Iqbal Janjua, Draftsman (PW-4) on 27.04.2012 took rough notes of the place of

occurrence and thereafter prepared scaled site plan in triplicate (Exh.PF, Exh.PF/1 and Exh.PF/2), under Rule 25.13 of the Police Rules, 1934, which was made part of the file. He on 01.05.2012 arrested Nadeem accused and obtained his physical remand. During the course of interrogation in pursuance of his alleged disclosure on 04.05.2012, Nadeem accused led to the recovery of hatchet (P-7) blood-stained, which Investigating Officer took into possession vide recovery memo. Exh.PN and prepared site-plan of the place of recovery Exh.PP. He on 05.05.2012 got remitted Nadeem accused to judicial custody. He recorded the statements of all the PWs stage-wise. On reaching at Police Station, the Investigating Officer handed over case property to the Moharrar for its safe custody in the Malkhana.

5. The investigation was encapsulated into submission of report under Section 173, Cr.P.C., the learned trial Judge took the cognizance, supplied the requisite statements under Section 265(c), Cr.P.C., framed the charge against them on 18.06.2012, which the accused denied, and while professing their innocence, claimed trial.

6. Ocular account in this case consists of the statements of the Muhammad Yousaf complainant (PW-8) and Muhammad Munir (PW-9). Investigation in this case was carried out by Zubair Anwar, SI (PW-10).

Whereas medical evidence has been furnished by Dr. Mazahir Akhtar (PW-3) who conducted post-mortem examination on the dead body of Muhammad Ashraf (deceased) and observed as under:--

EXTERNAL EXAMINATION.

"A" dead body of young man lying on mortuary table wearing black colour Shalwar Qameez and black vest. Qameez and Bunyan blood-stained and cut present, mouth open, both eyes closed. Rigor mortis developed. Post-mortem staining was present on the

dependent part of the body. There were following injuries found on his dead body:-

1. An abrasion 1-1/2 cm x 1 cm on the left side of forehead.
2. An abrasion 1-1/2 cm x 1/2 cm on lateral aspect of left eye.
3. An incised wound measuring 11 cm x 5 cm on front and lower part of neck, wound is going deep upto skin back of neck. All musculature + bony structure and vessels cut through.
4. An incised wound 05 cm x 03 cm muscle deep on front of left shoulder corresponding cut present on Qameez.

After conducting post-mortem examination, doctor rendered the following **opinion:-**

"According to my opinion, cause of death in this case was shock due to excessive haemorrhage caused by damage of both carotid vessels. All injuries were ante-mortem and were sufficient to cause death in ordinary course of nature.

Probable time that elapsed between injury and death was immediate while between death and post-mortem was 12 hours approximate."

and lady doctor Mosarrat Farhan (PW-6) had conducted post-mortem Examination on the dead body of Mst. Kauser Mai (deceased) and observed as under:--

EXTERNAL EXAMINATION.

"A young lady about 21/22 years old lying on the mortuary table wearing black Shalwar and Qameez with multiple shaded embroided. Rigor mortis present. Post-mortem staining positive. Eyes and mouth closed. She observed following injury on the body of deceased: --

"1. Incised wound 9 cm x 41/2 cm, 31/2 above the medial ends of both clavicles extending laterally. Wound was going deep, upto skin of back of neck. All musculatures plus bone structures with vessels cut through.

After conducting post-mortem examination, doctor rendered the following **opinion:--**

"To me cause of death in this case was shock due to excessive haemorrhage and damage to vital organs i.e. both carotid vessels. All injuries were ante.

Probable time that elapsed between injury and death with half hour approximately while between death and post-mortem was 8 to 10 hours approximate. "

Statements of rest of the prosecution witnesses are formal in nature.

7. Learned ADPP vide his statement dated 28.11.2012 gave up Witness Naveed Ahmad SI being unnecessary and he by tendering reports of Chemical Examiner regarding blood-stained earth Exh.PQ, and Exh.PR, reports of Chemical Examiner of hatchet Exh.PS and that of Serologist regarding hatchet Exh.PT closed the prosecution case. The learned trial Court keeping in view the facts of the case, itself requisitioned report of the Chemical Examiner (Exh.CA) regarding vaginal swabs of Mst. Kauser Mai (deceased) which was withheld by the prosecution.

8. Thenceforth, the appellant was examined under Section 342, Cr.P.C.; wherein he refuted the allegations levelled against him in the prosecution version. He did not opt to appear as his own witness in terms of Section 340(2), Cr.P.C., however, opted to adduce defence evidence but thereafter vide his statement dated 15.12.2012 did not produce any defence evidence.

He while replying to the question why this case against him and why the PWs deposed against him, made-the following deposition:

"It is false case, All the PWs are close relative and interested witnesses. All the PWs deposed falsely. On 25.04.2012 at about 12.30 (night); I saw Muhammad Ashraf deceased with my sister namely Kausar Mai deceased in compromising position in my house and in heat of passion and due to sudden provocation, I took up the hatchet and murdered them."

9. On conclusion of trial, the learned trial Court convicted and sentenced the appellant in the above stated terms.

10. Learned counsel for the appellant submits that according to the prosecution's story, the alleged occurrence has taken place inside one of the room of house of the appellant during odd hours of night; that the deceased had no legitimate and justifiable cause for his presence at the place of occurrence at the time of occurrence; that the PWs could not have been able to justify their presence and claim of witnessing the occurrence with their own eyes; that evidence available on record demonstrate that occurrence remained un-witnessed; that learned trial Court despite disbelieving the prosecution's evidence had proceeded to convict the appellant under section 302(c), P.P.C. merely on the basis of his own plea recorded in this statement under section 342, Cr.P.C. which is against settled canons of law; that the prosecution in order to prove its case has to stand on its own legs and no accused can be convicted on the basis of plea taken in statement recorded under Section 342, Cr.P.C. and thus has craved for acceptance of appeal and acquittal of the appellant.

11. Conversely, learned Law Officer has argued that keeping in view the statement of the appellant recorded under Section 342, Cr.P.C. it emerges that he has committed double murder on account of 'ghairat',

therefore, learned trial Court while taking into consideration his statement/plea has already taken a lenient view while convicting and sentencing the appellant, however, he has half heartedly stated that if his conviction is maintained and he is sentenced upto the period undergone by him so far, the same would be sufficient to meet the ends of justice. Lastly he has prayed for dismissal of the appeal.

12. Arguments heard. Record perused.

13. After hearing arguments of learned counsel for the appellant as well as learned Law officer it is observed that following features of this case are not disputed:-

(i) The occurrence allegedly took place inside a room situated within the four walls of the house of the appellant during the intervening night of 24/25.04.2012.

(ii) Muhammad Ashraf deceased aged about 22 years and Mst. Kauser Mai deceased aged about 22 years (as per post-mortem reports) had no inter-se legitimate relation at all.

(iii) Both the deceased died mainly as a result of injuries caused by sharp edged weapon on their bodies.

(iv) The appellant is real brother of Mst. Kauser Mai, one of the deceased.

(v) Both the eye-witnesses i.e. Muhammad Yousaf complainant (PW-8) and Muhammad Munir (PW.9) have inter se relation of being real brothers. The deceased Muhammad Ashraf was son of PW.8.

(vi) Motive behind the occurrence is the suspicion of illicit relation inter se with the deceased.

(vii) The appellant first version which he had taken before the Investigating Officer remained his version even before learned trial Court in the form of his statement under Section 342, Cr.P.C.

Considering the prosecution evidence as well as material available on record in its entirety, the hard but un-refutable ground realities, enumerated here in the preceding paragraphs of the judgment, simple questions which have emerged requiring their judicial determination are whether (i) the eye-witnesses have "duly established their presence" at crime scene at the time of occurrence and their claim of having witnessed the occurrence is believable? (ii) whether the conviction and sentence inflicted by the learned trial Court merely on the plea of appellant is sustainable under the law or not.

14. In order to prove its case prosecution has produced complainant Muhammad Yousaf as PW-8 and Muhammad Munir as PW-9 is real brother of the complainant. The scanning of evidence of both the said PWs it emerges that both of them have failed to establish their presence at the relevant time of occurrence at the crime scene. PW-9 has deposed while appearing in the witness box that on 24.04.2012 he was present in the house of his brother Muhammad Yousaf. He in the company of Muhammad Yousaf (complainant) and Muhammad Asghar (given up PW) had witnessed the occurrence. PW.8 Muhammad Yousaf when cross-examined has stated that "Munir PW-9 is my brother. Volunteered that he resides with me. It is correct that the house of my brother Munir is at a distance of 2-1/2 square from my house". He further stated while facing cross-examination that "Munir PW is married and is having wife and children. His wife and children do reside in their own home Munir PW is the bread winner of his family." Whereas PW.9 partly contradicted PW.8 while facing cross-examination while stating that "I am married and have

two children. My wife and children. also resident in the house of my brother Yousaf". Assertion of PW.9 that during night of occurrence he slept in the house of his brother Muhammad Yousaf and his other family members are also residing in the same house was only an abortive attempt on his part to justify his presence at the first instance in the house of the complainant and then at the place of occurrence. I do not feel any hesitation in holding that this PW-9 who according to PW-8 was residing in a separate house situated at a distance of 2-1/2 square in which his family members also reside and he being sole bread earner of his family has made a false statement; only under the social compulsion, being closely related to the complainant and the deceased. Thus, his statement cannot safely be relied upon and is discarded. So far as evidence of Muhammad Yousaf PW.8, the complainant is concerned, he stated that "on 24.04.2012, I was sleeping in my house. My son Muhammad Ashraf and Muhammad Asghar were sleeping in the cattle shed". Further stated during cross-examination that "my son Ashraf always used to sleep in the cattle shed and I always used to sleep at my home. Cattle, shed is constructed over a land of seven marlas." When suggested that there is no door from his home towards cattle shed from inside, he although replied in the negative but the Investigating Officer (PW-10), during his cross-examination has stated that "I had seen the house of the complainant Muhammad Yousaf. Ehata 'Mowashian' of complainant is also separate to his residential house". He further stated that according to complaint (Exh.PK), the complainant was present in his house whereas Ashraf and Asghar PWs were sleeping in the adjacent Ehata 'Mowashian' therefore, the claim of this PW/complainant about being acquainted with that his son Muhammad Ashraf was called by the appellant appears to be totally false because it is established that he was sleeping in his house where his deceased son was sleeping in the Ehata. Only one person, could have been

in a position to tell as to whether appellant came to call the deceased or not he was Asghar (given up PW). He has not been produce. This PW8 has also made very blatant and dishonest improvements in order to bring his case, as set out in the FIR, in conformity with the medical evidence as he deposed in examination-in-chief that "we saw my son Ashraf, Kauser Mai and Nadeem accused (appellants) were standing in the house of Nadeem. Nadeem gave the blow of hatchet to my son Muhammad Ashraf on different parts of his body including head who fell on the ground and then inflicted the hatchet blow on his neck and committed his murder. He also inflicted the blow of blunt side of hatchet to his sister Kausar May on her left thigh. She fell down on the ground and he gave the blow of hatchet on her neck. She also succumbed to the injuries at the spot." When confronted with his previous statement, he stated that "police recorded my statement Exh.PK without any addition or omission on his part. In my statement before the police I had stated that the accused inflicted the hatchet blow to my son who fell on the ground. Confronted with Exh.PK where not so recorded. I had stated before the policed that accused gave the hatchet blow on different parts of body of my son. Confronted with Exh.PK where not so recorded. In my statement before police I had stated that accused Nadeem gave the blow of blunt side of hatchet on the thigh of Kausar Mai deceased. Confronted with Exh.PK where not so recorded. I had stated before police that accused fled away from the spot and we raise the alarm attracting many persons of the locality. Confronted with Exh.PK where not so recorded". The above excerpts from the evidence of PW.8 clearly indicate that he was making a nefarious effort with mala fide to bring his ocular account in conformity with the medical evidence while lodging FIR he had only stated that "where they saw accused Muhammad Nadeem while committing murder of Muhammad Ashraf in a room by inflicting blows of hatchet on his

neck. He also committed murder of his sister Mst. Kausar Mai by inflicting blows of hatchet on his neck as well". Another factor to the mind of this Court which belies the claim of eye-witnesses regarding their presence at the spot of occurrence is that the accused was armed with hatchet and not any fire-arm weapon. He could have been overpowered by the witnesses, or their presence at least, could have been helpful for running away any of the deceased, from the place of occurrence. It is curiously noticed that none of the PWs have made any effort to rescue or intervene, during the occurrence in order to save the life of any deceased persons. They, according to the recital of the FIR only stayed motionless like statues, therefore, presence of this PW at the place of occurrence at the time of occurrence is held to be doubtful. Even from the bare perusal of the FIR, it appears that complainant has projected a self-harming and self-destructive version in it by stating that Muhammad Ashraf, his son, the deceased was called and taken along by the appellant during odd hours of night. When the motive of the occurrence viz: that Muhammad Nadeem accused had the suspicion of illicit intimacy of Muhammad Ashraf with his sister Kauser Mai. Moreover, internal and external vaginal swabs of the deceased Mst. Kauser Mai taken by PW-6 while conducting post-mortem examination over her dead-body, sent to the office of Chemical Examiner and its corresponding report (Exh.CA) confirms that said swabs were stained, with semen, unfolds the real story of the occurrence, making prosecution version highly unbelievable and preposterous.

15. The perusal of evidence available on record keeping in view the motive behind the occurrence, it emerges that both the deceased had some illicit intimacy/relation. The Investigation Officer (PW.10) has stated while facing cross-examination that "during my investigation, it came to light that both the deceased had illicit relations. Place of occurrence was

residential house of accused Nadeem and both the murders were committed in the same place. According to my investigation, it was not a pre-planned occurrence, the accused saw his sister with the deceased Muhammad Ashraf and in heat of passions and due to sudden provocation he took up the hatchet and murdered them. The accused had also taken this version in his first version during the investigation". It is also noticeable that Dr. Mosarrat Farhan, WMO, (PW-6) who at the time of post-mortem examination of the deceased Mst. Kauser Mai took her internal and external vaginal swabs of the said deceased and sent the same for procuring report of the Chemical Examiner to the relevant quarter but without producing the said report, the prosecution proceeded to close its evidence. The learned trial Court itself made an endeavour by requisitioning/ summoning the Chemical Examiner's report and brought the same on record itself as Exh.CA, according to which vaginal swabs of the deceased Mst. Kausar Mai taken by PW.6 at the time of post-mortem examination of the deceased were found to be stained with semen which reflects that both the deceased were not Masoom-ud-Dam. They have been done to death when they had indulged themselves in sexual intercourse without any legitimate relations. During cross-examination of PW.8, he impliedly admitted that his deceased son had contracted love marriage with his niece. The relationship between spouses were strained. He although denied the suggestion that the relations were strained due to keeping of relations by deceased Ashraf with other women but from-the facts of the case it appears to be correct; that the deceased son of the complainant had indulged himself in such activities.

16. In nutshell, the prosecution has failed in establishing not only the presence of the eye-witnesses (PW.8 and PW.9) at the spot at the time of occurrence, thus, proving their claim of witnessing the occurrence with their own eves also, hence, it failed in discharging of its bounden and

basic duty of proving the charge against the appellant. It is also noticeable that learned trial Court while disbelieving the version of the complainant/prosecution as well as the ocular account furnished by PW.8 and PW.9 had only proceeded to pass the impugned conviction and sentence upon the appellant on account of his plea which he has taken during investigation as well as while recording his statement under Section 342, Cr.P.C. reproduced herein above, which is not sustainable under the law. It is trite law that accused cannot be convicted and sentenced on the basis of his plea taken while recording statement under Section 342, Cr.P.C. as it is the duty of the prosecution to stand on its own legs and proved its case. Reliance in this regard is placed on the case of 'Abdul Samad and another v. The State and another (2018 YLR 922) in which the Hon'ble Federal Shariat Court has held as under--

> "Defense plea---Scope---Failure of accused to prove any plea in defence, if taken, by itself is not sufficient to prove case of prosecution--Prosecution is under compulsion to prove its case against accused beyond shadow of doubt."

Moreover, in case of 'Azhar Iqbal v. the State' (2013 SCMR 383), the august Supreme Court of Pakistan has observed infra:-

> "----S. 302(b)--Qatl-i-amd---Re-appraisal of evidence---Prosecution failing to prove its case--Accused admitting to killing the deceased--Conviction awarded on sole basis of such admission--Legality--Both Courts below had rejected version of prosecution in its entirety and then proceeded to convict and sentence the accused on the sole basis of his statement recorded under S. 342. Cr.P.C., wherein he had advanced a plea of grave and sudden provocation---Prosecution had failed to prove its case against accused beyond reasonable doubt, therefore, he should have been acquitted, even if

he had taken a plea and admitted to killing the deceased--Appeal was allowed, convictions and sentences recorded and upheld by the Courts below were set aside and accused was acquitted of the charge".

17. For what has been discussed supra, both the questions seeking their determination referred in para No. 13 are hereby answered in the negative and it is observed that learned trial Court has rightly held that neither the PWs had proved their presence at the place of occurrence at the relevant time nor they had seen the occurrence but had illegally passed the conviction and sentence which could not be sustained having been based upon the plea taken by the appellant while recording statement under Section 342, Cr.P.C., therefore, we allow the instant appeal, resultantly, conviction and sentence inflicted upon the appellant vide judgment dated 22.12.2012 passed by learned Addl. Sessions Judge is set aside and he is acquitted of the charge imputed against him. He is in jail, directed to be set at liberty in this case forthwith if not liable to be detained in any other case.

SA/M-128/L **Appeal allowed.**

2020 C L C 99

[Lahore (Bahawalpur Bench)]

Before Anwaarul Haq Pannun, J

HUSSAIN BAKHSH----Petitioner

Versus

Mst. RAZIA BIBI----Respondent

Civil Revision No.83-D of 2012, decided on 1st March, 2019.

(a) Punjab Land Revenue Act (XVII of 1967)---

----S.42---Civil Procedure Code (V of 1908), S.11---Multiple mutations Petitioner challenged first mutation in earlier suit which was dismissed---- Res-judicata, principle of---Applicability---Every fresh entry in the revenue record gave rise to fresh cause of action to the aggrieved party, mutation in question being a subsequent entry gave rise to a fresh cause of action----Trial Court decided issue against the petitioner but the appellate Court reversed the same which findings had not been challenged---Issue decided against a party, if not challenged, attained finality.

Muhammad Aslam and 2 others v. Syed Muhammad Azeem Shah 1996 SCMR 1862 and Kanwal Nain v. Fateh Khan PLD 1983 SC 53 ref.

(b) Muslim Family Laws Ordinance (VIII of 1961)----

----S. 4----Succession----Death of mother----No male heir---Share of sole surviving daughter as only legal heir---Held, in the event of death of any son or daughter of the propositus before the opening of the succession, the children of such son or daughter, if any, living at the time the succession opens, shall per stripes receive a share equivalent to the share which such son or daughter, as the case may be, would have received, if alive.

Mst. Bhaggay Bibi and others v. Mst. Razia Bibi and others 2005 SCMR 1595 and Mukhtar Ahmad v. Mst. Rasheeda and another 2003 SCMR 1664 ref.

(c) Civil Procedure Code (V of 1908)----

----S. 115---Revisional jurisdiction---Scope---Concurrent findings--Misreading and non-reading of evidence---Concurrent findings when found to be the result of misreading and non-reading of evidence or material irregularity and illegality, the same could be interfered with in exercise of revisional jurisdiction.

Habib Khan and others v. Bakhtmina and others 2004 SCMR 1668; Ghulam Muhammad and 3 others v. Ghulam Ali 2004 SCMR 1001 and Sultan Muhammad and another v. Muhammad Qasim and others 2010 SCMR 1630 ref.

(d) Constitution of Pakistan---

----Art. 189----Decisions of the Supreme Court----Binding effect---Scope---Any decision of the Supreme Court deciding a question of law, was binding on all other courts of the country.

Iftikharul Haq v. District Canal Officer and others 2005 CLC 1740 ref.

Mian Ameer Ahmad for Petitioner.

Muhammad Ismail Makki for Respondent.

Date of hearing: 21st February, 2019.

JUDGMENT

ANWAARUL HAQ PANNUN, J.---Through this Civil Revision the petitioner has challenged the vires of judgment and decree dated 22.12.2011, passed by the learned Addl. District Judge, Ahmedpur East, whereby appeal filed against the dismissal of his suit vide judgment and decree dated 16.07.2011 passed by the learned Civil Judge, Ahmedpur East, has been dismissed.

2. Precisely, the petitioner/plaintiff (hereinafter referred as 'the petitioner) instituted a suit against the respondent/defendant (hereinafter referred as 'the respondent' seeking declaration with the averments that

after the death of predecessor-in-interest of the parties namely Fazil son of Allah Wasaya, who was owner in possession of the land measuring 44-Kanals 18-Marlas, fully described in the head note of the plaint, Mutation of inheritance No.9 dated 18.06.1997 in respect of his estate was sanctioned in favour of the parties which was previously assailed by the appellant in a suit titled "Hussain Bakhsh v. Mst. Razia Bibi" which was dismissed vide judgment and decree dated 14.06.2007, however, with a direction to the Revenue Officer to attest a fresh inheritance mutation according to law. The appellant challenged the aforesaid judgment and decree by filing an appeal but in the meanwhile, the respondent, in collusion of the revenue officer, got sanctioned another Mutation No.1168 dated 19.06.2008 and has become owner of more shares in the property than her entitlement under Sharia. Through the instant suit, the appellant has challenged the Mutation No.1168, by alleging that the respondent has been given the share more than her entitlement as per Shariat, hence the Mutation No.1168 is illegal, void and ineffective upon his rights.

3. The respondent put her appearance and contested the suit by filing written statement wherein she besides raising preliminary objections has also controverted the claim of the petitioner on merits.

4. From the divergent contentions of the parties, the learned trial court framed the following issues:

1) Whether impugned inheritance mutation No.1168 dated 19.06.2008 is against law and facts, illegal, void and ineffective against rights of the plaintiff and liable to be rectified to the extent of share of plaintiff through declaratory decree? OPP

2) Whether the suit is not maintainable in view of preliminary objection No.1 of the written statement? OPD

3) Whether the plaintiff is estopped to file this suit keeping in view of principle of res judicata? OPD

4) Relief.

5. In order to establish his case, the petitioner himself appeared in the witness box as PW-1 and produced copy of mutation No.1168 Ex.P-1, copy of Mutation No.1167 Ex.P-2, copy of Register Haqdaran Zameen for the year 2004-05 Ex.P-3, certified copy of judgment in case Hussain Bakhsh v. Mst. Razia Bibi dated 14.06.2007 Ex.P-4 and copy of decree-sheet, in the said suit Ex.P-5. On the other hand, the respondent herself appeared in the witness box as DW-1. After having recorded the evidence of the parties and hearing the learned counsel for the parties, the learned trial court opted to dismiss the suit of the petitioner vide impugned judgment and decree dated 16.07.2011.

6. On the conclusion of trial, the learned Civil Judge proceeded to dismiss the suit of the petitioner/plaintiff, while deciding Issues Nos.1 to 3 in favour of the respondent/defendant vide its judgment and decree dated 16.07.2011. Feeling aggrieved of the same, the petitioner preferred an appeal before the learned District Judge, Ahmadpur East, which has also met the same fate and stands dismissed vide judgment and decree dated 22.12.2011, hence this civil revision.

7. At the very outset, learned counsel for the petitioner while relying upon the judgment reported as Mst. Rashidan Bibi v. Bashir Ahmad and others (PLD 1983 Lahore 549) and Mukhtar Ahmad v. Mst. Rasheeda and another (2003 SCMR 1664), submits that in view of an admitted position that Mst. Mithan had died leaving behind the respondent as her sole legal heir, therefore, in absence of any male heir of the said lady, the petitioner is entitled to 1/2 share out of her inheritance but Mutation No.1168 dated 19.06.2008 has wrongly been sanctioned depriving the petitioner from his lawful share in the property; that the impugned mutation is liable to be cancelled and as such is ineffective upon his rights.

8. On the other-hand, learned counsel for respondent has argued that judgment and decree dated 14.06.2007 passed in the suit earlier filed by

the petitioner challenging Mutation of inheritance No.9, has not been challenged by him before any forum and his appeal was also dismissed, therefore, suit case of the petitioner is hit by res judicata under section 11 of Civil Procedure Code (Act. No.5 of 1908). Further adds that concurrent findings of facts cannot be upset exercising revisional powers under section 115, Cr.P.C.

9. While exercising his right of rebuttal, learned counsel representing the petitioner submits that the point raised by learned counsel for the respondent regarding res-judicata has already been decided against the respondent by the learned lower appellate court and due to non-challenging of the same, it has attained finality, hence cannot be agitated.

10. Arguments heard. Record perused.

11. First of all, dealing with the objection raised by learned counsel for the respondent regarding the non-maintainability of suit filed by the petitioner being hit by res-judicata as contained in section 11 of C.P.C, it is straightaway observed that the said objection being not impressive is repelled for the reasons that in the earlier suit filed by the petitioner against the respondent, he had challenged Mutation No.9 dated 18.09.1997 which although was dismissed vide judgment and decree dated 14.06.2007 but direction was also issued by the learned trial court to the revenue authorities for attesting a fresh mutation in accordance with law. In the meantime, during the pendency of appeal filed by the petitioner against the aforesaid judgment and decree, the revenue authorities proceeded to sanction Mutation No.1168 dated 19.06.2008 which is the subject matter of the instant civil revision. It is trite law that every fresh entry in the revenue record gives rise to a fresh cause of action to the aggrieved party. Hence the impugned mutation being a subsequent entry gives rise to a fresh cause of action to the petitioner for filing the suit. The learned trial court decided Issue No.3 against the petitioner but the learned appellate court has reversed the findings of the

learned trial court on the said issue and the said findings of the learned appellate court had not been challenged by the respondent. It is now well settled that an issue decided against a party, if not challenged, shall attained the finality. Reliance in this regard is placed on the cases reported as Muhammad Aslam and 2 others v. Syed Muhammad Azeem Shah (1996 SCMR 1862) and Kanwal Nain v. Fateh Khan (PLD 1983 SC 53).

The learned lower appellate court, in Para-8 of the impugned judgment, has held as under:-

> "As regard to Issues Nos.2 and 3, the findings of the learned trial court are not tenable. In the previous suit, the appellant has challenged the validity of mutation No.9 sanctioned in favour of the respondent and that suit was although dismissed but the mutation No.9 was also set aside and the revenue officer was directed to sanction a fresh mutation according to law. In the suit in hand, the appellant has challenged the mutation No.1168 sanctioned by the revenue officer which according to him is illegal and void and he sought a declaration that the said mutation is not according to the share of the parties and the respondent has been given more land than her due share. So, the instant suit is maintainable and not hit by the principle of res-judicata."

Thus, the objection raised by learned counsel for the respondent questioning the maintainability of the suit filed by the petitioner on the ground of being hit by the principle of res-judicata, has no force.

12. The nutshell of the grievance agitated by the petitioner, through the instant civil revision, is that the respondent is entitled, being the only daughter/legal heirs of Mst. Mithan Mai, the pre-deceased daughter of Fazil, the propositus, out of his property, her Shari share, which she was entitled out of the property of Mst. Mithan, her mother. The petitioner's claim that out of the property measuring 49-Kanals 18- Marlas, mutated

through Mutation No.1168 dated 19.06.2008, the respondent is entitled to 1/2 share only and the remaining 1/2 share should have been mutated in the name of the petitioner as per mandate of section 4 of Muslim Family Laws Ordinance, 1961. It has been, thus, asserted that through the impugned mutation, the petitioner has been deprived of his Shari share and respondent has got more share than her entailment hence Mutation No.1168 dated 19.06.2008 is liable to be cancelled being ineffective upon his rights.

13. The provision of Section 4 of Muslim Family Laws Ordinance, 1961 is reproduced for better appreciation:-

> "Succession.- In the event of the death of any son of daughter of the propositus before the opening of succession, the children of such son or daughter, if any, living at the time the succession opens, shall per stripes receive a share equivalent to the share which such son or daughter, as the case may be, would have received if alive."

14. The said provision came under consideration of the Hon'ble Supreme Court of Pakistan in the case reported as Mst. Bhaggay Bibi and others v. Mst. Razia Bibi and others (2005 SCMR 1595) wherein, it has been held as under:-

> "3.---Section 4 of Muslim Family Laws Ordinance, 1961 provides that 'in the event of the death of any son or daughter of the propositus before the opening of succession, the children of such son or daughter, if any, living at the time the succession opens, shall per stripes receive a share equivalent to the share which such son or daughter, as the case may be, would have received, if alive'. This section does not override the law of Shariah and consequently, the parties will not get more than their share in the property in accordance with law of Shariah and the widows' and daughters of Maula Dad would get to which they would have been entitled on the death of Maula Dad, after opening of succession of Mughla.

The purpose of enacting section 4 (ibid) was to cater the need of grandchildren to remove their sufferings but this provision cannot be interpreted in a manner effecting the shares of other descendants in the property in accordance with law of Shariah."

Moreover, in another case reported as Mukhtar Ahmad v. Mst. Rasheeda Bibi and anther (2003 SCMR 1664) the apex Court has held as under:-

"6.----One thing deserves to be taken notice of. It is the Shari share of Mst. Rasheeda Bibi. No doubt, if she happened to inherit through her father Bir Din, her father would be entitled to 2/5th share in the property but she being the only daughter will inherit 1/2 share from the property of Bir Din while the remaining would go to other collateral's i.e. Mukhtar Ahmad and Mst. Sardar Bibi. She in fact is entitled to 1/5th share and not 2/5th share."

15. Article 189 of the Constitution of Islamic Republic of Pakistan, 1973, provides that any decision of the Hon'ble Supreme Court of Pakistan deciding question of law, is binding on all other courts of the country. For convenience, the same is reproduced as under:-

"Decisions of Supreme Court binding on other Courts.---Any decision of the Supreme Court shall, to the extent that it decided a question of law or is based upon or enunciates a principle of law, be binding on all other courts in Pakistan."

The aforesaid Article of the Constitution came under discussion before the Hon'ble Supreme Court of Pakistan in the case reported as Iftikharul Haq v. District Canal Officer and others (2005 CLC 1740) wherein it has been held as under:-

"7. The judgments and decrees or both the Courts below are not only violative of the provisions of law as contained in Order VII, Rule 11-B, C.P.C. but also in clear disregard to the law declared by the

Honourable Supreme Court of Pakistan in Jewan and 7 others v. Federation of Pakistan through Secretary, Revenue, Islamabad and 2 others 1994 SCMR 826, referred to above, which to me amounts to contempt of Court, because it is the mandate of Article 189 of the Constitution of Islamic Republic of Pakistan, 1973 that decisions of the Honourable Supreme Court of Pakistan are binding on all the Courts in Pakistan, so far as such decisions decide a question of law or enunciate a principle of law. The judgment of the Honourable Supreme Court cited above since constitutes a law in terms of Article 189 of the Constitution of Islamic Republic of Pakistan, 1973, hence binding on all the Courts in terms of said Article."

16. So far as the contention raised by learned counsel for the respondent that concurrent findings on facts have been recorded and re-appraisal of evidence cannot be made while exercising powers under section 115 of the Code of Civil Procedure, 1908, in this regard, it is observed that the concurrent findings when found result of misreading and non-reading of evidence or result of material irregularity and illegality, the, same can be interfered with in exercise of supervisory revisional jurisdiction. In this regard reliance is placed on the cases reported as Habib Khan and others Bakhtmina and others (2004 SCMR 1668), Ghulam Muhammad and 3 others v. Ghulam Ali (2004 SCMR 1001) and Sultan Muhammad and another v. Muhammad Qasim and others (2010 SCMR 1630), wherein it has invariably been held:-

"17. Indeed, the concurrent findings of three Courts below on a question of fact, if not based on misreading or non-reading of evidence and not suffering from any illegality or material irregularity effecting the merits of the case, are not open to question at the revisional stage, but where on record the position is contrary to it, then the revisional Court in exercise of its jurisdiction under section 115, C.P.C. or this Court, in exercise of

jurisdiction under Article 185(3) of the Constitution, are not denuded of their respective powers to interfere and upset such findings."

17. In view of the above, it is settled principle that when the concurrent findings suffer from misreading and non-reading of evidence or material illegality and irregularity, the same can be rectified by exercising supervisory jurisdiction.

18. For the foregoing reasons and discussions, by placing reliance on the judgments supra, the civil revision in hand is accepted, impugned judgments and decrees dated 16.07.2011 and 22.12.2012 passed by the learned trial Court and learned appellate court respectively, are set aside, consequently the suit instituted by the petitioner stands decreed as prayed for with no order as to costs.

MFB/H-7/L **Revision allowed.**

2020 M L D 42

[Lahore (Multan Bench)]

Before Anwaarul Haq Pannun, J

BASHIR AHMAD KHAN---Petitioner

Versus

ADDITIONAL SESSIONS JUDGE and others---Respondents

Writ Petition No. 865 of 2018, decided on 2nd May, 2019.

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

----S. 265-K---Power of court to acquit accused at any stage---Pre-requisites---Scope---Interpretation of S.265-K, Cr.P.C.---Power vested under S.265-K, Cr.P.C. can be exercised by the Trial Court at any stage of the trial---Words "Nothing in this Chapter shall be deemed to prevent a Court from acquitting an accused at any stage of the case" adequately convey the underlying object of the provision that there exists no impediment on the way of Trial Court in the exercise of its powers for acquitting accused at any stage, subject to certain prerequisites, that is; (i) after hearing the prosecutor and accused both; (ii) the reasons must be recorded for acquitting the accused; (iii) the Trial Court shall exercise its power only if it comes to the conclusion that there exists no probability of the accused being convicted of any offence; (iv) moving of formal application by the accused is not necessary and (v) the court can exercise its power on its own motion.

(b) Constitution of Pakistan---

----Arts. 199 & 189---Constitutional petition---Decision of Supreme Court binding on other courts---Certiorari, writ of---Scope---Person invoking the constitutional jurisdiction under Art. 199 of the Constitution seeking issuance of writ of certiorari, by way of setting aside the order, has to show that order, under challenge, violates the condition mentioned in the

Arts. 199 & 189 of the Constitution, that the authority/court/tribunal was denuded of jurisdiction whatsoever to pass the order or that the order impugned is unsustainable on account of being result of extremely improper exercise of jurisdiction or has clearly been passed in violation of any provision of law or is product of excess or failure of jurisdiction by the tribunal or that some principle of law laid down by the superior courts, which under Art. 189 of the Constitution is binding on the subordinate courts, has been violated---Scope of interference by the High Court is limited to the inquiry whether the tribunal has in doing the act or undertaking the proceedings acted in accordance with law---Where the answer is in the affirmative the High Court will not substitute its own findings for the findings recorded by the tribunal---Case of no evidence, bad faith, misdirection or failure to follow judicial procedure, etc. are treated as acts done without lawful authority and vitiate the act done or proceedings undertaken by the Tribunal.

Rahim Shah v. The Chief Election Commissioner of Pakistan and another PLD 1973 SC 24 ref.

Haji Muhammad Aziz Khokhar for Petitioner.

Ch. Muhammad Zulfiqar Ali Sidhu, Assistant Advocate General for the State.

Usman Tariq Butt for Respondents Nos. 2 to 7.

Date of hearing: 2nd May, 2019.

JUDGMENT

ANWAARUL HAQ PANNUN, J.---Through this Constitutional petition, the petitioner calls in question the order dated 25.11.2017 passed by the learned Addl. Sessions Judge, D.G. Khan whereby, accepting the application of respondents Nos.2 to 7 under section 265-K Cr.P.C. in a private complaint titled "Bashir Ahmad Khan v. Ijaz Ahmad and 5 others"

under section 3 (2) of the Illegal Dispossession Act, 2005, the learned trial court had proceeded to acquit the respondents.

2. The main plank of the arguments of the learned counsel for the petitioner is that the learned trial Judge, instead of accepting an application under section 265-K Cr. P.C. when the trial was just half the way ought to have granted opportunity of producing full fledge evidence to the petitioner/complainant, therefore, the impugned order is not sustainable in the eyes of law.

3. On the other hand, the learned counsel for the respondents has vehemently opposed the contentions of the learned counsel for the petitioner.

4. The arguments advanced by the learned counsel for the parties have been heard and record perused.

5. The contention of the learned counsel for the petitioner that the learned trial Judge ought to have granted full fledge opportunity to the petitioner for producing his entire proposed evidence and thereafter the matter should have been decided on merits instead of accepting the application under section 265-K, Cr.P.C. moved by the accused, half the way of the trial is concerned, the same is not even legally tenable. The provisions of section 265-K, Cr.P.C. is reproduced herein: -

265-K Cr.P.C. Power of Court to acquit accused at any stage:

"Nothing in this Chapter shall be deemed to prevent a Court from acquitting an accused at any stage of the case; if, after hearing the prosecutor and the accused and for reasons to be recorded, if considers that there is no probability of the accused being convicted of any offence."

The perusal of the provision clearly indicates that the power vested under section 265-K, Cr.P.C. can be exercised by the learned trial court at any stage of the trial. The language "Nothing in this Chapter shall be deemed

to prevent a Court from acquitting an accused at any stage of the case" adequately conveys the underlying object of the provision that there exists no impediment on the way of trial court in exercise of its powers for acquitting accused at any stage, subject to certain pre-requisites, i .e.

(i) after hearing the Prosecutor and the accused both,

(ii) the reasons must be recorded for acquitting the accused,

(iii) the trial court shall exercise its powers only if it comes to the conclusion that there exists no probability of the accused being convict of any offence.

(iv) Moving of formal application by the accused is not necessarily envisaged.

(v) The court can exercise its power on its own motion.

6. Keeping in view the provision of section 265-K Cr.P.C. in verbatim, I may add one thing that the law has vested a trial court with a wide power, enabling it to see through the wall on its other end. It may be observed here that in view of plethora of pending cases, instead of allowing the complainant/prosecution to produce weak, deficient, and inadmissible proposed evidence in the trial, it is high time for the trial courts to exercise such vast power vested therewith, to save precious public time, for conducting other meaning-full proceedings in some other matters pending in the courts objectively. Acceptance of the above noted contention of the learned counsel would amount to rendering the provision redundant which cannot be done. In order to appreciate the contention for the learned counsel for the petitioner of factual matrix, I feel it appropriate to reproduce a portion of the judgment under challenge:--

"Admittedly, the disputed plots/land is situated in same khata in which respondents Ijaz, Maher Mai and Aftaf also own their plots/land. This fact is evident from the report of the SHO, P.S. Sadar,

District D.G.Khan as well as Patwari concerned and also from petition under section 22-A/22-B, Cr.P.C. filed by complainant Bashir Ahmad Khan against accused Ijaz and Maher Mai wherein complainant Bashir Ahmad Khan admitted the said facts in Para No.2 thereof. Further, no time and date of incident has been mentioned in instant private complaint. The dispute, in fact, between the parties to present private complaint is of demarcation of land owned by them for which the remedy available to them is to file application to the Revenue Authorities or to institute a suit for declaration. If for the sake of arguments, it is admitted that the accused had taken possession of disputed plots/land in joint khata in absence of complainant even then it cannot be said that the accused illegally dispossessed the complainant from his land because in such situation, they would have dispossessed him without his consent of his immovable property otherwise in due course of law. So, the remedy available to the complainant is to institute a suit under section 9 of the Specific Relief Act, 1877 for the reason that it cannot be said that accused would have dispossessed him without having any lawful authority with intent to grab it. "

The perusal of the order of the learned trial Judge, hereinabove, clearly indicates that it is based on proper appreciation of facts and law and material available on record. No illegality, perversity or material irregularity could have been pointed out, in the impugned order by the learned counsel.

7. Even otherwise in order to issue a writ of certiorari under Article 199 (a) (ii) of the Constitution of Islamic Republic of Pakistan, 1973 which is reproduced hereunder for ready reference:--

199. Jurisdiction of High Court. (a) (ii):

"Declaring that any act done or proceeding taken within the territorial jurisdiction of the Court by a person performing functions in connection with the affairs of the Federation, a Province or a local authority has been done or taken without lawful authority and is of no legal effect; or"

The person invoking the Constitutional jurisdiction under the above Article seeking issuance of writ of certiorari, by way of setting aside the order, has to show that the order, under challenge, violates the condition mentioned in the above provisions of the Constitution, that the authority/court/tribunal was denuded of jurisdiction whatsoever to pass the order or that the order impugned is unsustainable on account of being result of extremely, improper exercise of jurisdiction or has clearly been passed in violation of any provisions of law or is product of excess or failure of jurisdiction, by the tribunal or that some principle of law laid down by the superior courts, which under Article 189 of the Constitution is binding on the subordinate courts has been violated. The scope of interference by the High Court is, therefore, limited to the inquiry whether the tribunal has in doing the act or undertaking the proceedings acted in accordance with law. If the answer be in the affirmative the High Court will stay its hands and will not substitute its own findings for the findings recorded by the tribunal. Cases of no evidence, had faith, misdirection or failure to follow judicial procedure, etc. are treated as acts done without lawful authority and vitiate the act done or proceedings undertaken by the Tribunal on this ground. Reliance is placed on the case law reported in Rahim Shah v. The Chief Election Commissioner of Pakistan and another (PLD 1973 Supreme Court 24), there remains a failure on the part of the petitioner to show that the impugned order being hit by any of above referred conditions, hence this petition, being bereft of any force, is hereby dismissed.

SA/B-12/L **Petition dismissed.**

2020 M L D 474

[Lahore]

Before Anwaarul Haq Pannun, J

SAFARISH ALI---Petitioner

Versus

The STATE and 2 others---Respondents

Criminal Miscellaneous No. 27074-M of 2019, decided on 13th June, 2019.

Penal Code (XLV of 1860)---

----S.322---Criminal Procedure Code (V of 1898), S. 176---Qatl-bis-Sabab---Appreciation of evidence---Disinterment of dead body, application for---Scope---Petitioner contended that disinterment of dead body of the deceased (wife of the petitioner) had been wrongly allowed by the Courts below and contended that during cleaning of a pistol by his son, inadvertently its trigger got pressed, two fire shots emitted out of it hitting the abdomen of his wife---Petitioner did not inform the police due to her critical condition and shifted her to the hospital, but she succumbed to injuries---Petitioner, being husband of the deceased, along with other legal heirs neither wanted to get the post-mortem examination of the dead body of the deceased nor register a criminal case---Station House Officer Police Station instead of registering a criminal case, only recorded Rapt and entrusted the matter to his subordinate Police Officer to inquire under S. 174, Cr.P.C.---Said Police Officer moved application to the Judicial Magistrate to get permission for post-mortem examination over the dead body of the deceased---Judicial Magistrate after recording presence of legal heirs, without due verification from any independent quarter, turned down the request of the police by giving observation that since the death of the deceased was result of receiving accidental fire shots the legal heirs of the deceased did not want to get the post-mortem examination conducted over her dead body---Mother of the

deceased, later on, submitted application before the Judicial Magistrate requesting for disinterment and post mortem over her dead body---Said applicant contended that the death of the deceased was not the result of accidental fire shot rather the same was an intentional murder, committed by her husband and son, through two successive fire shots---Said application was allowed by the Judicial Magistrate---Revision was filed against the said order, which was dismissed---Validity---Admittedly, death of deceased was result of two successive fire-arm shots by the real son of deceased who cleaning the pistol---Death certificate of deceased also confirmed that she had died as a result of firearm shots---Contents of present petition clearly showed the commission of offence, qatl-bis-sabab, punishable under S.322, P.P.C., which was a cognizable offence---Order passed by the Judicial Magistrate whereby he turned down the request of the police for post-mortem examination, on the concession of the legal heirs of the deceased, amounted to diverting the process of law by allowing the legal heirs to compound the offence by way of application to waive their rights of qisas---Said order appeared to be illegal---Courts below had passed the impugned orders quite in accordance with the law as the medical evidence could not be dispensed with for establishing a charge or offence, against a human body---Petition having no force was dismissed accordingly.

Abdul Sattar Ch. for Petitioner.

Muhammad Moeen Ali, Deputy Prosecutor General for the State.

M. Attique Khokhar for Respondent No.2.

ORDER

ANWAARUL HAQ PANNUN, J.---Through the instant petition, the petitioner has challenged the vires of orders dated 16.03.2019, 29.04.2019 and 30.04.2019 passed by the learned courts below whereby application filed by Mst. Zohra Bibi seeking exhumation of the grave of her daughter, namely, Shehnaz Bibi for autopsy of her dead body was accepted vide order dated 16.03.2019 by the learned Magistrate Section 30, Shakargarh.

The present petitioner assailed the said order dated 16.03.2019 by filing Revision Petition before the learned Addl. Sessions Judge, Shakargarh who dismissed the same vide order dated 29.04.2019. Thereafter, the learned Magistrate vide an interlocutory order dated 30.04.2019 directed the SHO concerned to depute guard on the grave of the deceased so as to prevent any untoward incident. The Medical Superintendent, DHQ Hospital, Narowal was also directed to depute experts team of medical to conduct autopsy of dead body of the deceased, hence this criminal miscellaneous petition.

2. The elaborate factual matrix of instant criminal miscellaneous application, as gleaned out, on perusal of the application of the petitioner (Annexure "A") submitted to the SHO, Police Station Kot Naina, Shakargarh is to the effect that on 08.11.2018 at about 8.00 p.m. (night) during cleansing a pistol by his son Rafaqat Ali, inadvertently its trigger got pressed, two fires shots emitted out of it, hit on the abdomen of Rafaqat's mother, namely, Mst. Shahnaz Bibi, (wife of the petitioner). The petitioner, due to severe injuries and her critical condition, did not inform the police, and at the first instance, shifted the lady injured to THQ Hospital, Shakargarh but in view of her critical condition, the Medical Officer, referred her to Mayo Hospital where she succumbed to her injuries on 11.11.2018. The application goes to further say that, he being husband of the deceased, along with other LRs, neither want to get the post mortem examination of the dead body of the deceased nor register a criminal case. It is noticed that after receiving said application, the SHO, instead of registering a criminal case, only recorded Rapt No.10 dated 11.11.2018. The SHO entrusted the matter to Muhammad Younas, SI of Police Statin Kot Naina to inquiring it under section 174 Cr.P.C. It further transpired from the record, that Muhammad Younas, SI of said Police Station, moved application (Annexure-"C") to the learned Illaqa Magistrate, reiterating the facts contained in (Annexure-B), with the prayer to get permission for post mortem examination over the dead body

of the deceased, who after recording presence of legal heirs (without due verification from any independent quarters), observed that since the death of the deceased was result of receiving accidental fire shots and the legal heirs of the deceased also do not want to get the post mortem examination conducted over the dead body of the deceased, and turned down the request of the police, however, he observed that proceedings under section 174 Cr.P.C. be initiated and inquiry report be submitted before him. Needless to say that a death certificate issued by the Mayo Hospital, Lahore (Annexure-"D") is also available on record confirming the death of Mst. Shahnaz Bibi as a result of firearm injury. The report under section 174 Cr.P.C. was also prepared declaring the death of the deceased to be an accidental death. Later on, mother of the deceased Mst. Zuhra Bibi, respondent No.3 herein, submitted her application before the learned Magistrate requesting for disinterment and post mortem over her dead body. She has alleged that the death of the deceased was not the result of accidental fire shot rather the same was an intentional murder, committed by Rafaqat Ali and Safarish Ali, through two successive fire shots. The learned Magistrate after hearing the parties, proceeded to pass the order dated 16.03.2019 which reads as under:-

> The perusal of the record reveals that the cause of
>
> death of deceased Shahnaz Bibi was not determined at the time of her death rather it was mentioned that it to be ascertained after autopsy. In the given circumstances, in order to know the real facts and have a definite opinion about the cause of death, examination of dead body
>
> is very necessary which can only be conducted after disinterring of the dead body. Hence, in the interest of justice, application in hand is accepted and SHO concerned is directed to depute guard on the grave of the deceased

so as to prevent any untoward incident with the dead body of deceased. The M.S. DHQ Hospital, Narowal is directed to depute a medical team to conduct examination of dead body of the deceased on 27.03.2019 at about

09.30 a.m."

3. The petitioner challenged the said order by filing a Criminal Revision Petition which has been dismissed vide order dated 29.04.2019, as a sequel of the above proceedings, the learned Magistrate in order to get the autopsy conducted after disinterment of her body, passed the order dated 30.04.2019, hence this petition.

4. At the very outset, learned counsel for the petitioner submits that respondent No.3 Mst. Zohra Bibi with her mala fide intention, moved application before the learned Magistrate for exhumation of the grave of her daughter Mst.Shehnaz Bibi who without considering the earlier proceedings and ignoring the order dated 11.11.2018, (passed by the learned Magistrate whereby he turned down the request of the police for conducting post mortem examination) had passed the impugned order dated 16.03.2019; adds that while deciding the revision petition, the learned Addl. Sessions Judge had also ignored the order dated 11.11.2018. He states that none of the legal heirs, wanted autopsy over dead body of their near and dear.

5. On the other hand, it is contended that even the application moved by the present application either before the SHO or before the Magistrate clearly indicates that death of the deceased was result of a fire shot which amount the commission of offence under section 322, P.P.C. "Qatl-bis-Sabab (defined under section 321, P.P.C.) and is punishable under section 322, P.P.C., therefore, the entire range of exercise of power either by the police or by the learned Magistrate vide order dated 11.11.2018 is not sustainable, as such the same amounts, to screen off the offender.

5. Heard. Record perused.

6. Verbiage aside, the petitioner himself moved application (Annexure-"A: and "B") before the SHO as well as before the learned Magistrate stating, that on 08.11.2018 at about 8.00 p.m. (night) his son Rafaqat Ali, allegedly was cleansing a pistol, due to incidental, trigger pressing, emitting two fire shots, hit on the abdomen of Mst. Shahnaz Bibi, as a result whereof, she succumbed to her injuries. Rest of the detail of facts has already been given in the previous paragraphs of this order, hence need no reiteration. It is also not disputed that after receipt the application Annexure-A, moved by the petitioner, the SHO endorsed his opinion while incorporating it in Rapt No.10 dated 11.11.2018 and through a request in writing, submitted by Muhammad Younis, SI, Police Station Kot Naina before the learned Magistrate seeking permission for getting conduct the post mortem examination which was turned down by the learned Magistrate vide order dated 11.11.2018, this order has presumably been passed in presence of the legal heirs of the deceased. No individual statement of the LRs is available on the record and he only got signatures of the alleged LRs on the margin of the order sheet, directing the police to proceed under section 174 Cr.P.C. and submit a report before him. Respondent No.3 is mother of the deceased, on whose application, order dated 16.03.2018 was passed for disinterment of the dead body by the learned Magistrate, which has also been upheld even by the Revisional Court.

7. It is an admitted fact that death of Mst. Shahnaz Bibi was result of two successive fire arm shots, emitted from the pistol being cleansed by Rafaqat Ali, the real son of the deceased. Mst. Shahnaz Bibi died in Mayo Hospital, her death certificate also confirms that she has died as a result of fire shot injuries. Keeping in view even the contents of application moved by the present petitioner, clearly the commission of offence Qatl-bis-Sabab punishable under section 322, P.P.C., a cognizable offence is made out. For ready reference, section 321, P.P.C. is reproduced as under:

321. Qatl-bis-Sabab. Whoever, without any intention to cause death of, or cause harm to, any person, does any unlawful act which becomes a cause for the death of another person, is said to commit Qatl-bis-sabab.

The order dated 11.11.2018 passed by the learned Magistrate whereby he turned down request of the police for post mortem examination on the concession of the LRs of the deceased, amounts to diverting the process of law by allowing the LRs compounding the offence by way of its application to waive their rights of Qisas and the question arises whether the learned Magistrate under the law is invested with the said jurisdiction, to pass the order. The answer is in negative. The post mortem examination is got conducted under Chapter XXV of the Police Rules, 1934. The offence under section 322, P.P.C. can, no doubt, be compounded by the LRs of the deceased but with the permission of a court of competent jurisdiction only as per mandate of law, after submission of the challan and taking cognizance of the offence by a court. The order of the learned Magistrate whereby he has turned down the request of the police only on the concession of the LRs of the deceased, appears to be illegal, unlawful, without jurisdiction and without lawful authority, therefore, the objection of the learned counsel for the petitioner that the order dated 11.11.2018 passed by the learned Magistrate, since has not been challenged and has attained the finality, cannot be entertained, and the same is turned down, and order is also set aside while exercising power under section 561-A, Cr.P.C. It also noticed that the action of the SHO for initiating the proceedings under section 174, Cr.P.C. instead of proceedings under section 154, Cr.P.C. is also uncalled for, and amounts to failure in discharge of his duty and the same is not appreciated. The offences against human body are though compoundable but at the same time it is an offence against the State for which the State machinery has to take the steps for prosecution of the offender, which, in the instant case, is lacking. It was yet to be investigated whether the

offender was keeping the pistol, with or without licence. In case, he was having unlicensed arm, can be allowed, through the way the police, the Magistrate have allowed him to go escorted free. Both the learned courts below have passed the impugned orders quite in accordance with law as the medical evidence cannot be dispensed with, for establishing a charge or offence, against a human body. Learned counsel representing the petitioner could not point out any illegality in the impugned orders, being impugned through this petition.

8. Resultantly, this petition having no force, is hereby dismissed.

9. Office, however, is directed to send a copy of this order to DPO, Narowal to look into the matter and find out, whether the conduct of his subordinates in dealing with the matter, does not come within the purview of making attempt for damaging and the evidence apart from failure in discharge of his duty.

JK/S-52/L **Petition dismissed.**

2020 M L D 1360

[Lahore (Rawalpindi Bench)]

Before Anwaarul Haq Pannun, J

MUHAMMAD RAFIQUE---Petitioner

Versus

TEHSIL MUNICIPAL ADMINISTRATION CHAKWAL and others-Respondents

Criminal Miscellaneous No. 1428-M of 2018, decided on 21st January, 2020.

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

----S. 133---Conditional order for removal of nuisance---Interpretation and scope of S.133, Cr.P.C.---Maxim: Sic utere tuo ut alienum non laedas---Scope---Petitioner assailed order passed by Magistrate whereby he had directed the public functionaries to close/remove unauthorized coach stands and illegal encroachments on the roads throughout the city---Petitioner and other respondents had established their coach stands without any permit or lawful authorization issued by the Regional Transport Authority---Maxim: sic utere tuo ut alienum non laedas (Use your own property in such a manner as not to injure that of another) was a complete answer to the contention of petitioner that he and others had established the coach stands on privately owned properties---Petitioner and others had established the coach stands in breach of their inviolable obligation of conducting themselves in accordance with law and the Constitution, therefore, the inherent powers vested in the High Court under S.561-A, Cr.P.C. could not be exercised in favour of the petitioner or any other person sailing the boats constructed with the same material---Petition, being devoid of merits, was dismissed.

Haji Mullah Noor Ullah v. Secretary Mines and Minerals and 3 others 2015 YLR 2349 rel.

Shah Muhammad v. Addl. Sessions Judge, Bahawalpur and 5 others 1998 PCr.LJ 1987; Haji Abdul Aziz and 2 others v. Haji Dost Muhammad and 5 others 1999 PCr.LJ 31; Haji Raz Muhammad and 9 others v. District Magistrate, Quetta 2000 PCr.LJ 1702; Mrs. Anjum Irfan v. Lahore Development Authority through Director-General and others PLD 2002 Lah. 555; Watan Party and another v. Federation of Pakistan and others PLD 2011 SC 997 and Zafrullah Khan v. Federation of Pakistan 2018 SCMR 2001 ref.

(b) Nuisance---

----Kinds---"Private nuisance", "public nuisance" and "annoyance"---Connotation.

Nuisance is a substantial interference with the right to use and enjoy land, which may be intentional, negligent or ultra-hazardous in origin, and must be a result of defendant's activity. Term 'Nuisance' connotes and includes any act, omission, animal or thing which causes or is likely to cause injury, danger, annoyance or offence to the sight, smell or hearing or disturbance to rest or sleep, or which is or may be dangerous to life or injurious to health or property or endanger the human life or unreasonable, unwarranted and/or unlawful use of property, which causes nuisance or damage to others, either to individuals or to the general public. Nuisance can include noxious smells, noise, burning, misdirection of water into other property, illegal gambling, unauthorized collection of rusting autos, indecent signs and pictures on business and a host of bother some activities. Where illegal they can be abated (changed, repaired or improved)by criminal or quasi-criminal charges. Nuisance is of two types i.e. private and public. Private nuisance is a civil wrong; it is the unreasonable, unwarranted, or unlawful use of one's property in a manner that substantially interferes with the enjoyment or use of another individual's property, without an actual trespass or physical invasion to the land. Public nuisance is a criminal wrong; it is an act or omission that

obstructs, damages or causes inconvenience to the rights of the community. Obstructing a highway or creating a condition to make travel unsafe or highly disagreeable are examples of nuisance threatening the public convenience. Public nuisance is actionable only by the State, through criminal proceedings, injunction, or physical abatement, the same activity or conduct may also create a private nuisance to neighbouring landowners and thus result in a civil suit. Conduct of business in violation of any law may constitute a public nuisance. Term annoyance is flexible one. It has many shades and varieties of meaning. In a nuisance case, the fundamental inquiry always appears to be whether the use of certain land can be considered as reasonable in relation to all the facts and surrounding circumstances. The environmental laws are adoption of doctrine of nuisance to modern complex societies in that person's use of his property may harmfully affect another's property or person, far from the nuisance activity. As a result of industrial revolution and modern life having intricacies and complications involving state institutions, the law curbing nuisance affecting adversely the human life has developed in a great deal.

(c) Constitution of Pakistan---

----Art. 18---Freedom of trade, business or profession---Scope---Right of freedom of trade, business or profession is not absolute, as it can be subjected to reasonable restrictions and regulations as may be prescribed by law---Such right is not unfettered---Regulation of any trade or profession by a system of licensing empowers the Legislature as well as the authorities concerned to impose restrictions on the exercise of right.

Pakcom Limited and others v. Federation of Pakistan and others PLD 2011 SC 44 ref.

Hassan Raza Pasha for Petitioner.

Ghulam Abbas Gondal, D.P.G.

Asad Mehmood Mughal and Qazi Afzaal Ahmad for Respondents.

M. Aslam, S.P. (Inv), Chakwal.

ORDER

ANWAARUL HAQ PANNUN, J.---Precisely the facts, necessary for the decision of the instant petition in terms of section 561-A, Cr.P.C., are that on a complaint moved by Amjad Hussain/respondent No.15 under section 133, Cr.P.C. for removal of public nuisance by way of closure of unauthorized and illegally operating transport Addas within the precincts of Chakwal City besides removal of encroachments over the roads, the learned Magistrate after receipt of reports from RTA Secretary Chakwal, TMA Chakwal and DSP Traffic, wherein it has been maintained that besides General Bus Stand, Alliance Travels and Hamsafar Travels, no other bus/wagon stand is sanctioned by the relevant authorities, passed a conditional order dated 30.05.2018 while issuing directions to all the concerned quarters to close/remove unauthorized stands and illegal encroachments on the roads throughout the city. The petitioner and the private respondents herein, after putting up appearance in the Court, submitted their respective replies. Subsequently, the petitioner also filed objection before Ilaqa Magistrate questioning his exercise of powers under section 133, Cr.P.C. in the facts and circumstances of the instant case. After considering replies and the other material the learned Magistrate transformed his earlier conditional order dated 30.05.2018 into his final order vide order dated 31.07.2018. Being aggrieved of the aforesaid orders, the petitioner filed criminal revision petition, which the learned Addl. Sessions Judge, Chakwal has dismissed in terms of impugned order dated 02.10.2018. Hence, instant petition.

2. Learned counsel for the petitioner has mainly contended that "the complainant/respondent No.15 due to his business rivalry with the petitioner and other private respondents had moved complaint under section 133, Cr.P.C. with mala fide" and that "since the wagon stands

have been established on the personal/private properties by their respective owners, the provisions of section 133, Cr.P.C. do not attract, in stricto sensu, and that the entire edifice built as a result of exercise undertaken by the learned Magistrate under section 133, Cr.P.C. is un-sustainable in the eye of law", therefore, while exercising powers under section 561-A, Cr.P.C., in the interest of justice, the same may be set aside/quashed.

3. Conversely, from the side of private respondents as well as learned DPG, it has been asserted that petitioner and others, without having a valid permit/licence issued by RTA, have established the wagon stands on privately owned properties and as such they have illegally indulged themselves in the business of running these stands/Addas, thus, are entitled to no relief. They have also maintained that due to the plying of wagons on roads from the illegally established wagon stands besides traffic congestion, spread of environmental pollution, health hazards to the public at large is being caused. which tantamounts to public nuisance, therefore, both the courts below have rightly exercised their jurisdiction under section 133, Cr.P.C. and 435, Cr.P.C. respectively, Finally, they have prayed for dismissal of instant petition.

4. Heard. Record perused.

5. Article 5 of the Constitution of Islamic Republic of Pakistan 1973, is reproduced hereunder:-

Art.5. (1) ----------

(2) Obedience to the Constitution and law is the (inviolable) obligation of every citizen wherever he may be and of every other person for the time being within Pakistan.

A wagon stand can only be established on the application of a person on fulfillment of certain requirements and conditions after deposit of requisite licence fee in the Govt. Exchequer on the order of the concerned

authority; the Regional Transport Authority, after giving a notice to the party concerned can revoke its order, permitting the establishment of any stand, if in its opinion, any of the conditions on which Stand has been permitted, is found to be violated or the stand has not been satisfactorily managed or its continuation is no longer in the public interest. It can also impose penalty upon the defaulting party. No vehicle is allowed under the rules to be admitted in any D-Class Stands other than vehicle in respect of which a permit has been awarded to a person or a company in whose name Stand has been sanctioned. Any vehicle which has been specially mentioned in Regional Transport Authority's order, is entitled to use the Stand. It is an admitted position in the facts and circumstances of the instant case that the petitioner and other private respondents have established their wagon stands without any permit or lawful authorization issued by the Regional Transport Authority. The above referred Article of the Constitution casts upon every citizen and every other person, for the time being within Pakistan, or wherever he may be, an inviolable obligation for conducting himself in accordance with law. Therefore, in view of the above facts and circumstances, no difficulty is being felt by this Court to hold that the petitioner and others are illegally running the wagon stands, by violating their above referred constitutional obligations. Under Article 9 of the Constitution which reads as under:--

> 9. Security of person. No person shall be deprived of life or liberty save in accordance with law.

In the case reported as Haji Mullah Noor Ullah v. Secretary Mines and Minerals and 3 others (2015 YLR 2349), it has been held as under:

> "14. The right to 'life' is the most fundamental right as enshrined in Article 9 of the Constitution. Such right includes all attributes of the life. The term 'life' means something more than mere animal existence. It is a fundamental right of every citizen to live with dignity. Living with dignity would include all those rights, which

ensure a person's life as meaningful, complete and worth living. Right to life would also include right to live in peace, to sleep in peace and enjoy health free from pollution. Right to live is a fundamental right under Article 9 of the Constitution and it includes the right of enjoying pollution free air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of Laws, a citizen has the right to have recourse to Article 199 of the Constitution for removing that very thing, and polluted air is certainly one of them, for it is detrimental to the quality of life. The Hon'ble Supreme Court of Pakistan in the case "petition regarding miserable condition of the schools": In the matter of Constitutional Petition No.37 of 2012, decided on 22nd November, 2013-reported in 2014 SCMR 396, while interpreting Article 9 of the Constitution observed as under:-

"As far as Article 9 is concerned, the word "life" occurring in said Article has received interpretation in different contexts in a large number of cases decided from time to time and now it is well-settled that the word 'life' cannot be assigned limited meaning and its scope has been enlarged enough to encompass almost each and every aspect of human life."

15. Similarly, the Hon'ble Supreme Court, while interpreting the word 'life' used in Article 9 of the Constitution in the case of "Ms. Shehla Zia v. WAPDA", (PLD 1994 SC 693), held as under:--

"Article 9 of the Constitution provides that no person shall be deprived of life or liberty save in accordance with law. The word "life" is very significant as it covers all facts of human existence. The word "life" has not been defined in the Constitution but it does not mean nor can be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such

amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally."

Moreover, Article 18 ofthe Constitution of Islamic Republic of Pakistan, 1973 is also relevant in the instant case, which reads as follows:-

18. Freedom of trade, business or profession. Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business;

Provided that nothing in this Article shall prevent--

(a) The regulation of any trade or profession by a licensing system; or

(b) The regulation of trade, commerce or industry in the interest of free competition therein; or

(c) The carrying on, by the Federal Government or a Provincial Government, or by a corporation controlled by any such Government, or any trade, business, industry or service, to the exclusion, complete or partial, of other persons.

Judicial consensus regarding the interpretation of Article 18 of the Constitution has emerged that "right of freedom of trade, business or profession is not absolute, as it can be subjected to reasonable restrictions and regulations as may be prescribed by law. Such right is therefore not unfettered. The regulation of any trade or profession by a system of licensing empowers the Legislature as well as the authorities concerned to impose restrictions on the exercise of right. Even in those countries where the right to enter upon a trade or profession is not expressly subjected to conditions, similar to this Article, it was eventually found that the State has, in exercise of its police power, the authority to subject the right to a system of licensing i.e. to permit a citizen to carry on the trade or profession only if he satisfies the terms and conditions imposed by the

prescribed authority for the purposes of protecting and promoting general welfare. Reliance is placed upon case titled Pakcom Limited and others v. Federation of Pakistan and others (PLD 2011 Supreme Court 44). Thus from the above discussions, it is quite clear that petitioner and others are running wagon stands illegally, without having been granted a valid permit/licence by the competent authorities. It may also be relevant to mention that under the relevant Motor Vehicle Rules, for the grant of licence/permit to establish a new wagon stand, prime consideration before the Regional Transport Authority is that no order, causing prejudice to the party. who is already running a duly sanctioned wagon stand, shall be passed.

6. The term 'Nuisance' connotes and includes any act, omission, animal or thing which causes or is likely to cause injury, danger, annoyance or offence to the sense of sight, smell or hearing or disturbance to rest or sleep, or which is or may be dangerous to life or injurious to health or property or endanger the human life. (Manipur Municipalities Act (43 of 1994), S. 2(37) and New Delhi Municipal Council Act (44 of 1994), S.2(28) and Cantonment Act (2 of 1924), S.2(xxii). The unreasonable, unwarranted and/or unlawful use of property, which causes inconvenience or damage to others, either to individuals or to the general public. Nuisance can include noxious smells, noise, burning, misdirection of water into other property, illegal gambling, unauthorized collections of rusting autos, indecent signs and pictures on business and a host of bothersome activities. Where illegal they can be abated (changed, repaired or improved) by criminal or quasi-criminal charges. There are two types of nuisance i.e. private nuisance and public nuisance. A private nuisance is a civil wrong; it is the unreasonable, unwarranted, or unlawful use of one's property in a manner that substantially interferes with the enjoyment or use of another individual's property, without an actual Trespass or physical invasion to the land. A public nuisance is a criminal wrong; it is an act or omission that obstructs, damages, or inconveniences

the rights of the community. Obstructing a highway or creating a condition to make travel unsafe or highly disagreeable are examples of nuisances threatening the public convenience. A public nuisance, as such, is actionable only by the state, through criminal proceedings, injunction, or physical abatement, the same activity or conduct may also create a private nuisance to neighbouring landowners and thus result in a civil suit. The conduct of business in violation of any law may constitute a public nuisance. In legal terminology, a nuisance is a substantial interference with the right to use and enjoy land, which may be intentional, negligent or ultra-hazardous in origin, and must be a result of respondent's/ defendant's activity. The term annoyance is flexible one. It has many shades and varieties of meaning. In a nuisance case, the fundamental inquiry always appears to be whether the use of certain land can be considered as reasonable in relation to all the facts and surrounding circumstances. There may hardly be any cavil in saying that the environmental laws are an adaptation of the doctrine of nuisance to modern complex societies, in that person's use of his property may harmfully affect another's property, or person, far from the nuisance activity. As a result of industrial revolution and modern life having intricacies and complications involving state institutions, the law curbing nuisance affecting adversely the human life has developed in a great deal.

7. In order to further appreciate the contentions raised by learned counsel for the respective parties, in the light of above discussion and to arrive at a proper conclusion, it would be advantageous to draw an exhaustive extraction from section 133, Cr.P.C. The perusal of the above quoted provision of law indicates that Chapter-X (Public Nuisance) contains the provisions for regulating mechanism/procedure for passing an order to achieve the object contained in section 133, Cr.P.C., it appears that under section 133, Cr.P.C. a Magistrate by way of exercising his powers has been enabled to make speedy redressal when public nuisance available within the categories enumerated in the section, is being caused.

Bare reading of section 133, Cr.P.C. reflects that a Magistrate before he passes final order, has to pass a conditional order which, in fact, is a kind/type of show-cause notice to the person who is indulged in any activity prompting initiation of proceedings under this section and thereafter to pass final order. Section 133 indicates that whenever a Magistrate, on receiving a police Report or other Information and on taking such evidence, if any, as he thinks fit that any unlawful obstruction or nuisance should be removed from any Way, River or Channel which is or may be lawfully used by the public, or from any public place, or that the conduct of any trade or occupation, or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and: that in consequence of such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated, or that the construction of any building, or the disposal of any substance, as is likely to occasion conflagration or explosion, should be prevented or stopped, or that any building, tent or structure, or any tree is in such a condition that it is likely to fait and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence. the removal, repair or support of such building, tent or structure, or the removal or support of such tree, is necessary, or that any tank, well or excavation adjacent to any such way or public place should be fenced in such manner as to prevent danger arising to the public, or that any dangerous animal should be destroyed, confined or otherwise disposed of, such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, tent, structure, substance, tank, well or excavation, or owning or possessing such animal or tree, within a time to be fixed in the order, to remove such obstruction or nuisance; or to desist from carrying on, or to remove or regulate in such manner as may

be directed, such trade or occupation, or to remove such goods or merchandise, to regulate the keeping thereof in such manner as may be directed; or to prevent or stop the erection of; or to remove, repair or support, such building, tent or structure; or to remove or support such tree, or to alter the disposal of such substance; or to fence such tank, well or excavation, as the case may be; or to destroy, confine or dispose of such dangerous animal in the manner provided in the said order; or, if he objects so to do, to appear before court, at a time and place fixed in the order, and move to have the order set aside or modified in the manner provided. This section also explains term 'public place' which includes property belonging to the State, camping grounds and grounds left unoccupied for sanitary or procreative purposes. The arguments of the learned counsel for the petitioner that since the petitioner and others have established the wagon stands/addas on the privately owned places, therefore, proceedings in terms of section 133, Cr.P.C. cannot be initiated, is unsustainable, suffice it to observe "sic uteri two ut alienum non laedas"---Meaning and applicability---Public nuisance---Maxim means "so use your own property as not to injure the rights of another"---Use of private property may give rise to a public nuisance to those who are living in the same vicinity" also is the complete answer to the arguments of the learned counsel for the petitioner.

8. It may also not be difficult to visualize that the vehicles being plied on the roads from these illegal wagon stands are not only contributing to the road traffic congestion but their fuel emissions are also contributing to the atmospheric pollution, causing health hazards to public at large. The vehicles plying on the roads in the above noted circumstances by blowing horns are also an additional source of noise pollution, which cannot be overlooked. Moreover, vehicle plied illegally on the roads by their owners or drivers, from the illegally established wagon stands as observed herein above may also be enhancing the chances of road accidents. It may also be relevant to say that the persons carrying on their business by way of

establishing wagons stands illegally, are also evading the licence/permit fee and other relevant taxes which ought to have been paid in the national exchequer, to inject the funds in the national purse, for running the affairs of the State.

9. Undeniably, as noted above, on the application of respondent No.15, the learned Magistrate Chakwal after receiving reports from the quarter concerned viz: SHO City Chakwal dated 16.05.2018, District Traffic Officer, Chakwal dated 18.05.2018, Encroachment Inspector as well as Chief Officer, TMA, Chakwal dated 22.05.2018 and District Regional Transport Authority, Chakwal dated 22.05.2018, the crux whereof is that Besides General Bus Stand, Alliance Travels and Hamsafar Travels, only three out of total vehicle stands are duly authorized and no other bus stand/local vehicle stand in operation have been sanctioned by the concerned authority, passed initially the conditional order dated 30.05.2018, and after considering the objections of the petitioners and others, and affording an opportunity of hearing to them, passed the final order while issuing direction to all the concerned to remove all the illegal bus stands, rickshaw stands and other illegal encroachments made on public roads throughout the city, which were causing hurdles in traffic o flow and great deal of public nuisance.

The petitioner through instant application has since invoked the jurisdiction of this Court, therefore, it may also be relevant for better appreciation to quote the provision of Section 561-A hereunder:

> 561-A. Saving of inherent powers of High Court. Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of process of any court or otherwise to secure the ends of justice.

Let me reiterate, before concluding the above discussion that since petitioner and others had established the wagon stands in breach of their

inviolable obligation of conducting themselves in accordance with law and the Constitution, therefore, the inherent powers, vested in this Court under section 561-A, Cr.P.C, cannot be exercised in favour of the petitioner or any other person sailing in the boats constructed with the similar material. Providing a shield through exercise the inherent power in favour of the petitioner and others will not be securing the ends of justice by any stretch of imagination rather it would amount to encouraging the defaulting elements in fulfillment of their inviolable constitutional obligation. In this context, the reliance is placed upon cases reported as Shah Muhammad v. Addl. Sessions Judge, Bahawalpur and 5 others (PCr.LJ 1998 Lahore 1987), case titled Haji Abdul Aziz and 2 others v. Haji Dost Muhammad and 5 others (11999 PCr.LJ Lahore 31), case titled Haji Raz Muhammad and 9 others v. District Magistrate, Quetta (2000 PCr.LJ 1702), case titled Mrs. Anjum Irfan v. Lahore Development Authority through Director-General and others (PLD 2002 Lahore 555), case titled Watan Party and another v. Federation of Pakistan and others (PLD 2011 Supreme Court 997) and case titled Zafrullah Khan v. Federation of Pakistan (2018 SCMR 2001).

10. For the above noted reasons, the instant petition being patently devoid of any force stands dismissed.

11. Before parting with this order, it may not be out of place to observe that this Court being defender of duly enshrined fundamental rights of the citizens in the Constitution of the Islamic Republic of Pakistan 1973, cannot remain oblivious of the fact that the mushroom of illegally established wagon, rickshaw, taxi stands etc. by the unscrupulous elements, are a constant source of public nuisance which should have been removed by the concerned authorities at the earliest while exercising the powers vesting in them under the provisions of relevant laws.

SA/M-23/L **Petition dismissed.**

2020 P Cr. L J 1

[Lahore (Multan Bench)]

Before Anwaarul Haq Pannun and Sadiq Mahmud Khurram, JJ

ASIF KAMAL---Petitioner

Versus

The JUDGE ACCOUNTABILITY COURT, MULTAN and others---Respondents

Writ Petition No. 1646 of 2019, decided on 18th March, 2019.

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

----S. 344---Trial, postponement of---Scope---Remand with Physical Custody---Scope---Control of court over under-trial accused while remanding his physical custody primarily remains intact with object to proceed with trial of the case---Matter is only adjourned due to non-availability of evidence or any other reasonable cause but such remand cannot exceed period of fifteen days so that right of expeditious trial of an accused may not be prejudiced by way of postponement of proceedings for a longer period and transfer of his custody by Executive/Government abusing its power on any other extraneous consideration behind it.

(b) Interpretation of Constitution---

----Fundamental Rights--- Courts, duty of--- Superior courts are custodians and defenders of Fundamental Rights guaranteed by Constitution who are required and expected to interpret Constitutional provisions in such manner which is beneficial to citizens instead of interpreting them in a stringent way giving them a strict construction.

(c) Constitution of Pakistan---

----Art. 4---Protection of law---Prisoners, rights of---Prisoners being a special class subject, to special regime and special status are not entirely

denude of all Fundamental Rights which are inherent in the Constitution---Such rights of citizens circumscribed by penalty/sentence are a permanent concern of courts unless clearly, without any ambiguity, barred by law---Jurisdiction, unless is expressly barred, can be exercised by superior courts to safeguard Fundamental Rights of citizens---Courts are in general, are ultimate extension of rights and liberties of subject whatever his status and whoever attenuated those rights and liberties may be, as result of some punitive or other process---Essential characteristic right of a subject is that it carries with it a right of recourse to courts unless some statute decrees otherwise.

National Commission on Status of Women through Chairperson and others v. Government of Pakistan through Secretary Law and Justice and others PLD 2019 SC 218 rel.

(d) Prisoners Act (III of 1900)---

----Ss. 29 & 42---Pakistan Prisons Rules, 1978, Rr. 147, 148 & 149---Transfer of under-trial prisoner---Principle---Petitioner was an under-trial prisoner who was facing trials before three Accountability Courts situated in different districts---Petitioner sought permission from Trial Court at place 'M' to allow him to appear before other courts situated at places 'L' and 'R' but application was dismissed by Trial Court---Validity---Petitioner was domiciled at place 'L', his family members were also residing there where he was facing trial simultaneously in three references pending before Accountability Courts at places 'M', 'L' and 'R' respectively---Arrangement for production of petitioner before all three courts was to be made by Government through its relevant agencies---District 'L' was in middle of District 'R' and District 'M' with regard to their inter se distances, therefore, transfer of custody of petitioner from District jail at place 'M' to District jail at place 'L' would place none under any extra burden rather it ensured materialization of his admissible rights

and privileges under law---By shifting custody of petitioner at place 'L', it enabled him to maintain himself by way of receiving homemade food and also company of his near and dear ones to fulfil his desire to communicate with his children, being elder of family, right to which he was entitled to under relevant provision of law---Trial Court had passed order in question in slipshod manner without properly adhering to entire range of issues involved and without considering facts and circumstances of case in their true perspective---High Court set aside order in question as same lacked due application of judicial mind and was passed illegally, without lawful authority, was a result of failure in exercise of jurisdiction so vested in Trial Court particularly when jail authorities had no objection to transfer custody of petitioner from District jail at place 'M' to District jail at place 'L'---High Court directed authorities to transfer custody of prisoner from District Jail at place 'M' to District Jail at place 'L'--- Constitutional petition was allowed accordingly.

Muhammad Tufail Khokhar v. The Inspector-General of Prisons Punjab, Lahore and 3 others PLD 1980 Lah. 162; Zia-ud-Din v. Superintendent, Camp Jail, Lahore and another PLD 1976 Lah. 93; Shahabudin v. Home Secretary, Home Department Punjab Lahore and 4 others 2005 YLR 1902; Sheikh Rashid Ahmad v. The State PLD 1996 SC 168; Ali Muhammad v. The State 1974 PCr.LJ 249; Atta Ullah Maingal v. The State and others PLD 1965 (WP) Kar. 320; Zia ud Din's case PLD 1976 Lah. 93 and Malik Ghulam Jilani v. The Government of Pakistan through the Secretary, Ministry of Interior, Islamabad and 3 others PLD 1976 Lah. 38 ref.

Barrister Momin Malik for Petitioner.

Muhammad Akram Rao, Special Prosecutor NAB assisted by Shafqat Abbas Mighiana, Research Officer, Lahore High Court, Lahore (Research Centre).

Date of hearing: 18th March, 2019.

JUDGMENT

ANWAARUL HAQ PANNUN, J.---Pithily, the facts constituting background for institution of instant writ petition are that the petitioner, being an accused, is facing the trial, simultaneously in the below mentioned three NAB references:-

i) Accountability References No.03/2018 pending before Judge Accountability Court at Multan;

(ii) Accountability References No.71/2018 pending before Judge Accountability Court-III, Lahore.

(iii) Third case of similar nature filed by NAB authorities at Rawalpindi and the petitioner is under judicial remand of the learned Judge Accountability Court at Rawalpindi.

2. The case of the petitioner as portrayed, in the writ petition is to the effect that the petitioner, as a result of his alleged involvement as an accused in the reference mentioned at serial No.1, was arrested on 05.04.2018 and since then, he has been confined in District Jail, Multan. The petitioner is also allegedly involved in Accountability References mentioned at serial Nos.2 and 3 pending before the respective Accountability Courts at Rawalpindi and Lahore. The petitioner is legally bound to be produced before the said courts on the dates fixed for hearing. The Government machinery responsible to produce the petitioner in the courts referred above, has failed in doing so on various dates, causing delay consequently in his trial without any fault on his part. The petitioner is permanent resident of Lahore. As a result of his confinement at a distant place i.e., Multan, he is facing hardships in materializing his right of visitation with his family members including his unmarried daughter

and a son. The petitioner is also unable to avail of the legally permissible facilities like home-made food to which he is entailed to seek. The petitioner moved an application before the court/respondent No.1 seeking transfer of his custody from District Jail, Multan to Camp Jail at Lahore. It was dismissed vide order dated 14.11.2018. Once again, as a result of excessive hardships to the petitioner, his dependents since facing financial constraint moved an application to I.G. (P) and Secretary Home Department, Government of the Punjab for transfer of custody of the petitioner, as aforesaid from Multan to Lahore. The office of I.G. (P), accorded the requisite permission, subject to the concurrence of the concerned Accountability Court, for shifting the custody of the petitioner as prayed for, vide his letter dated 17.12.2018. Once again, the concerned authority moved to the learned court for seeking concurrence for transfer of the petitioner's custody as aforesaid which has been dismissed vide order impugned dated 03.01.2019. The petitioner, in the above background has made through instant petition the following prayer:-

a) The impugned orders passed by the respondent No.1 dated 14.11.2018 and 03.01.2019 may kindly be set aside and declared illegal, unlawful, void ab initio resultantly allowing the petitioner to be shifted to Jail in Lahore.

b) The concurrence as desired by the office of the Inspector General of Prisons through its letter dated 17.12.2018 may kindly be accorded, in the wider interest of justice.

3. In response to the notice, the learned respondent No.1 has submitted his parawise comments, the crux of which is that it is the duty of the jail authorities to produce the petitioner from jail. In case the petitioner's custody is shifted to Camp Jail, Lahore, the expenses will have to be borne out of the exchequer. Further, that in the subject Reference Hon'ble Supreme Court of Pakistan vide order dated 14.02.2018 in CPLA

No.5133-34 passed a direction to decide the case within three months. However, Reference could not be decided within the stipulated period because when the direction was received, no reference was even pending in this court. Reference was submitted on 15.02.2018, thereafter, charge was framed on 27.03.2018. During shifting of Asif Kamal, petitioner/accused, to Lahore by the NAB for investigation in another Reference and for investigation by the NAB at Rawalpindi, the case in hand remained pending. Ahsan Rafique, accused, was arrested later on. Supplementary Reference to his extent was awaited which was received on 10.12.2018. In the meanwhile, request was sent to the Hon'ble Supreme Court of Pakistan for extension of time for disposal of the Reference. Then Humayun Nabi Jan, accused did not appear and his non-bailable warrants of arrest were issued. On 02.11.2018, Ahsan Refique and Asif Kamal, accused were not produced from Jail due to Law and Order situation. On the same date, learned defence counsel remained busy in the Hon'ble High Court. Humayun Nabi Jan, accused, after necessary proceedings was declared PO vide order dated 26.11.2018. In view of supplementary reference, amended charge was framed on 17.12.2018 against the accused and on 07.02.2019, examination in chief of PW-1 has been recorded and on the request of learned defence counsel, case has been adjourned to 13.02.2019 for cross-examination on PW-1.

4. While reiterating his contentions, based on the grounds urged in the writ petition, learned counsel for the petitioner while relying upon the case-law reported as Muhammad Tufail Khokhar v. The Inspector-General of Prisons Punjab, Lahore and 3 others (PLD 1980 Lahore 162), Zia-ud-Din v. Superintendent, Camp Jail, Lahore and another (PLD 1976 Lahore 93) and Shahabudin v Home Secretary, Home Department Punjab Lahore and 4 others (2005 YLR 1902) submits that due to the incarceration of the petitioner at Multan, excessive hardships have accrued to the petitioner's dependents i.e., un-married daughter and a son.

The petitioner has failed to avail the right of visitation due to financial constraints. The petitioner is also unable to avail the facility of home-made food etc. The petitioner may, while setting aside the impugned orders, be ordered to be shifted to Camp Jail at Lahore. He further submits, that since the petitioner is also required to be produced before Accountability Courts at Lahore and Rawalpindi, besides court at Multan, therefore, Lahore being in the midth of both the courts, the shifting of the petitioner is more feasible and quite in the interest of justice.

5. On the other hand, it has been maintained by the learned Special Prosecutor NAB that since the petitioner has been remanded by the court to jail under section 344, Cr.P.C., therefore, unless the trial is completed, the jail authorities, without the concurrence of court, have no power to shift the petitioner, to any other place from District Jail, Multan. He has reiterated the contents of the reply and prayed for dismissal of the writ petition.

6. The arguments advanced by the learned counsel for the parties have been heard and record perused.

7. For the sake of reference and convenience, it is pointed out that the relevant legal instruments, in force, to establish and regulate the affairs of the prisons and the prisoners respectively, are;

(i)	THE PRISONS ACT, 1894 (ACT IX OF 1894)	(ii)	THE PRISONERS ACT, 1900 (ACT III OF 1900)
(iii)	THE PRISON RULES 1978	(iv)	Rules and Orders of the Lahore High Court, Lahore, Volume II, Chapter 27, Judicial and Police Lock-ups.

{To be called as The Prisons Act, The Prisoners Act and Prison Rules and High Court Rules hereinafter)

According to Oxford Advanced Learner's Dictionary, word 'prison' means:-

"a building where people are kept as a punishment for a crime they have committed, or while they are waiting for trial."

As per Black's Law Dictionary, meanings of word 'jail' have been provided as under:-

"A local government's detention center where persons awaiting trial or those convicted of misdemeanors are confined."

8. In order to advance the discussion over the subject of {the bearing of concurrence of court for transfer of custody of an under trial prisoner from one jail to another} progressively moving towards its conclusion, some excerpts out of the related provisions, of the above mentioned statutes, shall be quoted, at appropriate places. The term jail or prison has also been defined under above mentioned statutes. Under subsection (1) of section 3 of The Prisons Act, 1894 is reproduced hereunder:-

Section 3(1) of The Act provides the meaning of word 'Prison' as under:-

"Prison" means any jail or place used permanently or temporarily under the general or special orders of a Provincial Government for the detention of prisoners, and includes all lands and buildings appurtenant thereto, but does not include-

(a) any place for the confinement of prisoners who are exclusively in the custody of the police;

(b) any place specially appointed by the Provincial Government under section 541 of the Code of Criminal Procedure, 1898; or

(c) any place which has been declared by the Provincial Government by general or special order to be a subsidiary jail."

Similarly, under section 2 of The Prisoners Act, 1900, the term 'Court' and 'Prison' have been defined as under:-

(a) "Court" includes a Corner and any officer lawfully exercising civil, criminal or revenue jurisdiction; and

(b) "Prison" includes any place which has been declared by the (provincial Government), by general or special order to be a subsidiary jail.

9. From the above definitions, it spells out that both the words i.e. 'prison' and 'jail' can interchangeably be used to denote and describe a building, under general or special order of the Provincial Government where people are detained either as a punishment for a crime, they have committed or where they are housed waiting for their trial. There may be persons detained in it, who, although have not committed any offence but detained under any order of some authority competent to pass such order.

(i) THE PRISONS ACT, 1894 (ACT IX OF 1894)

An Act to amend the law relating to Prisons.

Preamble: "Whereas it is expedient to amend the law relating to prisons in Pakistan and to provide Rules for the regulation of such prisons."

59. Power to make rules .The Provincial Government may make rules consistent with this Act .

(1) .

(11) as to the food, bedding and clothing of criminal prisoners and of civil prisoners maintained otherwise than at their own cost;

(17) for the classification and the separation of prisoners;

(28) ..

(ii) THE PRISONERS ACT, 1900 (ACT III OF 1900)

"An Act to consolidate the law relating to PRISONERS CONFINED BY ORDER OF A COURT"

Preamble: "WHEREAS it is expedient to consolidate the law relating to prisoners confined by order of a Court:

THE PRISON RULES 59

Power to make Rules under this Part---(1) The (Provincial Government) may make rules:

(a) For regulating the escort of prisoners to and from Court in which their attendance is required and for their custody during the period of such attendance.

(b) ..

(c)

(iii) THE PRISON RULES, 1978

CHAPTER 15

Undertrial Prisoners

(Rules 365 to 399)

10. It may be observed that both the instruments i.e. The Prisons Act, 1894 and The Prisoners Act, 1900 were enacted/legislated during the colonial rule. These pieces of legislation like many other laws have been adopted. It may also be mentioned that the perusal of preamble of the Prisons Act would shed light on the objectives behind its enactment. It clearly says that the laws relating to prisons have been amended through this Act, to provide rules for the regulation of such prisons. Besides various other provisions meant to regulate the affairs of the prisons,

through section 59 of ibid the rule making powers have been vested in the Provincial Government. Similarly, the preamble of The Prisoners Act 1900 sets it out that through this Act, the laws relating to prisoners confined by order of the court have been consolidated. It may also be of interest and relevant to say that the power for rule making had also been delegated to the Provincial Government. The Provincial Government has framed, in pursuance of delegated powers, the Prisons Rules, 1978 to maintain and regulate the affairs of the prisons and the prisoners besides their ancillary matters.

11. After describing hereinabove the dictionary meanings and legal definitions of the term jail or prison under the relevant statutes, which means a building or place used permanently or temporarily under general or special order of Provincial Government for the detention of the persons required to be detained by operation of law. It may be relevant to state, under Pakistan Prisons Rules, 1978, the classification of the prisons, into four kinds, is given below:-

Classification of Prisons, Pakistan Prisons Rule, 1976

Rule 4. Prisons shall be classified into four kinds namely, Central Prisons, Special Prisons, District Prisons and Sub-Jails.

CENTRAL PRISONS.

Rule 5. (i) Central Prisons shall have accommodation ordinarily for more than 1,000 prisoners irrespective of the length of sentences. There shall be a Central Prison in each division of a Province.

(ii) The Provincial Government may, in its discretion, declare any Special Prison or District Prison to be a Central Prison.

SPECIAL PRISONS.

Rule 6 (i) The provincial Government may, from time to time, declare any prison to be Special Prison or establish a Special Prison at any place.

(ii) No prison shall be deemed to be a special Prison, within the meaning of these rules, unless, it has been declared to be so or established as such under clause (i).

(iii) Women's Prisons, Open Prisons, Borstal Institutions and Juvenile Training Centers shall be deemed to be special Prisons under this Rule.

DISTRICT PRISONS.

Rule 7. All Prisons, other than Central Prisons or Special Prisons shall be deemed to be District Prisons.

CLASSES OF DISTRICT PRISONS.

Rule 8 (i) There shall be three classes of District Prisons:-

First class, having accommodation ordinarily for 500 prisoners or more with sentences upto 5 years;

Second class, having accommodation ordinarily for 300 prisoners or more but less than 500 with sentences up to 3 years; and

Third class, having accommodation ordinarily for less than 300 prisoners with sentences up to one year;

(ii) The class to which any District Prison shall be deemed, during any year, to belong and the term of sentence for confinement in each prison shall be determined by the Inspector-General in the month of July in each year, in accordance with the average number of prisoners confined in such prison during the preceding year ending on the thirtieth of June.

CENTRAL PRISON MAY ALSO BE A DISTRICT PRISON.

Rule 9. The Provincial Government may declare any Central Prison to be for all or any purposes, also a District Prison.

12. It may also be relevant to state that the prisoners have also been divided into various classes. This classification is important for the reason that every class of prisoners under the law and rules had been placed under some restrictions and had also been allowed certain privileges. According to subsections (2), (3) and (4) of section 3 of The Prisons Act, 1894, following are the main kinds of prisoners:-

Section 3(2) "criminal prisoner" means any prisoner duly committed to custody under the writ, warrant or order of any Court or authority exercising criminal jurisdiction, or any order of a Court-martial;

Section 3(3) "convicted criminal prisoner" means any criminal prisoner under sentence of a Court or Court-martial, and includes a person detained in prison under the provisions of Chapter VIII of the Code of Criminal Procedure, 1898, or under the Prisoners Act, 1871;

Section 3(4) "civil prisoner" means any prisoner who is not a criminal prisoner;

Rule 224 of Prison Rule, 1978 also provides following types of prisoners:-

(i) a criminal prisoner, which includes

(a) A convicted prisoner, and

(b) An un-convicted or under-trial prisoner:

(ii) A civil prisoner; or

(iii) A state prisoner detained under Regulation III of 1818, or a person ordered to be detained in prison without trial under any law relating to the detention of such person.

Rule 225 further classifies convicted prisoners as under: (a) superior class; (b) ordinary class; and (c) political class. Superior class is further classified into A and B class prisoners. Ordinary class comprises of prisoners other than superior class. Under said Rule Political class comprises of prisoners who commit crimes not for personal gain but for political motives. This class is not criminal and does not require reformative or correctional treatment. Rules also classify convicted prisoners according to quantum of their sentences and also as casual and habitual.

Similarly Rule 229 provides classification of under trial prisoners such as

(a) Committed to Sessions

(b) Committed to other Courts

13. Let's revert back to examine that how and under what circumstances, a person is sent to jail or prison. In order to explain the legal position, the following legal provisions are relevant; hence the same are being reproduced in a chronology. Article 10 of the Constitution of Islamic Republic of Pakistan, 1973 is reproduced hereunder:-

Article: 10 of the Constitution of Islamic Republic of Pakistan, 1973 provides Safeguards as to arrest and detention.

(1) .

(2) Every person who is arrested and detained in custody shall be produced before a Magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the Court of the nearest Magistrate, and no

such person shall be detained in custody beyond the said period without the authority of a Magistrate.

Section 61, Cr.P.C. No police-officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

A Magistrate to whom an accused is forwarded under section 167, Cr.P.C., whether or not he has the jurisdiction to try the case, authorize his detention in such custody as he deems fit for a term not exceeding 15 days in whole.

Section 167 of the Code of Criminal Procedure, 1898 reads:

167. Procedure when investigation cannot be completed in twenty four hours: (1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty four hours fixed by section 61, and there are grounds for believing that the accusation or information is well founded, the officer incharge of the police-station or the police-officer making the investigation if he is not below the rank of the sub-inspector, shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has no jurisdiction to try the case, from time to time, authorize the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole. If he has no jurisdiction to try the case or

[send] it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that no Magistrate of the Third Class, and no Magistrate of the Second Class not specially empowered in this behalf by the Provincial Government shall authorise detention in the custody of the police.

(3) A Magistrate authorizing under this section detention in the custody of the police shall record his reasons for so doing.

(4) The Magistrate, giving such order shall forward copy of his order, with his reasons for making it, to the Sessions Judge.

(5) Notwithstanding anything contained in sections 60 and 61 or hereinbefore to the contrary, where the accused forwarded under subsection (2) is a female, the Magistrate shall not, except in the cases involving Qatl or Dacoity supported by reasons to be recorded in writing, authorise the detention of the accused in police custody, and the police officer making an investigation shall interrogate the accused referred to in subsection (1) in the prison in the presence of an officer of jail and a female police officer.

(6) The officer in-charge of the prison shall make appropriate arrangements the admission of the investigating police officer into the prison for the purpose of interrogating the accused.

(7) If for the purpose of investigation, it is necessary that the accused referred to in subsection (1) be taken out of the prison, the officer incharge of the police station or the police officer making investigation, not below the rank of sub-inspector, shall apply to the Magistrate in that behalf and the Magistrate may, for the reasons to be recorded in writing, permit taking of accused out of

the prison in the company of a female police officer appointed by the Magistrate:

Provided that the accused shall not be kept out of the prison while in the custody of the police between sunset and sunrise."

Section 344 of Code of Criminal Procedure, 1998 is regarding the postponement of proceedings by the courts during trial of a case, which reads as under:-

"Power to postpone or adjourn proceedings. (1) If, from the absence of a witness or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of or adjourn any inquiry or trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefore from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

Remand. Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time.

(2) Every order made under this section by a Court other than a High Court shall be in writing signed by the Presiding Judge or Magistrate.

Let us now draw a synthesis from the above quoted provisions.

14. Arrest: A police officer or other person making an arrest shall actually touch or confine the body of the person to be arrested unless there be a submission to the custody either by word or action. It may also be pointed out that Article 10(2) of the Constitution of Islamic Republic of Pakistan safeguards to ensure that every person who is arrested and detained in custody shall be produced before a Magistrate within a period

of 24 hours of such arrest, excluding the time necessary for journey from the place of arrest, to the court of nearest Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate. Moreover, it may be observed that a police officer making an arrest without warrant, shall without unnecessary delay, subject to the provisions relating to bail, or send the person arrested before a Magistrate having jurisdiction in case or before the court incharge of a police station. No police officer as aforesaid thereafter shall detain in custody an arrested person without warrant for a longer period than under all circumstances of the case, which is reasonable and such period shall not in absence of any special order of a Magistrate under section 167, Cr.P.C. exceeds 24 hours exclusive of the time necessary for journey from the place of arrest, to the Magistrate's court. Thereafter, it may further be pointed out that in case of a person required in a criminal case for the purpose of investigation, when produced before the Magistrate under section 167, Cr.P.C. and the Magistrate is of the opinion that the investigation cannot be completed within a period of 24 hours, and there are grounds for believing that accusation or information is well-founded, the incharge of the police station or the police officer making investigation, not below the rank of Sub-Inspector, shall forthwith transmit with the nearest Magistrate, a copy of the entries in diary hereinafter prescribed relating to the case and shall at the same time forward such accused to the Magistrate. The Magistrate will authorize the retention of physical custody of the accused for further investigation. In nutshell, an accused has to be produced before a Magistrate within 24 hours of his arrest either for his physical remand or for his detention in judicial lock up. No person shall be detained by any investigating police officer in custody after the expiry of 24 hours fixed by section 61, Cr.P.C. unless authorized by any Magistrate under section 167, Cr.P.C. The provisions in fact are meant to ensure that lives, liberties and honour of

citizens are not thrown in the hands of a man in uniform who unbridled by any judicial restraint is likely to loose balance, leading to misery, tyranny and oppression. Sections 167 and 344, Cr.P.C. when put in juxtaposition with each other, it appears that while section 167, Cr.P.C. contemplates, remand during investigation and section 344, Cr.P.C. on the other hand, contemplates remand after initiation of proceedings in court. Needless to say, that the judicial proceedings cannot commence until and unless a report under section 173, Cr.P.C. or complaint is placed before a court. Section 344, Cr.P.C. postulates that no Magistrate shall remand an accused person to custody for a term exceeding 15 days at a time and if sufficient evidence has been obtained to raise suspicion, that accused might have committed an offence and it appears likely that further evidence may be obtained by a remand. Under the above provisions, the Code inter alia empowers the court after taking cognizance of an offence or commencement of trial, to remand the accused in judicial custody in cases where the court finds it necessarily to postpone the commencement of trial or inquiry. The rationale underlying both these provisions is that the continued detention of the prisoner in jail during the trial or inquiry is legal and valid only under the authority of the court/Magistrate before whom the accused is to be produced or before whom he is being tried. An undertrial prisoner remains in custody by reason of such order of remand passed by the concerned court and such remand is by a warrant addressed to the authority who is to hold him in custody. The remand orders are invariably addressed to the Superintendent of Jail where the under trials are detained till their production before the court on the date fixed for that purpose. The prison where the undertrial prisoner is detained is thus a prison identified by the competent court either in terms of section 167, Cr.P.C. or section 344, Cr.P.C. It is reasonable because for the remand where a case is exclusively triable by a court of session till the sending of the case to the court of session. It is the court of Magistrate who has the

power to postpone or adjourn the proceedings and remand the accused in custody under section 344, Cr.P.C. and the court of session would not have any power to adjourn or postpone the proceedings and remand the accused to judicial custody as at that stage the said court shall not be deemed seized of the case. A court of session shall pass an order under section 344, Cr.P.C. after receiving a complaint or a report under section 173, Cr.P.C. for trial. A close scrutiny of section 344 of Cr.P.C., makes evident the rationale behind it that as to why the physical custody of an under trial prisoner cannot be transferred, violating exigency contained in the writ, warrant or the order committing accused in prison. It says that if from the absence of a witness or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of or adjournment any inquiry or trial, the court may as it thinks fit, by order in writing stating the reasons thereof from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it consider reasonable and may by a warrant remand the accused if in custody provided that no Magistrate shall remand an accused person to the custody under this section for a term exceeding 15 days at a time. It evinces that control of the court over the under trial accused while remanding his physical custody primarily remains intact, with the object to proceed with the trial of the case. The matter is only adjourned due to non-availability of evidence or any other reasonable cause but such remand cannot exceed the period of 15 days, so that the right of expeditious trial of an accused may not be prejudiced, by way of postponement of proceedings for a longer period and transfer of his custody by the executive/Government abusing its power on any other extraneous consideration behind it. The accused needs a reasonable time for preparing his defence, unless his personal attendance is dispensed with, the accused is required to appear in person in the court for facing trial. The rationale behind commencement of trial after a period of 7 days of supplying the copies of statements of

the witnesses to the accused cannot be overlooked in this respect. Under Article 10 of the Constitution of the Islamic Republic of Pakistan, 1973 the accused has been bestowed with a right to engage to defend himself a counsel of his own choice. The executives have been bound down to obey the terms of the warrant, by producing the accused in the court.

15. The above discussion now requires browsing of the relevant provisions of law regulating the mode of admission of a prisoner into jail on the order of the court may be reproduced:-

Section 3 of The prisoners Act, 1900 requires:-

"Officers incharge of prisons to detain person duly committed to their custody.-The officer incharge of a prison shall receive and detain all persons duly committed to his custody, under this act or otherwise, by any Court, according to the exigency of any writ, warrant or order by which such person has been committed, or until such person is discharged or removed in due course of law."

and

Section 4 of The prisoners Act, 1900 provides as under:-

"Officers incharge of prisons to return writs, etc., after execution or discharge.-the officer incharge of a prison shall forthwith, after the execution of every such writ, order or warrant as aforesaid other than a warrant of commitment for trial, or after the discharge of the person committed thereby, return such writ, order to warrant to the Court by which the same was issued or made, together with a certificate, endorsed thereon and signed by him, showing how the same has been executed, or why the person committed thereby has been discharged from custody before the execution thereof."

{EXIGENCY according to Oxford Advanced Learner's Dictionary, word 'Exigency' means an urgent need or demand. In "Law Terms

and Phrases", words 'Writ, Warrant and Order' have been defined as "Writ". A judicial process by which any one is summoned to do a certain act, e.g., a writ of habeas corpus, to produce a minor before the court." "Warrant". A precept or notice under the seal and signature of a Court directed to a person to arrest a criminal and bring him before it (the Court) for being dealt with according to law. Warrant is also used for all kinds of processes of civil courts to attach properties and to arrest judgment-debtors." Order. Mandate, command."}

Chapter 3, of the Pakistan Prisoners Rules, 1978 in the light of sections 24 to 26 of the Prisons Act, 1894, contain certain directions about the admission, discharge and removal of prisoners from one prison to another. Moreover, sections 3, 15 and 16 of the Prisoners Act, 1900 empower officer incharge of prisons to give effect to any sentence, order or warrant for detention of persons duly committed to their custody. For ready reference, a relevant rule No.14 is reproduced hereunder:-

Rule 14.---No prisoner shall be admitted into any prison except under a lawful warrant or order of commitment issued by a competent Court addressed to the Superintendent of Prisons.

16. The perusal of law on the subject goes on to show that, a person accused of commission of an offence irrespective of the seriousness or severity of the allegation, until found guilty is presumed to be innocent, therefore, an undertrial prisoner is treated as a different class of persons, as compared to those who have been found guilty of the commission of an offence, thus known as convicts. This distinction is not only on the basis of their having been found and yet to be found guilty only rather there are certain other reasons behind it. An accused till the time, he remains undertrial, his personal appearance before the court unless it is dispensed with, is required by law. It may, however, be observed that on recording

of conviction an accused, loses his initial presumption of innocence. His sentence may be suspended by a competent court. However, the conviction, i.e. the verdict of found guilty can only be set aside or removed by a superior court, exercising its appellate or revisional jurisdiction. Confining ourselves within the prescient of the issue under discussion, suffice it to say that on the termination of trial proceedings, in case of conviction, de jure control of the court remanding an accused to prison also comes to an end. The court after passing the judgment becomes functus officio of the case. Thus, the custody of convict is legally deemed to have been handed over finally to the Government for serving out the sentence imposed upon him. Thenceforth, the passing of a judgment of the conviction, the Government becomes exclusive custodian of the convict. All the matters relating to a convict are then to be regulated under the provisions of law applicable to him in prisons as a convict. In nutshell, the de jure control of the trial court over the custody of an undertrial prisoner comes to an end. The Government subject to law regulating the proceedings of the appellate court through jail authorities becomes de jure and de facto custodian of the convict to deal with him in accordance with law. The Rule 161 dealing with a convict/prisoner, under The Prisons Rules came under consideration of the Hon'ble Supreme Court of Pakistan in the case of Sheikh Rashid Ahmad v. The State reported in (PLD 1996 SC 168) wherein it was held that,

(b) Rules for the Superintendence and

Management of Prisons in Pakistan-

----R. 161---Transfer of prisoner from the prison to which he was in the first instance committed---Rule 161, Prison Rules requires that prisoners shall not ordinarily be transferred from the prison to which they were in the first instance committed until the result of the appeal is known or if appeal is not preferred, the time for

appealing has elapsed---In absence of such material, order passed by the concerned Authorities transferring the prisoner from the place where he was in the first instance committed, to another place was not bona fide.

Purpose of the prisons:

It may be observed that an accused involved in a crime, if not released on bail, has to be detained in a prison. An accused committing a public wrong which constitutes an offence against State and society both, has to be put to trial by the State as a part of its duty. There are inter alia, primarily three functions of prisons: CUSTODY, CARE and REMEDIAL or CORRECTIVE. In this regard, Jail Manual was drafted with the object to hold the under-trial prisoners or confining the convicted persons at prisons. The prime purpose of prisons is certainly custodial but the purpose of custody has to take care of prisoner and apply corrective measures. The moment an accused enters into a prison, he loses his contact with outside world and he has to face an entirely changed atmosphere. An unfriendly atmosphere prevails all around; hence the strong and lofty walls, fortified with concrete watch towers, and the steel barracks all around are a constant source of dejection for him. An unfamiliar regime controls his conduct. Disowned by society and unclaimed by friends, the prisoner breaks in a discarded barrack for a stipulated period.

On the other hand the prisons are of course necessary to save the society from the wrong doings of nasty persons. There are other considerations as well for maintaining prison system but that does not mean that human beings should not be saved or he be left alone to ruin himself. He may also not be left abandoned as a total wreck. At the end of his prisoning term, a prisoner must return

home with the realization that human life is a Divine gift which has to be honoured because it has a meaning and a purpose.

RIGHTS OF PRISONERS PROTECTED UNDER PRISON LAWS.

Civilized societies are those which respect and honour human freedoms/rights. This is why prison discipline in modern world has undergone healthy amendments and legal instruments at the International level have been ratified to safeguard the rights of imprisoned lot. The relevant provisions of The Prisons Act, 1894 and the Pakistan Prisons Rules, 1978 are reproduced hereunder:-

Section 31 of The Prisons Act, 1894

31. Maintenance of certain prisoners from private sources.---A civil prisoner or an unconvicted criminal prisoner shall be permitted to maintain himself, and to purchase, or receive from private sources at proper hours, food, clothing, bedding or other necessaries, but subject to examination and to such rules as may be approved by the Director of Prisons.

Section 40 The Prisons Act, 1894

40. Visits to civil and unconvicted criminal prisoners.---Due provision shall be made for the admission, at proper times and under proper restrictions, into every prison of persons with whom civil or unconvicted criminal prisoners may desire to communicate, care being taken that so far as may be consistent with the interests of justice, prisoners under trial may see their duly qualified legal advisers without the presence of any other person.

Rule 375. An under-trial prisoner may be permitted by the Superintendent to purchase or receive from private sources, food, clothing, bedding and other necessaries subject to the following restrictions:-

(a) The articles shall be examined by the Assistant Superintendent and the Medical Officer before being introduced into prison.

(b) Nothing that may be considered injurious to health or unnecessary or unsuitable by the Superintendent shall be allowed. Intoxicating drugs and spirituous liquors are prohibited.

(c) In case of zany epidemic disease being prevalent in the city, food from private souse may be stopped temporarily on the advice of the Medical Officer.

Right or privilege	Relevant Rule of the Pakistan Prison Rules, 1978
Maintenance from private sources	375
Maintenance of private accounts	377
Permission to cook his own food	378
Provision of Books, newspapers etc.	387

The survey of above provisions and rules makes it abundantly vivid that subject to rules for examination of articles approved by the Director of Prisons, a civil or unconvicted prisoner shall be permitted to maintain himself and to purchase or receive from private sources at proper hours, food, clothing, bedding or other necessaries. Section 40 ibid further states that due provisions shall be made for the admission at proper times and under proper restrictions into every prison of person with whom civil or unconvicted prisoner may desire to communicate. Further that the interest of justice may not be mutilated in making such arrangements. Even the undertrial prisoners have also been allowed to see their duly qualified legal advisor without presence of any other person. It may be said that even the scrutiny of rules also admits that the undertrial prisoner may be

dealt with as nearly as possible with an ordinary man. Due care about his health, has specifically been ordered to be taken of. Due regards has also been shown towards grant of opportunities for fair trial by engaging a counsel of their choice by the undertrial prisoners while maintaining the secrecy and privacy of the privileged communication between the accused and his counsel as guaranteed under the constitution and the law. The facility which has been extended to an undertrial prisoner, as aforementioned, are of a vital importance for a living person. The undertrial prisoner has also been allowed to maintain his private account. He can also be provided the books and newspaper etc for his studies. The undertrial prisoner should not be placed under such circumstances rendering him to be in isolation.

17. Let us now examine the provision of law relating to transfer of prisoners; Section 29 of the said Act (Prisoners Act, 1900), is regarding removal of prisoners which provides as under:-

"Removal of prisoners.---(1) The (provincial Government) may, by general or special order, provide for the removal of any prisoner confined in a prison---

(a) Under sentence of death, or

(b) under, or in lieu of , a sentence of imprisonment, or

(c) in default of payment of a fine,

(d) in default of giving security for keeping the peace or for maintaining good behavior

(e) (convicted criminal prisoners).

{Sections 29, 37 and 39 of the Prisoners Act, 1900 and Chapter-7 of the Pakistan Prison Rules, 1978 specifically provide about the transfer of prisoners from one jail to the other. In original section 29 of the Prisoners Act, 1900 was quiet about transfer of under-

trial prisoners either within or outside the province. Subsequently vide Notification No: Prs. I (M) 1572, dated 6th July, 1977 clause (e) was added by the Punjab Government. While issuing this notification, the Government of Punjab allegedly exercised powers Under Section 60 of the Prisons Act, 1894, which had already been repealed through adaption Order, 1937. In this regard in case titled, "Muhammad Tufail Khokhar v. The Inspector General of Prisons, Punjab" Cited as PLD 1980 Lahore 162, this Court held as under:-

"9. Again, there is no power vesting with the Inspector-General of Prisons under section 29 of the Prisoners Act to transfer any unconvicted prisoner from one prison to the other, as even the above said notification of the Governor, issued under a non-existent provision of law, conferred that power only on the Provincial Government. Going further, one may conclude that the above notification, even if it had been made under a valid power, could not and would not have been intended or contemplated to take away the power conferred by section 344 of the Code of Criminal Procedure. Thus the legal situation at the time of the decision of the Ziauddin's case remains unchanged and I respectfully agree with the view taken therein. Consequently, the orders of transfer, in case of both the prisoners, are without lawful authority and are, therefore, of no legal effect."}

POWER OF INSPECTOR GENERAL TO TRANSFER PRISONERS.

Rule 147.-The transfer of prisoners from one prison to another within the Province shall be directed by the Inspector General. It may be stated that in the case of Dr. Muhammad Aslam Khaki v. The State and others (PLD 2010 Federal Shariat Court 1) wherein it is observed that,

(d) Pakistan Prisons Rules, 1978---

----Rr. 147, 148 & 149---Prisoners Act (III of 1900), Ss.29 & 42---Constitution of Pakistan (1973), Art. 203-D---Transferring certain categories of prisoners within and beyond the territorial limits of a Province and from one jail to another jail within the Province---Vires of Rr.147, 148 & 149 Pakistan Prisons Rules, 1978 and Ss.29 & 42, Prisoners Act, 1900 on the touchstone of Injunctions of Islam---Rules 147, 148 & 149 of the Pakistan Prisons Rules, 1978 and S. 29 of Prisoners Act, 1900 are repugnant to Injunction of Islam---Extent of repugnancy and exceptions---Principles.

18. A plain reading of section 3 of Prisoners Act, 1900 read with Rule 14 of Pakistan Prisons Rules, 1978 would make it clear that when an under trial prisoner is committed to a prison, he has to be received by the officer incharge in accordance with the warrant issued by the court. Such officer is then to detain that person in the prison till he is discharged or removed in due course of law. The power of Provincial Government for the removal of any prisoner confined in a prison is laid down in section 29 but that pourer is exercisable only in cases mentioned in class (a) to (d) of subsection (1) i.e. when the prisoner is under sentence to death or is confined in lieu of sentence of imprisonment or transportation or in default of payment of fine or in default of removing security for keeping the peace or for maintaining good behaviour. Considering, that the power of the Provincial Government for providing for the removal of any prisoners confined in any prison is limited under section 29 to the cases referred to above, it must follow that no such power was intended to be conferred upon that Government with regard to removal of an under trial prisoners. Such prisoner is to be governed by section 3 of the Act (The Prisoners Act, 1900) under which the officer incharge of the prison, according to the exigency, warrant or order of the court concerned,

therefore, when the Magistrate adjourns a case under section 344 and commits under trial accused to prison or specify the date for appearance in court, the prison authority have to comply with that order and detained the accused in that prison and produced him from there into court according to the warrant of commitment. The above was held in the case of Ali Muhammad v. The State reported as (1974 PCr.LJ 249 Karachi). This view was based upon in the case titled Atta Ullah Maingal v. The State and others (PLD 1965 (WP) Karachi 320). It has further been noted in Zia ud Din's case reported as (PLD 1976 Lahore 93) that an under trial prisoner committed to a custody of an officer incharge of a prison by a warrant is to be kept by the latter because of the obligation cast upon him by section 3 of the Prisoners Act, 1900 unless the prisoner is discharged or removed in due course of law. It is quiet plain that this discharge or removal come about except an order of a court because no executive authority can countermand or vary an order of a court unless there is a express legislative authority. No enactment has bestowed such a power regarding unconvicted persons on the Provincial Government or for that matter an Inspector General of Prison, by implication. Such a power can neither be claimed nor contested to interrogate the authority of court established by law.

19. We have examined that no specific provisions exits on the statute books to permit expressly the Government to transfer an undertrial prisoner without the permission or concurrence of the court which had committed him to a specific prison. However, we have also noticed that provisions in Chapter IX of The Prisoners Act, 1900 (Sections 35 to 43) allow the courts, other than the court remanding the custody of an undertrial prisoner to a prison, to requisition his custody, either for recording his evidence as a witness or his facing of a charge for an offence, pending before them. For facility of reference, the relevant

provisions of Chapter IX of Prisoners Act, 1900 are expounded hereunder:

Relevant Provisions of Chapter IX (Provisions for Requiring the Attendance of Prisoners and obtaining their evidence) Prisoners Act, 1900	Summary of the Provision
Section 35 Subject to the provisions of section 39, any Civil Court may, if it thinks that the evidence of any person confined in any prison within the local limits of its appellate jurisdiction, if it is a High Court, or, if it is not a High Court, then within the local limits of the appellate jurisdiction of the High Court to which it is subordinate, is material in any matter pending before it, make any order in the form set forth in the first schedule, direct to the officer in charge of the prison.	This section empowers a Civil Court to summon a prisoner within the local limits of its appellate jurisdiction to get record the evidence.
Section 36 reads as under:- (a) Where an order under section 35 is made in any civil matter pending-in a Court subordinate to the District Judge, or	Conditions and procedure has been laid down for the Civil Court to pass the order under section 35. Order under Section 35 is always conditional to the scrutiny and countersigning by the concerned District Judge.
(b) in a Court of Small Causes it shall	

not be forwarded to the officer to whom it is directed, or acted upon by him, until it has been submitted to, and countersigned by,-	
(i) the District Judge to which the Court is subordinate, or	
(ii) the District Judge within the local limits of whose jurisdiction the Court of Small Causes is situate.	
(2) Every order submitted to the District Judge under subsection (1) shall be accompanied by a statement, under the hand of the Judge of the subordinate Court or Court of Small Causes, as the case may be, of the facts which in his opinion render the order necessary, and the District Judge may, after considering such statement, decline to countersign the order.	
Section 37 Subject to the provisions of Section 39, any Criminal Court may, if it thinks that the evidence of any person confined in any prison within the local limits of its appellate jurisdiction, if it is a High Court, or, if it is not a High Court, then within the local limits of the appellate jurisdiction of the High Court	This section empowers a Criminal Court to summon a prisoner within the local limits of its appellate jurisdiction to get record the evidence or for proceedings in trial of a case, in which such person has been charged against. Here again

to which it is subordinate, is material in any matter pending before it, or if a charge of an offence against such person is made or pending, make an order in the form set forth in the first or second schedule, as the case may be, directed to the officer incharge of the prison: Provided that if such Criminal Court is inferior to the Court of a Magistrate of the first class, the order shall be submitted to, and countersigned by, the Sessions Judge to whose Court such Criminal Court is subordinate or within the local limits of whose jurisdiction such Criminal Court is situated.	such an order is conditional to the scrutiny and countersigning by the concerned Sessions Judge. Section 43 of this Act makes it mandatory for the prison incharge to execute such an order.
Section 38 Where any person, for whose attendance an order as in this Part provided is made, is confined in any district other than that in which the Court making or countersigning the order is situate, the order shall be sent by the Court by which it is made or countersigned to the Sessions Judge or Magistrate within the local limits of whose jurisdiction the person is confined, and that Court shall cause it to be delivered to the officer incharge of the prison in which the person is	Where any person, for whose attendance an order is made, is confined in any district other than that in which the Court (making or countersigning the order) is situate, then such an order shall be executed through the Sessions Judge, within the local limits of whose jurisdiction the person is confined.

confined.	
Section 39 (1) Where a person is confined in a prison more than one hundred miles distant from the place where any Court, subordinate to a High Court, in which his evidence is required, is held, the Judge or presiding officer of the Court in which the evidence is so required shall, if he thinks that such person should be removed under this Part for the purpose of giving evidence in such Court, and if the prison is within the local limits of the appellate jurisdiction of the High Court to which such Court is subordinate, apply in writing to the High Court, and the High Court may, if it thinks fit, make an order in the form set forth in the first schedule, directed to the officer incharge of the prison.	Where a person is confined in a prison more than one hundred miles distant from the Court, (if such Court is subordinate to a High Court and the prison locates within local limits of the appellate jurisdiction of High Court) then the High Court may, if it thinks fit, make an order in the form set forth in the first schedule, directed to the officer incharge of the prison.
(2) The High Court making an order under sub-section (1) shall send it to the Sessions Judge or Magistrate within the local limits of whose jurisdiction the person named therein is confined, and such Court shall cause it to be delivered to the officer incharge of the prison in which the person is confined.	

Section 40: Where a person is confined in a prison beyond the local limits of the appellate jurisdiction of a High Court, any Judge of such Court may, if he thinks that such person should be removed under this Part for the purpose of answering a charge of an offence or of giving evidence in any criminal matter in such Court or in any Court subordinate thereto; apply in writing to the Provincial Government of the territories within which the prison is situate, and the Provincial Government may, direct that the person be so removed, subject to such rules regulating the escort of prisoners as the Provincial Government may prescribe.	This section of law empowers the Judge of High Court, when the person confined is beyond the local limits of the appellate jurisdiction of a High Court.
Section 41: Upon delivery of any order under this Part to the officer incharge of the person in which the person named therein is confined, that officer shall cause him to be taken to the Court in which his attendance is required, so as to be present in the Court at the time in such order mentioned, and shall cause him to be detained in custody in or near the Court until he has been examined or until the Judge or presiding officer of the Court authorises him to be taken	It deals about duties of officer incharge of the prison to produce such prisoner before the court.

back to the prison in which he was confined.	
Section 42 The Provincial Government may, by notification in the Official Gazette direct that any person or any class of persons shall not be removed from the prison in which he or they may be confined; and thereupon, and so long as such notification remains in force, the provisions of this Part, other than those contained in sections 44 to 46, shall not apply to such person or class of persons	This Section empowers the Government to restrain removal of certain prisoners from the prison.

THE SECOND SCHEDULE

(See Section 37)

Court of _____

To the officer incharge of the_____

(state name of prisons).

You are hereby required to produce_____, now a prisoner in _____, under safe and sure conduct before the Court of _____at clock in the forenoon of the same day, there to answer a charge now pending before the said Court, and after such charge has been disposed of or the said Court has dispensed with his further attendance, cause him to be conveyed under safe and sure conduct back to the said prison.

The _____day of _____

Countersigned

20. We have noticed, as observed hereinabove, in absence of any express provision of law, the Government has no power to transfer an undertrial prisoner. At the same time, however, we have also noticed that there is no provision expressly, prohibiting or placing any bar on the transfer of duly committed undertrial prisoner by the court, either at the instance of the Government or the jail authorities. This aspect of the matter once came under consideration of the Lahore High Court, Lahore. In the case of Malik Ghulam Jilani v. The Government of Pakistan through the Secretary, Ministry of Interior, Islamabad and 3 others (PLD 1976 Lahore 38), a Division Bench of this Court while examining the vires of some order, observed that,

> "No law was shown which forbids the detention of an undertrial prisoner at a place outside the territorial jurisdiction of the trial Magistrate. On the other hand in PLD 1957 Kar. 939 where the prisoners were removed from the Mekran levies lock-up to the District Jail, Quetta, which was outside the jurisdiction of the officer who passed the order of arrest it was held that the legality of the detention was not questionable. It appears that where an accused person is remanded to judicial custody, there is no fetter on the power of the detainer, subject to the provisions relating to reception and detention of prisoners and the exigencies of the warrant, as to the place where he might be detained."

21. Irrespective of severity and seriousness of allegations of committing an offence, subject to discretion of a court in terms of release of an accused on bail and despite attachment of an inherent presumption of innocence, he loses some of his rights available to a free citizen of the State only because of allegations of the commission of an offence, however, the status of an accused viz-a-viz his right is distinguishable from a person who is a convict. The statutory provisions of sections 31

and 40 of the Prisoners Act, 1900 read with Rules 375, 377, 378 and 387 of the Pakistan Prisons Rules, 1978, when looked through the prism of inherent presumption of innocence of an accused, it emerged demands that an undertrial prisoner, subject to law be dealt with, by allowing him to enjoy his fundamental rights guaranteed under Part II of Chapter II of the Constitution of Islamic Republic of Pakistan, 1973. The superior courts being custodian and defenders of the fundamental rights guaranteed by Constitution are required and expected to interpret the constitutional provisions, in such manner which is beneficial to the citizens instead of interpreting them in a stringent way giving them a strict construction. Adopting such a view in interpreting the law relating to undertrial prisoner is also required because he is yet to be found guilty, when equal possibility of his exoneration of charge simultaneously cannot be ruled out on the conclusion of his trial, therefore, a carefully drawn balanced approach should be adopted, while dealing with the rights of undertrial prisoners. The courts possess to exercise jurisdiction to review the public action, unless specifically barred by the parliament through appropriate legislation. The prisoners being a special class subject to special regimen and special status, they are not entirely denuded of all fundamental rights which are inherent in the Constitution. These rights of citizens, however, circumscribed by the penalty/sentence are a permanent concern of the courts as aforesaid unless clearly without any ambiguity barred by law. It is the basic principle that unless the jurisdiction is expressly barred, it can be exercised by the superior courts to safeguard the fundamental rights of the citizens. The courts are in general an ultimate extension of rights and liberties of the subject, whatever his status and, however, attenuated those rights and liberties may be as a result of some punitive or other process. An essential characteristic right of a subject is that it carries with it a right of recourse to the courts unless some statute decrees otherwise. Here Article 4 of the Constitution of the Islamic Republic of Pakistan, 1973,

(1) To enjoy the protection of law and to be treated in accordance with law is the inalienable right to every citizen. Wherever he may be, and of every other person for the time being within Pakistan, in particular.

(2) In particular--

(a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.

(b) no person shall be prevented from or be hindered in doing that which is not prohibited by law; and

(c)

The law laid down in the case National Commission on Status of Women through Chairperson and others v. Government of Pakistan through Secretary Law and Justice and others (PLD 2019 Supreme Court 218) wherein it has been held,

(a) Constitution of Pakistan---

----Art. 4(1)---Right of individuals to be dealt with in accordance with law---Scope--- Foreign citizens in Pakistan---Article 4(1) of the Constitution extended the right to enjoy the protection of law to every citizen regardless of where he was---Persons who were not citizens (of Pakistan) were also given said right while they were in Pakistan.

is quoted with immense pleasure. What should be the nature and measures of the relief accorded must be a matter for the courts. Public policy and expediency as well as merit may be factors to consider and they may influenced to answer any application for relief but to deny jurisdiction on the grant of expediency seems to me ..to be tantamounts to abdicating a primarily function of the judiciary {Modern Law Review, Vol.42 P.469}.

22. It may be pointed out that in absence of any statutory provisions relating to transfer of an undertrial prisoner from one prison to another on certain grounds without the permission/concurrence of the court, remanding his custody to the prison, still there may arise certain situations in which transfer of custody of an undertrial prisoner may be expedient in the interest of justice. Generally there may be a prisoner whose transfer is necessary to relieve overcrowding, prisoner with special qualification whose services may be required elsewhere, influential, violent and dangerous prisoners, whose transfer is necessary in the interest of Law and Order, there may be a prisoner whose transfer is necessary for taking care of his health, and a prisoner whose transfer is desirable for any other reason as e.g. security of the person, character of the prisoner or his friends or relatives among the jail staff and in order to maintain peace and tranquility in the jail premises, are the main considerations for the transfer of the prisoners from one prison to another. The transfer of an undertrial prisoner can be ordered to avoid the breach of rights of such prisoner.

23. We will quote a judgment from other side of border in Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav, the Hon'ble Supreme Court observed that,

> "a convict or an undertrial who disobeys the laws of the land, cannot contend that it is not permissible to transfer him from one Jail to another because the Jail Manual does not provide for it. If the factual situation requires the transfer of a prisoner from one prison to another, be he a convict or an undertrial, the Courts are not to be a helpless bystanders when the rule of law is being challenged with impunity. The arms of law are long enough to remedy the situation even by transferring a prisoner from one prison to another, that is by assuming that the concerned Jail Manual did not provide such a transfer."

In the light of above discussion, we feel no hesitation to hold that in absence of any legal provision, either expressly placing a bar or allowing the Government to transfer, the custody of a duly committed under trial prisoner, subject to the permission of the concerned court, from one prison to another, the Government may transfer, such a prisoner without causing a prejudice to his admissible rights and privileges including his right to a fair trial. Undertrial prisoner may also seek his transfer upon showing his grievance regarding breach of his admissible rights and privileges, for fulfillment thereof by way of his confinement in a particular prison. The court after giving a proper hearing to all the concerned, being under a legal obligation to consider all relevant, legal, factual necessities and situational demands with their possible consequences, while keeping in view that the undertrial prisoner enjoys an inherent presumption of innocence till found guilty, shall pass such order of transfer of unconvicted prisoner. Needless to observe that such order of the court is since bound to affect either way, the right to life, not only of the individual prisoner but also some of his related persons, therefore, the order of transfer of custody from one prison to another is thus a judicial order and not a ministerial one.

24. In the light of what has been discussed hereinabove, it is observed that indisputably the petitioner is domiciled at Lahore, his family members are also residing there, he is facing trial simultaneously in the above mentioned three References pending before the learned Accountability Courts at Multan, Lahore and Rawalpindi respectively, the arrangement for the production of the petitioner before all the three aforesaid courts is to be made by the Government through its relevant agencies, the district Lahore is in the middle of Rawalpindi and Multan with regard to their inter-se distances, therefore, the transfer of custody of the petitioner from District Jail Multan to District Jail (Camp Jail), Lahore, shall place none under any extra burden rather it shall ensure the

materialization of his admissible rights and privileges under the law, by shifting his custody at Lahore, it will enable the petitioner to maintain himself by way of receiving homemade food and also company of his near and dear ones to fulfill his desire to communicate with his children being elder of the family, the right to which he is entitled to under the relevant provisions of law. After going through the impugned orders, we have found the same to have been passed in slipshod manner without properly adverting to the entire range of issues involved and without considering the facts and circumstances of the case in their true perspectives, hence the same lack due application of judicial mind, therefore, the same are set aside, as having been passed illegally, without lawful authority, being result of failure in exercise of jurisdiction so vested with respondent No.1, particularly when the jail authorities have no objection to transfer the petitioner's custody from the District Jail, Multan to District Jail, Lahore. Consequently, by setting aside the impugned orders dated 14.11.2018 and 03.01.2019 passed by the learned Judge Accountability Court, Multan, this Writ Petition No.1646 of 2019 is accepted, the custody of the petitioner thus shall be transferred from District Jail, Multan to District Jail (Camp Jail), Lahore and the Government shall ensure in making of arrangements for the production/presence of the petitioner before all the courts concerned as and when required without any failure on its part.

25. Before parting with the judgment, it is mentioned that we have noticed that in most of the law legal commentaries on the Prisoners Act, 1900 and books published on the subject of Prisons and Prisoners, available in the market for consumption of law relating persons, clause (e) of section 29(1) of the Prisoners Act, 1900, {reproduced in paragraph No.16 of the judgment} has been shown, as still intact. Even if one may access the Prisoners Act, 1900 through http://punjablaws.gov.pk/laws/17.html, which is the Website of the

Government of Punjab, then again clause (e) may be found intact regarding section 29 of the said Act. It is complete oblivion and disregard to earlier Judgment of this Court, cited as PLD 1980 Lahore 162 and legal proposition propounded through this judgment. This delusion in a shape of printing, publishing and mentioning of clause (e) should not remain any more on the statute books and Websites relating to law for perpetuating misguiding. Therefore, we feel necessary rather expedient to direct the Punjab Government through Chief Secretary and all Publishers and printers engaged in the business of publishing law books to get deleted Clause (e) from section 29 of the Prisoners Act, 1900. All Publishers, printers' and law sites handlers are cautioned to be careful in future and always to keep updating requisite data laws from the Ministry of Law.

MH/A-73/L **Petition allowed.**

2020 P Cr. L J Note 53

[Lahore (Multan Bench)]

Before Anwaarul Haq Pannun, J

HADAYATULLAH---Appellant

Versus

The STATE and another---Respondents

Criminal Appeal No. 442 of 2016, decided on 9th April, 2019.

(a) Criminal trial---

----Benefit of doubt---Principle---If some evidence was disbelieved to the extent of some of accused, same could not be believed against rest of the accused.

Ifran Ali v. The State 2015 SCMR 840; Shahbaz v. The State 2016 SCMR 1763; Imtiaz alias Taj v. The State and others 2018 SCMR 344 and Mst. Anwar Begum v. Akhtar Hussain alias Kaka 2017 SCMR 1710 ref.

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

----Ss. 302, 447, 511, 316, 148 & 149---Qatl-i-amd, criminal trespass, attempt to commit offence, rioting armed with deadly weapon, unlawful assembly---Appreciation of evidence---Sentence, reduction in---Night-time occurrence---Scope---Prosecution case was that the accused party assaulted on complainant party, due to which, father of complainant died and two persons including complainant sustained injuries on different parts of their bodies---Motive behind the occurrence was a land from which the accused party wanted to illegally dispossess the complainant, who were forbidden but they committed murder of father of complainant in prosecution of their common object/intention---Occurrence allegedly took place during night hours but the parties were previously quite known

to each other---Identity of the accused-appellant in the tractor's light and specific role attributed to him for causing fist blows on the head of deceased causing his death was fully established---In the present case, the appellant had given fist blows on the head of the deceased and there might have been neither any intention on his part as he was not armed with any kind of weapon to kill but the fist blows given by him to the deceased as per medical evidence has resulted directly death of the deceased, hence, it had been found that the appellant was guilty for committing Qatl Shibh-i-amd---Liability of the appellant to pay diyat was mandatory under the provisions of S. 316, P.P.C. whereas awarding of imprisonment was discretion with the court---Injury had been caused to the person of the deceased without any premeditation by the appellant which fact was fully borne out from the record---Sentence of imprisonment awarded to the appellant appeared to be harsh and without legal justification, in circumstances---Accused was a previous non-convict, such state of affairs, lenient view qua quantum of sentence of the appellant was taken by the High Court, by maintaining his conviction, quantum of his sentence of imprisonment under S. 316, P.P.C. was reduced from twenty five years' R.I. to the period which he had already undergone---Appeal was dismissed with said modification.

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

----S. 342---Examination of accused---Principle---Duty of court and not of the adversaries to put questions which it considered necessary, enabling him to explain the circumstances appearing against him in evidence.

James Joseph for Appellant.

Abdul Wadood, DPG for the State.

Nemo for the Complainant.

Date of hearing: 9th April, 2019.

JUDGMENT

ANWAARUL HAQ PANNUN, J.---Hadayatullah son of Qadir Bakhsh, Caste Lori, resident of Darabhi Vehova, Tehsil Taunsa, District D.G. Khan, the appellant along with his co-accused Habib Ullah, Najeeb Ullah, Naseeb Ullah and Qadir Bakhsh (since acquitted) was involved in case FIR No.265/2009, dated 22.12.2009, offence under sections 302, 447, 511, 148, 149, P.P.C., registered with Police Station Vehova, Tehsil Taunsa Sharif. He was tried by learned Additional Sessions Judge, Taunsa Sharif. The learned trial court seized with the matter vide its judgment dated 31.03.2016 convicted and sentenced the appellant in the following terms:-

Under section 316, P.P.C.	> Sentenced to undergo 25 years' R.I. as Tazir with order to pay Rs.1,00,000/- as compensation in terms of section 544-A, Cr.P.C. to the legal heirs of Ghulam Farid (deceased) and in default whereof to further undergo SI for six months. > He was also ordered to pay Diyat amount of Rs.16,80,270/- to be recovered in accordance with law. > He was also extended the benefit of section 382-B of Cr.P.C.

2. Feeling aggrieved by the judgment of the learned trial court, the appellant has assailed his conviction and sentence through the captioned criminal appeal.

3. Prosecution's story as portrayed in the FIR (Exh.PA/1) lodged on the statement (Exh.PA) of Ishtiaq Ahmad (PW-2) is to the effect that on 22.12.2009 at about 10.00 p.m., Anjum Iqbal son of Muhammad Iqbal imparted him the information through mobile phone that plot of complainant measuring three kanals is being possessed by Hadayat Ullah etc and constructions raised over it in the tractor light, then complainant along with his father Ghulam Farid deceased, Muhammad Sohail while riding on a motorcycle went to Basti Drabhi and found Hadayat Ullah, Habib Ullah, Najeeb Ullah, Naseeb Ullah sons of Qadir Bakhsh, Qadir Bakhsh son of Muhamamd Bakhsh raising construction with 'kassis', his father restrained them that earlier when they had attempted to take over possession of this plot, they were forbidden to do so, at that time, they desisted to it, now once again they were constructing the plot, in order to take over the possession of the same plot whereupon the accused party started belabouring the father of the complainant by giving him fists and kicks blows, who fell down on the ground and Hadayat Ullah has been giving fist blows on his head. They tried to rescue him, accused party also belaboured the complainant and Muhammad Sohail PW with fist and kick blows, resulting into injuries on different parts of their bodies. On their hue and cry Asif Saleem and Muhammad Iqbal (both given up PWs) who were present nearby the place of occurrence attracted there. On their intervention, accused party went to their homes. Complainant along with Sohail PW shifted his father, on a car, to the clinic of Dr. Ahsan, but on the way to the clinic, his father succumbed to the injuries.

Motive behind the occurrence as disclosed in the FIR was a dispute of land from which the accused party want to illegally dispossess the complainant who were forbidden but they committed murder of his father in prosecution of their common object/intention.

4. Ghulam Shabir, SI (PW-11) deposed that 08.11.2013 investigation of this case was handed over to him. On the same day he made arrest of accused Hadayat Ullah and on the following day got him remanded to judicial Lock.

5. The investigation was encapsulated into a report under section 173, Cr.P.C, which was duly submitted, the learned trial Judge took the cognizance, supplied the requisite statements under section 265-C, Cr.P.C., framed the amended charge against him and his co-accused on 19.11.2015, to which he pleaded not guilty and claimed trial.

6. Ocular account in this case consists of the evidence of the Ishtiaq Ahmad complainant (PW-2) and Muhammad Sohail (PW-3). Investigation in this case was carried out by Abdul Rehman, SI (PW-10), Ghulam Shabbir, SI (PW-11), Imran Nawaz Inspector (CW-1) and Barkat Ali, Inspector (CW-2).

Whereas medical evidence has been furnished by Dr. Qadir Bakhsh, SMO (PW-1) who conducted postmortem examination on dead body of deceased on 22.12.2009 and observed as under:-

> It was the dead body of an old man having normal physique and muscular built. Rigor mortis and post mortem staining were present. Eyes and mouth were closed. No marks of external violence seen. Skull, scalp, vertebrae, membranes, brain and spinal.
>
> AND
>
> Cranial cavity was full of blood. Brain matter was taken and sent to Histopathologist, Lahore to rule out any pathology.

After conducting postmortem examination, doctor rendered his opinion with the following observation/remarks:-

"In my opinion, in this case specimens were sent to Chemical Examiner Lahore and Histopathologist, Lahore. Final opinion will be given after receipts of aforesaid reports.

On receipt of reports of Chemical Examiner Exh.PC and Histopathologist Exh.PD, I issued final report Exh.PE which is in my hand and bears my signature. As per report of Chemical Examiner, poison was not detected in the above viscera. According to the report of Histopathologist, Lahore, histological examination of the heart sections reveals moderate to advance grade atherosclerotic changes in the coronaries and unremarkable myocardium. The brain and the meanings were congested and presence of extravagated R.B.Cs. inside brain tissue. Histological examination of the hyoid bone revealed bone. No ante-mortem haemorregics were seen.

On the basis of above reports, in my opinion, death was due to traumatic injury to brain, which is a vital organ. Weapon used in this case was blunt and probable duration between injury and death was instant."

Statements of rest of the prosecution witnesses are formal in nature.

7. Learned ADPP vide his statement dated 12.01.2016 gave up PWs Asif Saleem, Muhammad Iqbal being unnecessary, Abdul Razzaq being dead, Muhammad Afzal being not able to walk due to illness and closed the prosecution case.

8. Thenceforth, the appellant was examined under section 342, Cr.P.C; wherein he refuted the allegations levelled against him in the prosecution version. He opted to appear as his own witness in terms of section 340(2), Cr.P.C. and also opted to adduce defence evidence.

He while replying to the question why this case against him and why the PWs deposed against him, made the following deposition:-

"This case is false and baseless. In fact Ghulam Fareed deceased was a heart patient. In fact he was riding on a motorcycle and due to heart attack, he fell on the ground, received head injury due to falling and died his natural death. The complainant party wants to grab our plot and due to this reason, they got registered this false and frivolous case by widening a net."

9. On conclusion of trial, the learned trial Court convicted and sentenced the appellant in the above stated terms where his co-accused were acquitted.

10. Learned counsel for the appellant submits that prosecution's evidence has already been disbelieved by the learned trial court, to the extent of four acquitted co-accused, which has neither been challenged by the State nor by the complainant and as such the same has attained finality, therefore, in absence of any independent corroboration, the same evidence cannot be relied upon against the appellant for upholding his impugned conviction. Reliance has been placed upon case titled Ifran Ali v. the State (2015 SCMR 840) and case titled Shahbaz v. The State (2016 SCMR 1763). Next argued that charge against all the accused was framed, by the learned trial court, in a composite form and not individually, therefore, prejudice, has been caused to the appellant in defending himself. Adds that while recording statement under section 342, Cr.P.C, the specific incriminating evidence regarding death of the deceased has not been put to the appellant, hence, said evidence cannot be used for maintaining his conviction, while placing reliance on case titled Imtiaz alias Taj v. The State and others (2018 SCMR 344) and case titled Mst. Anwar Begum v. Akhtar Hussain alias Kaka (2017 SCMR 1710), learned

counsel has craved for the acceptance of appeal and acquittal of the appellant.

11. Conversely, learned Law Officer has argued that allegation against and role attributed to the appellant is quite distinguishable one vis-a-viz his acquitted co-accused persons, and while referring report of Histopathologist (Exh.PD), the statement of Dr. Qadir Bakhsh, SMO (PW-1) submits that the death of the deceased is direct result of the injury caused by the appellant. Maintains that medical evidence is quite in line with the un-shaken ocular account. Adds that the court while exercising its discretion/consideration has put the incriminating material to the accused under section 342, Cr.P.C., no prejudice has been caused to the appellant while recording his statement under section 342, Cr.P.C. Adds that prosecution has proved its case to the hilt. He, lastly, with all fairness has argued that the occurrence had taken place without any premeditation, therefore, keeping in view the provisions of section 316, P.P.C., the sentence of imprisonment awarded to the appellant appears to be harsh, prayed that while maintaining the amount of Diyat, the appeal may be dismissed.

12. Arguments heard. Record perused.

13. After hearing arguments of learned counsel for the appellant as well as learned Law officer and perusing record, it is noticed that according to the prosecution, for taking over the possession of the plot measuring three kanals and to perpetuate the same, construction was being raised in the tractor's light by the accused. The complainant along with his father Ghulam Farid deceased, Muhamamd Sohail (PW-3) while riding on a motorcycle reached at the spot and found that Hadayat Ullah, Habib Ullah, Najeeb Ullah, Naseeb Ullah sons of Qadir Bakhsh and Qadir Bakhsh son of Muhamamd Bakhsh were raising constructions with 'kassis', and upon restraining the accused, by the father of the complainant

that earlier they had attempted to take possession of the plot, and they were forbidden to do so and at that time they agreed to it, now once again they were raising constructing over the plot in order to perpetuate their possession, whereupon accused party started giving punch/fist blows to his father namely Ghulam Farid who fell down on the earth, Hadayat Ullah gave punch blows on the head of his father/Ghulam Farid, when tried to rescue, the accused party also gave punch/first blows on different parts of his body. The prosecution has thoroughly proved its case by furnishing ocular account through complainant Ishtiaq Ahmad (PW-2) and Muhammad Sohail (PW-3) which is duly corroborated by medical evidence furnished by Dr. Qadir Bakhsh, SMO (PW-1) who conducted post mortem examination over the dead body of the deceased. According to his opinion which he formed on the basis of report of Histopathologist (Exh.PD) declaring death of the deceased, the direct result of injury on the head of the deceased. The co-accused of the appellant, since acquitted by the learned trial court, were not assigned specific role of causing punch/fist blows, like the appellant, on the head of the deceased, hence, arguments of the learned counsel for the appellant that, the evidence, already disbelieved to the extent of his acquitted co-accused, cannot be relied upon for maintaining the impugned conviction and sentence, is repelled as case of the appellant stands on distinguishable footing from his acquitted co-accused. The roots of the rule that, if some evidence is disbelieved to the extent of some of co-accused, it should not be believed against rest of the accused, is embedded in the principle of parity to extend benefit under this principle, the case of the accused must be at par with the acquitted co-accused. It is quite discernable from the record that case of the appellant stands on distinguishable footing/pedestal than that of his acquitted co-accused, therefore, rule of parity is not applicable in the facts and circumstances of the instant case. This court finds no difficulty in concluding that learned trial court while properly

appreciating the evidence available on record in its true perspective has rightly while relying upon evidence of the prosecution to the extent of the appellant passed the impugned judgment. In his statement under section 342, Cr.P.C., the accused has stated that the head injury on the person of the deceased was result of accident, but non-existence of any apparent injury on head belies his stances, but through his statement, the death being result of head injury is not denied. The occurrence has allegedly taken place during night hours but the parties were previously quite known to each other. Identity of the appellant in the tractor's light followed by specific role attributing to him for causing fist blows on the head of Ghulam Farid causing his death is fully established. Respectful reliance is placed on case titled Muhammad Aslam v. The State (2011 SCMR 1157) where in the Hon'ble Supreme Court has held that "headlights of the car were sufficient for identification of accused, particularly when he was known to the witnesses". It has thus been established that none else except the appellant has caused injuries on the head of the deceased resulting into his death.

14. So far as argument of learned counsel for the appellant that specific evidence not put to the accused cannot be relied upon for recording his conviction and it must ensure into his acquittal is concerned, with all humility on my command, cannot be entertained as such. For ready reference, provisions of section 342, Cr.P.C. are reproduced infra:-

> 342. Power to examine the accused. (1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence again him, the court may, at any stage of any inquiry or trial without previously warning the accused, put such questions to him as the court considers necessary, and shall for the purpose aforesaid, question him generally on the case after the witnesses

for the prosecution have been examined and before he is called on for his defence".

Moreover, rule 11 of Chapter.13 of the Rules and Orders of the Lahore High Court, Lahore Volume-III is also reproduced hereunder:-

"11. Mode of recording examination of accused.-Section 364 provides that mode in which the examination of an accused person is recorded. The questions put to the accused and the answers given by him should be distinctly and accurately recorded, but the accused must confine himself to relevant answers to the questions asked by the Court. Section 364 does not prevent a Court from refusing to record irrelevant answers to questions put by it to the accused under section 342. If necessary, the Court may even prevent the accused making lengthy irrelevant answers. The examination of the accused should be recorded in the language in which he is examined, and, if that is not practicable, in the language of the Court or in English. In cases in which examination is not recorded by the Magistrate or Judge himself, he must record a memo thereof in the language of the Court or in English if he is sufficiently acquainted with the latter language. The examination must be read over to the accused and made conformable to what he declares to be the truth. The Magistrate or judge must then certify under his own hand that the examination was taken down in his presence and hearing, and that the record contains a full and true account of what was stated".

Bare perusal of the above provisions clearly envisages that its purpose is to enable the accused to explain any circumstances appearing in evidence against him. The Court may put at any stage of the inquiry or trial without previously warning to the accused, question to him as it considers necessary and the questions put to him shall be generally to the case after

the witnesses of the prosecution have been examined but before he is called on for his defence. The requirement of examining the accused, under this provision of law, it appears, is imbedded in the maxim of audi alteram partem. It is the duty of the court and not of the adversaries to put questions which it considers necessary, and generally on the case to the accused enabling him to explain circumstances appearing against him in evidence, after the witnesses for the prosecution have been examined. Bare reading of the provision of law indicates that putting of questions for enabling the accused for explanation is an act of the court and none else. It is also settled that none should be prejudice from the act of the court i.e. neither the accused nor the complainant. The defence has to show as to what prejudice has been caused to it by not confronting the accused with any specific portion of incriminating evidence. Learned counsel for the appellant has failed to point out as to which incriminating material has not been put to the appellant, causing him any prejudice, therefore, arguments of the learned counsel for the appellant is repelled. Case laws relied upon by learned counsel for the appellant is quite distinguishable to the facts and circumstances of the instant case. Even otherwise it is the cardinal principle of criminal administration of justice that each and every criminal case has its own facts and circumstances, therefore, reliance made by the learned counsel for the appellant appears to be inapt.

15. Arguments of learned counsel for the appellant that charge has been framed against all the accused in composite language and not individually, hence, appellant has been misled in his defence, it will be appropriate to reproduce section 265-D, Cr.P.C. hereunder:-

> "265-D. When charge is to be framed. If, after perusing the police report or, as the case may be, the complaint, and all other documents and statements filed by the prosecution, the Court is of

the opinion that there is ground for proceeding with the trial of the accused it shall frame in writing a charge against the accused".

The above said provision is also read with sections 237 and 537, Cr.P.C., hence there being no force in this contention, is also repelled.

In order to appreciate the contention of the Law Officer, it will be appropriate to reproduce the provisions of sections 300, 315 and 316, P.P.C., which are reproduced as under:-

"300. Qatl-i-amd. Whoever, with the intention of causing death or with the intention of causing bodily injury to a person, by doing an act which in the ordinary course of nature is likely to cause death, or with the knowledge that his act is so imminently dangerous that it must in all probabilities cause death, causes the death of such person, is said to commit qatl-i-amd.

315. Qatl Shibh-i-amd. Whoever, with intent to cause harm to the body or mind of any person causes the death of that or of any other person by means of weapon or an act which in the ordinary course of nature is not likely to cause death is said to commit qatl shibh-i-amd.

316. Punishment for Qatl Shibh-i-amd. Who commits Qatl Shibh-i-Amd shall be liable to Diyat and may also be punished with imprisonment of either description for a term which may extend to twenty five years as tazir.

Main distinguishing factor between provisions of section 300, P.P.C., (qatl-i-amd) and section 315, P.P.C., (qatl-i-shibh-i-amd), was that in case of qatl-i-amd intention of the assailant must be to cause death or such bodily injury, which, in the ordinary course of nature was likely to cause death, whereas in the case of qatl-i-shibh-i-amd, the intention should be to

cause such harm to the body or mind of the person, which, in the ordinary course of nature was not likely to cause death.

In order to bring the case within the mischief of section 316, P.P.C., prosecution has to establish that there existed an intention on the part of the accused to cause harm to the body or mind of any person, by means of a weapon or an act which in ordinary course of nature is not likely to cause death is said to commit Qatl Shibh-i-Amd. In the instant case, the appellant had given fist blows on the head of the deceased. There might have been neither any intention on his part as he was not armed with any kind of weapon to kill but the fist blows given by him to the deceased as per medical evidence has resulted directly death of the deceased; hence, it has been found by this court that the appellant is guilty for committing Qatl Shibh-i-amd. Liability of the appellant to pay Diyat is mandatory under the provisions of section 316, P.P.C. whereas awarding of imprisonment is discretion with the court. The injury has been caused to the person of the deceased without any premeditation by the appellant which fact is fully borne out from the record. Therefore, it is noticed that sentence of imprisonment awarded to the appellant appears to be harsh and without legal justification. However, it is noticed that if imprisonment awarded to the appellant in the facts and circumstances narrated above appears to be harsh.

16. Coming to quantum of sentence in this case as observed above, it has been noticed that appellant is crawling in the corridors of the courts as justice seeker since long. He is previous non-convict. He was not armed with any kind of weapon of offence. In view of this, lenient view qua quantum of sentence of the appellant is taken, therefore, by maintaining his conviction, his quantum of sentence of imprisonment under section 316, P.P.C. is reduced from twenty five years' R.I. to the period which the appellant has endured/undergone so far including the sentence in lieu of

non-payment of compensation amount. However, Diyat amount Rs.16,80,270/- would remain intact as ordered by the learned trial court.

17. With the above modification, the instant appeal stands dismissed.

JK/H-8/L **Order accordingly.**

2020 P Cr. L J Note 55

[Lahore (Multan Bench)]

Before Anwaarul Haq Pannun, J

MUHAMMAD AAMER---Petitioner

Versus

The STATE and others---Respondents

Criminal Revision No. 70 of 2019, heard on 19th March, 2019.

Pakistan Arms Ordinance (XX of 1965)---

----S. 13---Possessing illicit weapon---Appreciation of evidence---Allegation against the appellant/petitioner was that he was arraigned as an accused in FIR registered under Ss. 302, 201 & 34, P.P.C.; during investigation whereof, in pursuance of his disclosure, he got recovered unlicensed pistol .30 bore along with two live bullets from his shop and despite demand, he could not produce any licence or a permit for its possession---Consequently, a separate case FIR under S. 13, Pakistan Arms Ordinance, 1965 was registered against him---Petitioner was convicted and sentenced---Appeal of petitioner failed before the lower appellate court---Validity---Contention that petitioner had earned his acquittal in the murder case, therefore, conviction and sentence imposed upon him was liable to be set aside---Offence of murder was committed on 17.09.2012 while offence under S. 13 of the Arms Ordinance, 1965 was committed by the petitioner the moment he got recovered weapon of offence on 28.07.2013---Separate reports under S. 173, Cr.P.C., in respect of both the offences were submitted before different courts of competent jurisdiction---Recovery of unlicensed pistol only rendered corroboration before Trial Court for the offence of murder---Recovery of pistol on the pointation of petitioner had constituted an independent offence for which he was separately charged and after recording separate evidence by a

different competent court, he was convicted and sentenced---Appeal of petitioner was also dealt with by two different forums i.e. sessions court and High Court---Evidence recorded in murder case could not be considered in the present case---No fault in findings of conviction recorded by the courts below was noticed---Petition having no force was dismissed, in circumstances. [Paras. 11 & 12 of the judgment]

Mobasher Hussain Khosa for Petitioner.

Date of hearing: 19th March, 2019.

JUDGMENT

ANWAARUL HAQ PANNUN, J.---This judgment will decide captioned criminal revision petition, filed by the petitioner challenging the legality and propriety of judgments dated 11.01.2018 passed by learned trial Court/Judicial Magistrate Section-30, Vehari, on the conclusion of a trial in case FIR No.368/13 dated 28.7.2013 under section 13 of the Pakistan Arms Ordinance, 1965 at Police Station Luddan, District Vehari. The judgment of learned trial court was assailed through appeal and the Appellate Court/ASJ, Vehari, vide judgment dated 04.09.2018 while upholding his conviction and sentence, inflicted upon him by trial court dismissed the same. The petitioner was convicted and sentenced in the following term:-

Under section 13 of the Pakistan Arms Ordinance, 1965.

Three years' R.I. with fine of Rs.10,000/- and in default whereof to further undergo SI for two months. He was also extended the benefit of section 382-B, Cr.P.C. The sentence would run concurrently with other imprisonment, if any.

2. Pithily, the allegation against the petitioner is that he was arraigned as an accused, in case FIR No.349/2013 dated 20.07.2013

under sections 302, 201, 34, P.P.C., Police Station Luddan, Vehari, during investigation whereof, in pursuance of his disclosure he got recovered unlicensed pistol .30 bore (P-1) along with two live bullets (P-2/1-2) from his shop, despite demand he could not produce any licence or a permit for its possession, consequently, a separate case FIR No.368/13 under section 13 of Pakistan Arms Ordinance, 1965 was registered against him. The petitioner on submission of challan was charge sheeted to which he denied and claimed trial. On the conclusion of trial, the petitioner was convicted and sentenced as mentioned op-cit by the learned trial court. His appeal also failed before the learned lower Appellate Court. It will be relevant to mention here that the petitioner, in the above referred case of Qatl-i-amd, had already been convicted and sentenced to death with a further direction to pay Rs.1,00,000/- as compensation under section 544-A, Cr.P.C. to the legal heirs of the deceased and in default whereof to further undergo imprisonment for six months vide judgment dated 30.04.2016 passed by learned Addl. Sessions Judge, Vehari. The learned trial court submitted a reference under section 374, Cr.P.C. His Criminal Appeal No.413 of 2016 along with Murder Reference No.76/2016 had been decided by the learned Division Bench of this court while accepting the appeal and setting aside his conviction and sentence, had acquitted him vide judgment dated 04.03.2019. The Murder Reference had been answered in negative. The above resume of the facts indicates that after the dismissal of his appeal on 04.09.2018 (in case under Arms Ordinance), the petitioner did not invoke revisional jurisdiction of this Court challenging the legality or propriety of his conviction and sentence. He remained under a deep slumber for quite some time. The petitioner, has filed this petition, after his acquittal in the murder case vide judgment dated 04.03.2019 passed by this Court.

3. Pithily, the argument of the learned counsel for the petitioner is that the case FIR No.368/13 dated 28.7.2013 under section 13 of the Pakistan

Arms Ordinance, 1965 at P.S. Luddan, District Vehari, in which the impugned conviction and sentence had been recorded against the petitioner was a progeny or an offshoot of case FIR No.349/13 dated 20.7.2013, offence under sections 302, 201, 34, registered at P.S. Luddan, District Vehari, during the investigation of which, as result of his alleged disclosure, he got recovered an unlicensed weapon/pistol (P-1), consequently, instant case was registered against him, the petitioner, has since earned his acquittal in the murder case, therefore, the impugned conviction and sentence imposed upon him may be set aside. He, in order to re-enforce his above argument has referred to Para No.11 of the acquittal judgment dated 04.03.2019 passed by the learned Division Bench in murder case in his appeal against conviction which is reproduced as under:-

> "11. As far as recovery of .30 bore pistol (P-1) at the instance of appellant which was taken into possession vide recovery memo (Exh.PH) is concerned, the same is inconsequential because of the reason that the report of Punjab Forensic Science Agency (Exh.PM) is simply to the effect that the pistol was in mechanical operating condition".

4. In order to appreciate the above noted contention containing pure question of law, and the question involved, requiring its determination, essentially, the meaning and scope of word offence shall have to be explored. According to Corpus Juris Secundum Edition 2006, Volume 22, page 22 an offense is the transgression of a law, the word frequently being sued interchangeably with "crime" or "criminal offense." The word "offense" is usually used to describe a crime. In its usual sense, it means a crime or misdemeanor, or a breach of the criminal law. In its legal significance, an "offense" is a violation of law for which a penalty is prescribed. It is an act committed or omitted in violation of a public law,

either forbidding or commanding it. Furthermore an "offense" is a breach of the laws established for the protection of the public, as distinguished from an infringement of mere private rights, for which a penalty is imposed or punishment inflicted in any judicial proceeding. The word implies a violation of a law by which alone it can be denounced. The terms "crime, "offense," and "criminal offense" are all said to be synonymous and ordinarily used interchangeably. "Offense" any comprehend every crime and misdemeanor, or may be used in a specific sense as synonymous with "felony" or with misdemeanor," as the case may be, or as signifying a crime of lesser grade, or an act not indictable, but punishable summarily or by the forfeiture of a penalty.

According to Halsbury's Laws of India, the fundamental principle of criminal law is that what constitutes crime is essentially a matter of statute law. The Code of Criminal Procedure, 1898 and the General Clauses Act, 1897 defines word "Offence" as it means any act or omission made punishable by any law for the time being in force. According to Stroud's Judicial Dictionary of Words and Phrases 8th Edition "Prima facie, an 'offence' is equivalent to a crime" (per Collins J., Derbyshire CC v. Derby [1896] 2 Q.B. 57, 58, affirmed [1896] 2 Q.B 297; [1897] A.C. 550. According to Black's Law Dictionary, 8th Edition offense is a violation of the law; a crime, often a minor one. The terms `crime, 'offense' and 'criminal offense' are all said to be synonymous and ordinarily used interchangeably. 'Offense' may comprehend every crime and misdemeanor, or may be used in a specific sense as synonymous with 'felony' or with 'misdemeanor', as the case may be, or as signifying a crime of lesser grade, or an act not indictable, but punishable summarily or by the forfeiture of a penalty.' 22 C.J.S. Criminal Law S 3, at 4 (1989). In Merriam-Webster's Dictionary of Law: word offence is defined as a violation of law; especially a criminal act. According to K J Aiyar's Judicial Dictionary offence is defined as the commission of an act

contrary to or forbidden by law. [Standard Chartered Bank v. Directorate of Enforcement AIR 2006 SC 1301, 1314, [2006] 4 SCC 278, (2006) 197 ELT 18, (2006) 130 Comp Cas 341 (SC)]. According to the Chambers 21st Century Dictionary offence is the breaking of a rule or law. In case of Standard Chartered Bank v. Directorate of Enforcement, (2006) 4 SCC 278 the term 'offence' is defined as the commission of an act contrary to or forbidden by law. It is not confined to the commission of a crime alone. The word 'offence' generally implies infringement of a public duty, as distinguished from mere private rights punishable under criminal law. According to Advance Law Lexicon 4th Edition the word offence denotes a thing made punishable by the Code. The word offence generally implies infringement of public duty as distinguished from mere private right punishable under criminal law. (AIR 1997 SC 2232)

The term 'Offence' has been defined in section 40 of P.P.C., as under:-

"Offence": Except in the chapters and sections mentioned in clauses 2 and 3 of this section, the word "offence" denotes a thing made punishable by this Code. In Chapter IV, Chapter V-A and in the following sections, namely, Sections 64, 65, 66, 67, 71, 109, 110, 112. 114, 115, 116, 117, 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 389 and 445, the word "offence" denotes a thing punishable under this Code, or under, any/special or local law as hereinafter defined.

And in sections 141, 176, 177, 201, 202, 212, 216 and 441 the word "offence" has the same meaning when the thing punishable under the special or local law is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine.

41. "Special law": A "special law" is a law applicable to a particular subject.

42. "Local Law" A "local law" is a law applicable only to a particular part of the territories comprised in Pakistan.

5. From above, it flows that every act or omission, constitutes an offence if the same is duly defined under any of the laws i.e. general laws, special laws and local laws; which if proved, on trial, ensues into a judicial verdict, called conviction, followed by imposition of prescribed sentence by the trial court. It is paramount to mention here that before passing conviction and sentence against the persons found guilty for the commission of an offence, by a court of competent jurisdiction, the accused, during trial proceedings either has to plead guilty at the time of framing of charge or while refuting it has to claim trial. The trial proceedings consist of certain steps i.e. taking cognizance of the offence, supply of the copies of incriminating statements to the accused, framing of charge, recording of evidence, putting evidence to the accused enabling him to give explanation, if any, affording him an opportunity to adduce the defence evidence, if any, and finally the verdict i.e. judgment, by the court. All the steps referred above can validly be taken by a court which has been conferred upon, the jurisdiction, by or under law, otherwise proceedings become coram non judice in the eyes of law, thus unsustainable. The charge, being pivotal for holding a trial, as observed herein above, has been defined under section 4(c) which is reproduced as under:-

"Charge". "Charge" includes any head of charge when the charge contains more heads than one.

Chapter XIX deals with the framing of charge against a person-accused of having committed an offence.

221. Charge to state offence. (1) Every charge under this Code shall state the offence with which the accused is charged.

(2) Specific name of offence; sufficient description. If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only.

(3) How stated where offence has no specific name. If the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.

(4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.

(5) What implied in charge. The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.

(6) Language of charge. The charge shall be written either in English or in the language of the Court.

(7) Previous conviction when to be set out. If the accused having been previously convicted of any offence, is liable by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence, the fact, date and place of the previous conviction shall be stated in the charge. If such statement has been omitted, the Court may add it any time before sentence is passed.

The Hon'ble Supreme Court of Pakistan in Criminal Original Petition No.06 of 2012 in Suo Motu Case No.04 of 2010, decided on 26th April, 2012 reported in PLD 2012 Supreme Court 553 in its head note `o' has held as under:-

----S. 221---Constitution of Pakistan, Art. 204---Contempt of Supreme Court---Charge to state offence---Scope---Charge against the accused (Prime Minister) was of non-implementation of orders and direction of the Supreme Court---Scope---Section 221, Cr.P.C., clarifies that a charge is to state the offence and if the offence with which an accused is charge is given a specific name by the relevant law then the offence may be described in the charge "by that name only"---According to section 221, Cr.P.C. "If the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged"---Section 221, Cr.P.C., further provides that "the law and section of the law against which the offence is said to have been committed shall be mentioned in the charge"---In the present case, not only the name of the offence, i.e. contempt of court had been specified in the charge framed against the accused but even the relevant constitutional and legal provisions defining `contempt of court' had been mentioned in the charge framed, which in terms of section 221(5), Cr.P.C., "is equivalent to a statement that every legal condition required by law to constitute the offence charges was fulfilled in the particular case".

6. The edifice of the petitioner's case, since rests upon the strength of a subsequently passed judgment of acquittal, therefore, the question of law involved, can also be viewed yet from another angle.

Art.54. Previous judgments relevant to bar a second suit or trial. The existence of any judgment, order or decree which by law prevents any Court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such Court out to take cognizance of such suit or to hold such trial.

55. ----------

56. ----------

57. Judgments, etc., other than those mentioned in Articles 54 to 56, when relevant. Judgments, orders or decrees, other than those mentioned in Articles 54, 55 and 56, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue or is relevant under some other provisions of this Order.

In case titled American Life Insurance Company (Pakistan) Ltd. v. Master Agha Jan Ahmed and another (2011 CLD Karachi 350), its headnote (a) is reproduced infra:-

"----Art. 57---Previous judgment---Relevancy---Conviction in criminal trial---Effect---Previous judgment, order or decree is irrelevant unless either (i) existence of such judgment, order or decree is itself a fact in issue, or (ii) judgment, order of decree is relevant under some other provision of Qanun-e-Shahadat, 1984---Judgment and conviction in a criminal case is not even relevant in another or subsequent criminal trial."

and case titled Khushi Muhammad alias Natho v. The State (PLD 1986 SC 146), its postulate (c) is reproduced as under:-

"----S.43-Penal Code (XLV of 1860), S. 307-West Pakistan Arms Ordinance (XX of 1965), S. 13-D-Evidence recorded in main case (under S. 307, P.P.C.), held, could not be relied upon for upholding conviction of accused under Arms Ordinance, 1965-Each case has to be judged upon its own facts established by evidence led therein-A judgment was not admissible for purpose of proving reasons for judgment or for using it, findings of facts as evidence of those facts in another case."

7. The object for the description of offence is to put the accused under the proper notice of the matter he is charged. In my judicial estimation, the subject will remain insatiable if some other, relevant provisions of law are not considered. Section 367, Cr.P.C. is reproduced infra:-

367. Language of judgment: Contents of Judgment.

(1) ----------

(2) It shall specify the offence (if any) of which, and the section of the Pakistan Penal Code or other law under which the accused is convicted, and the punishment to which he is sentenced.

(3) Judgment in Alternative. When the conviction is under the Pakistan Penal Code and it is doubtful under which of two sections, or under which of two parts of the same section of that Code the offence falls, the Court shall distinctly express the same, and pass judgment in the alternative.

(4) If it be a judgment of acquittal, it shall state the offence of which the accused is acquitted and direct that he be set at liberty.

(5) ----------

(6) ----------

The above quoted provision of law clearly envisages that the Court while delivering its verdict commonly known, in the legal parlance as judgment, shall specifically express the offence and the section of the Penal law, under which the accused is convicted and sentenced. Even in case of acquittal, the judgment shall state the offence of which the accused is acquitted of and a direction shall be issued that accused be set at liberty, if under custody, and his bail bonds shall be ordered to be discharged, forthwith.

8. Although learned counsel for the petitioner has not argued in unequivocal and clear terms that the petitioner cannot be put at trial twice

in view of Article 13-A of the Constitution of Islamic Republic of Pakistan, 1973, read with section 403, Cr.P.C. but I feel that from the tenor of the arguments of learned counsel for the petitioner as recorded in para No.3 of the judgment, by necessary implications, the petitioner's counsel intended to raise the question of double jeopardy. Instead of undertaking any discussion on the point. Reliance in this regard is placed on the case titled Hassan and others v. The State and others (PLD 2013 SC 793), its headnote (c) is reproduced as under:-

> "...S. 403(1)---Constitution of Pakistan, Art. 185---Double jeopardy---Autrefois acquit and autrefois convict, principles of---Applicability---Convict who was sentenced to death had undergone a period of custody equal to or more than a full term of imprisonment for life during the pendency of his legal remedy against his conviction---Question was as to whether sentence of death awarded to convict could be maintained by the Supreme Court despite the fact that he had already served out one of the two legal sentences provided for in S.302(b), P.P.C---Plea of accused was that in such a situation the Supreme Court must not, affirm the sentence of death and might reduce the same to imprisonment for life in view of provisions of S.403, Cr.P.C.---Validity---Principles of autrefois acquit and autrefois convict contained in S. 403(1), Cr.P.C. forbid a new trial after a conviction or acquittal on the basis of the same facts had attained finality but it was equally obvious that the said principle had no application to the present situation wherein holding of a new trial was not in issue---Principles of autrefois acquit and autrefois convict contained in S.403(1), Cr.P.C. had no relevance to a case wherein the question under consideration in an appeal was not as to whether a new trial of the convict should be held or not but the issue was as to which sentence would be the appropriate sentence for a convict."

Moreover, in the case titled State through Prosecutor-General, Punjab v. Jahangir Akhtar and others (2018 SCMR 733), the august Supreme Court of Pakistan in its headnote (1), has observed infra:-

"----Art.13(a)---Criminal Procedure Code (V of 1898), S.403---Simultaneous disciplinary and criminal proceedings--Permissibility---Employment in police obtained on basis of fake and forged documents---As a disciplinary measure the respondents (police officials) were compulsorily retired from service but criminal proceedings against them were stopped on the basis that in view of their compulsory retirement it would amount to double jeopardy; held, that disciplinary action taken by a department and criminal prosecution were quite distinct from each other and could proceed simultaneously or one after the other and such separate actions did not attract the principle of double jeopardy---Disciplinary proceedings were meant solely for maintaining and ensuring purity of service whereas criminal prosecution was meant to punish a person for the offence committed by him---Supreme Court restored status of respondents as accused persons in the relevant criminal cases and the Trial Court was directed to proceed with their trials in accordance with law."

In case titled Muhammad Nadeem Anwar v. Securities and Exchange Commission of Pakistan through Director NBFCs Deptt., Islamabad (2014 SCMR 1376) in its headnote (b), it has been held as follows:-

"----S. 403---Constitution of Pakistan, Art 13(a)---General Clauses Act (X of 1897), S.26---Double jeopardy, principle of-- Scope---No person could be vexed twice and prosecuted or punished for the same offence, but if he was guilty of offence under another enactment, though by the same chain of facts, he could be tried,

convicted and punished under that very offence committed by him." Emphasis supplied.

The above quoted judgments are complete answer, to the indirect argument of the learned counsel about double jeopardy.

9. The petitioner has since invoked the revisional jurisdiction of this Court, therefore, it will be appropriate to reproduce provisions of sections 435 and 439, Cr.P.C.

435. Power to call for records of inferior Courts. (1) The High Court or any Sessions Judge [....], may call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court and may, when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending examination of the record.

[Explanation. All Magistrates, shall be deemed to be inferior to the Session Judge for the purposes of this sub section.]

439. High Court's powers of revision. (1) In the case of any proceeding the record of which has been called for by itself, [....] or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 423, 426, 427 and 428 or on a Court by section 338, and may enhance the sentence; and, when the Judges composing the Court of Revision are equally divided in opinion, the case shall be disposed of in manner provided by section 429.

It will be necessary to see this:

1. Scope of Revisional Power:

1.1 ..... in exercise of its revisional jurisdiction the High Court ought

to have confined itself to correctness, legality, regularity or propriety of the proceedings of the courts below rather than embarking upon a full-fledged reappraisal of the evidence, an exercise fit for appellate jurisdiction.

(PLD 2019 Supreme Court 261)

2. Suo Motu Powers to examine legality or correctness of order:

2.1 ..... revisional jurisdiction can be exercised even suo motu so as to examine correctness, legality or propriety of an order passed by a subordinate Court.

2000 YLR 2619 [Lahore]

3. Restriction upon conversion of acquittal into conviction:

3.1 .....although High Court has been conferred power of an Appellate Court under section 423 of the Cr.P.C. while exercising the powers of revision under section 439 of the Cr.P.C., clause (a) of subsection (1) of section 423 of the Cr.P.C. if read minutely has not awarded the power to appellate/revisional Court to convict any acquitted person by taking suo motu action....

(2009 SCMR 569)

3.2 ..... Revisional Court has no jurisdiction to award the sentence itself for the offence for which accused has been acquitted of the charge.

(2003 SCMR 698)

4. Power to enhance sentence:

4.1 The Appellate Court under Cr.P.C. is not authorized even to convert acquittal into conviction or enhance the sentence whereas section 439 Cr.P.C. confers such powers upon the Revisional Court i.e. the High Court to enhance the sentence .....

(PLD 2007 Supreme Court 405)

5. Proper opportunity of hearing:

6.1 In view of the clear language of section 439(2), Cr.P.C., as reproduced above, it was mandatory for the revisional Court to have afforded proper opportunity of hearing to the petitioner, after due notice to him, which the revisional Court admittedly failed to follow.

(2012 SCMR 1072)

10. In order to examine the matter further from another angle in view of the factual matter of the case, it will be advantageous to reproduce provisions of section 300, P.P.C., which has been made punishable under section 302, P.P.C.

S. 300. Qatl-i-amd. Whoever, with the intention of causing death or with the intention of causing bodily injury to a person, by doing an act which in the ordinary course of nature is likely to cause death, or with the knowledge that his act is so imminently dangerous that it must in all probability cause death, causes death of such persons, is said to commit qatl-i-amd.

S. 302. Punishment of qatl-i-amd. Whoever commits qatl-i-amd shall, subject to the provisions of this Chapter be;

(a) punished with death as qisas;

(b) punished with death or imprisonment for life as ta'zir having regard to the facts and circumstances of the case, if the proof in either of the forms specified in section 304 is not available; or

(c) punished with imprisonment of either description for a term which may extend to twenty-five years, where according to the injunctions of Islam the punishment of qisas is not applicable;

(Provided that nothing in clause (c) shall apply where the principle of fasad-fil-arz is attracted and in such cases only clause (a) or clause (b) shall apply.)

And

Section 9 of the Pakistan Arms Ordinance, 1965 is reproduced as under:-

9. Unlicensed possession of arms etc. No person shall have in his possession or under his control any arms, or any ammunition or military stores, except under a licence and in the manner and to the extent permitted thereby.

Section 13 Arms Ordinance provides penalty for breach of sections 4, 5, 8 to 11 of the Ordinance reading as follows:-

"Section 13.- Penalty for breach of sections 4, 5, 8 to 11. Subject to the provisions of sections 13-A and 13-B, whoever commits any of the following offences, namely:-

(a) Sells or keeps, offers or exposes for sale, any arms, ammunition of military stores, or undertakes the repairs of any arms in contravention of the provisions of section 4;

(b) Fails to give notice of the sale of arms and ammunition and of the purchasers name and address as required by section 4;

(c) Transports any arms, ammunition or military stores in contravention of a regulation or prohibition issued under section 5;

(d) Goes armed in contravention of the provisions of section 8;

(e) Has in his possession or under his control any arms, ammunition or military stores in contravention of the provisions of section 9;

(f) Fails to deposit arms, ammunition or military stores as required by section 10;

(g) Intentionally makes any false entry in a record or account which by a rule made under clause (d) of section 11 he is required to keep;

(h) Intentionally fails to exhibit anything which by a rule made under clause of section 11 he is required to exhibit; or

(i) Keeps, carries or displays any arms in contravention of an order issued under section 11-B.

Shall be punished with imprisonment for a term which may extend to seven years or with fine or with both:

Provided that the punishment for an offence committed in respect of any rifle of .303 bore or over, musket of .410 bore or over, pistol or revolver of .441 bore or over, or ammunition which can be fired from such musket, pistol or revolver, shall be imprisonment for a term which is not less than three years.

The act of commission of qatl-i-amd is an offence, has been defined under the Pakistan Penal Code. The act of keeping in possession of an unlicensed arms etc without permit or valid licence constitutes as an offence duly defined under a special law i.e. Pakistan Arms Ordinance, 1965. Both the offences have been given their specific names under the respective legislation. A person accused of committing either of the offence at trial has to be distinctly charged by a court of competent jurisdiction. The object behind proving recovery of weapon of offence i.e. pistol (P-1) during a murder trial is to lend corroboration to prosecution's case, which may consist of the ocular account or circumstantial evidence. The medical evidence also had a corroboration with ocular account. Respectful reliance is placed on the case of Muhammad Jamil v.

Muhammad Akram and others (2009 SCMR 120) wherein the august Supreme Court of Pakistan has held as under:-

"----S. 302 (b)---Appreciation of evidence---Principle---In a case of direct evidence other pieces of evidence are used for corroboration or in support of direct evidence---."

It will be important to mention here that I have been able to lay my hand on the opinion in case titled Mataro v. The State (1984 PCr.LJ 1724) wherein in headnote (a) is held as under:-

"----S. 13(e)---Penal Code (XLV of 1860), S. 302---Recovery of unlicensed country-made pistol and cartridges---Appreciation of evidence---Witnesses, disbelieved by High Court in a criminal appeal in murder case whereby conviction set aside, held, not believable in connected appeal under West Pakistan Arms Ordinance, 1965. (witnesses)"

In case titled Yasir Chaudhry v. The State and another (MLD 2012 Lahore 1315), its headnote (b) is reproduced infra:-

"----S.249-A---Power of Magistrate to acquit accused at any stage---Scope---When the accused had been acquitted in the main case, he would become entitled to acquittal in a case which was an offshoot of the main case".

In case titled Tariq Saeed v. The State and another (2014 MLD Lahore 1561), my learned brother Shahid Hameed Dar-J, as he then was, has held as under:-

----S. 417(2-a)---Penal Code (XLV of 1860), S. 302---Pakistan Arms Ordinance (XX of 1965), S.13---Qatl-i-amd, possessing illicit arms---Appeal against acquittal---Accused who was acquitted for the murder charge, requested for his acquittal in case under S.13 of Pakistan Arms Ordinance, 1965, which request was acceded to,

and accused was also acquitted of the charge under S.13 of Pakistan Arms Ordinance, 1965---Validity---Facts relating to recovery of dagger, were inseparably stitched with story qua the murder of the deceased--Said dagger had not been recovered from the possession of accused, but investigating officer took it in his possession in absence of accused---Accused was implicated as an accused of murder case, and he was also booked in a separate case under the same FIR---Witnesses of recovery of said dagger, who also deposed against accused in murder case, were disbelieved---Story of murder of the deceased and that of recovery of dagger both were disbelieved and accused acquitted---Case, depended a lot on the outcome of murder case, in which accused was acquitted---Recovery of the dagger was not an independent circumstance, but it stood imbedded in murder case, in which accused was acquitted---Complainant had failed to file appeal within prescribed time-limit---Appeal was also liable to be dismissed on that score."

It appears that while passing judgment, referred above, their lordships either had not properly been assisted or the case law on the subject had escaped their notice and the law laid down in following cases titled The State through Assistant Advocate-General Sindh v. Khalid Ahmed (2010 PCr.LJ Karachi 126) and case titled Irfan alias Irfoo and 2 others v. The State (MLD 2016 Sindh (Sukkur Bench) 1977) and case titled Khushi Muhammad alias Natho v. The State (PLD 1986 SC 146), its postulate (c) is reproduced as under:-

"----S. 43---Penal Code (XLV of 1860), S. 307---West Pakistan Arms Ordinance (XX of 1965), S. 13-D---Evidence recorded in main case (under S. 307, P.P.C.), held, could not be relied upon for upholding conviction of accused under Arms Ordinance, 1965---

Each case has to be judged upon its own facts established by evidence led therein-A judgment was not admissible for purpose of proving reasons for judgment or for using it, findings of facts as evidence of those facts in another case."

11. Admittedly, the offence under section 13 of the Pakistan Arms Ordinance, 1965, was tried by learned Magistrate Section-30, Vehari. The murder case was tried by the court of learned Sessions Judge, Vehari. The offence of murder was committed on 17.09.2012. The offence under section 13 of the Pakistan Arms Ordinance, 1965 stood committed by the petitioner, the moment he got recovered weapon of offence i.e. on 28.07.2013. The Separate reports under section 173, Cr.P.C., in respect of both the offences were submitted before different courts of competent jurisdiction. After taking cognizance, separate charges were framed by respective courts while adopting legal formalities. The evidence was separately recorded by both the courts below and the accused was confronted with evidence under section 342, Cr.P.C. on different dates by different courts and ultimately conviction was recorded by two courts. Neither the charge was framed under section 13/20/65, A.O. in the murder case nor was he tried for the same, consequently, neither convicted nor acquitted. Recovery of unlicensed pistol (P-1) only renders corroboration before learned trial judge for the offence of murder. The recovery of pistol (P-1) on the pointing out of the petitioner since constituted an independent offence for which the petitioner was separately charged and after recording separate evidence by a different competent court to try it, he was convicted and sentenced vide impugned judgment. His appeal was also dealt with by two different forums i.e. Sessions Judge and High Court. Even, keeping in view the Articles 54 to 56 of the Qanun-e-Shahadat Order, 1984, the evidence recorded in murder case i.e. in Sessions Court neither could have been considered in the instant case, so, Revisional Court despite having power to call for record of any

proceedings before any inferior criminal court situated within the local limits of its jurisdiction for the purpose of satisfying itself as to the correctness, legality and propriety of any finding, sentence or order passed. The judgment of acquittal dated 04.03.2019 passed in murder case even otherwise is not part of the record of the case pertaining to the case under section 13/20/65 of the Arms Ordinance, therefore, contention of the learned counsel for the petitioner is hereby repelled. I have also gone through the contents of Para No.11 of the judgment passed in murder case which apart from the above noted reasons being alien to the record of the instant case, even otherwise, is not helpful to the case of the petitioner because recovery of weapon of offence has not been disbelieved. Apart from the above noted arguments of learned counsel for the petitioner, I have gone through the record of the case and this court has found no fault in findings of conviction recorded by the learned court below.

12 The corollary of the above discussion is that conviction and sentence of the petitioner recorded by learned trial court vide impugned judgment dated 11.01.2018 and upheld by learned Addl. Sessions Judge, Vehari vide judgment dated 04.09.2018, is maintained and resultantly instant criminal revision petition having no force is dismissed.

JK/M-131/L **Revision dismissed.**

2020 P Cr. L J Note 71

[Lahore (Multan Bench)]

Before Anwaarul Haq Pannun, J

QAISER NADEEM---Appellant

Versus

The STATE and others---Respondents

Criminal Appeal No. 58-J of 2017, decided on 17th April, 2019.

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

----Ss. 302(b), 337-F(i), 394 & 411---Qanun-e-Shahadat (10 of 1984), Art. 22---Qatl-i-amd, ghayr-jaifah-damiyah, voluntarily causing hurt in committing robbery, dishonestly receiving stolen property---Appreciation of evidence---Benefit of doubt---Night-time occurrence---Test identification parade---Scope---Accused were charged for committing murder of the deceased during robbery---Record showed that the occurrence took place at midnight on 11.06.2011 in the fields---No source of light existed in the fields for identification of the accused with exactitude---Ocular account in the case had been furnished by complainant and injured witness---Since the accused were not named in the FIR, therefore, after their arrest on 27.06.2011, they were put to identification parade, conducted under the supervision of Judicial Magistrate on 04.07.2011---Police took into possession blood stained earth, one empty of pistol 30-bore, one empty of pistol 30-bore from a distance of 10 steps and 04 empties from a distance of further 10 steps---Complainant also made many dishonest improvements while recording his statement in the court---Eye-witness who along with given up witness allegedly received injuries during the occurrence was medically examined on 15.06.2011, whereas the occurrence took place on 11.06.2011---Said

injured witness, while facing the test of cross-examination, made many dishonest improvements---Presence of said witnesses at the place of occurrence appeared to be highly doubtful, in circumstances---Despite the fact that the accused had raised no objection over the identification parade, reliance could not be placed upon the said identification parade because of non-existence of sufficient light at the place of occurrence for recognizing the features, role and face complexions of the accused persons at the time of occurrence---Identification parade was rejected on that score---Case of prosecution was not free from doubts---Appeal was allowed and accused was acquitted by setting aside conviction and sentence recorded by the Trial Court, in circumstances. [Paras. 11, 12, 14, 15, 16 & 18 of the judgment]

Kamal Din alias Kamala v. The State 2018 SCMR 577 rel.

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

----Ss. 302(b), 337-F(i), 394 & 411---Qatl-i-amd, ghayr-jaifah-damiyah, voluntarily causing hurt in committing robbery, dishonestly receiving stolen property---Appreciation of evidence---Benefit of doubt---Medical evidence---Scope---Accused were charged for committing murder of the deceased during robbery---Record showed that complainant reported the matter on 11.06.2011 at 5.10 a.m.---Post-mortem examination of the dead body was conducted at 11.30 a.m. on 11.06.2011---Post-mortem report showed probable time elapsed between injury and death as one hour while between death and post-mortem 09-11 hours---Two prosecution witnesses had also received injuries at the hand of the accused---Said witnesses had been medically examined by Medical Officer, after unexplained delay of about 04 days---Medical Officer had observed duration of injuries as three to five days back---Injured witnesses got recorded their statements under S. 161, Cr.P.C. on 15.06.2011---Said unexplained delay in medical

examination of injured witnesses and recording their statement by police cast serious doubt about their presence at the spot---Appeal was allowed and accused was acquitted by setting aside conviction and sentence recorded by the Trial Court, in circumstances. [Paras. 11 & 15 of the judgment]

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

----Art. 22---Test identification parade---Scope---Holding of test identification parade was not a mandatory requirement as identification would be essential for establishing the identity of the accused only if there was any doubt in that regard. [Para. 18 of the judgment]

Abdul Aziz and others v. The State 2019 PCr.LJ 12 rel.

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

----Ss. 302(b), 337-F(i), 394 & 411---Qatl-i-amd, ghayr-jaifah-damiyah, voluntarily causing hurt in committing robbery, dishonestly receiving stolen property---Appreciation of evidence---Benefit of doubt---Recovery of weapon and crime empties---Reliance---Scope---Accused were charged for committing murder of the deceased during robbery---Record showed that accused got recovered .30-bore pistol along with five bullets---Accused got recovered 44-bore rifle along with seven live bullets on the same day and place---Complainant had deposed that in their presence the accused made a disclosure and led to the recovery of pistol .30-bore from the bank of a canal, which was buried---Accused himself while digging earth recovered pistol along-with five live bullets---Complainant had further deposed that from a distance of 4 steps, accused also got recovered rifle 44-bore with 7 live cartridges---Head Constable/witness was silent about handing over the recovered empties of pistol .30 bore to anyone for keeping the same in the malkhana for safe custody---Official witness had deposed that he transmitted sealed parcel of pistol 30-bore for its

transmission to the Forensic Science Laboratory on 06.08.2011---Said witness was also silent about the transmission of crime empties recovered from the spot to the office of Forensic Science Laboratory---Photocopy of report of Forensic Science Laboratory, which was not admissible in evidence under S. 510, Cr.P.C., could not be relied upon---Record transpired that the recoveries of weapon of offence were effected from an open plot, which was accessible to the public-at-large---High Court observed that such type of recoveries were nothing but trash and could not render any corroboration to the prosecution's case. [Paras. 19 & 20 of the judgment]

Ghayour Abbas v. The State 2018 YLR 2494 and Muhammad Saleem v. Shabbir Ahmad 2016 SCMR 1605 rel.

(e) Criminal trial---

----Benefit of doubt---Principle---Single instance causing a reasonable doubt in the mind of court entitled accused to the benefit of doubt not as a matter of grace but as a matter of right. [Para. 21 of the judgment]

Muhammad Khan and another v. State 1999 SCMR 1220; Muhammad Akram v. The State 2009 SCMR 230 and Tariq Pervaiz v. The State 1995 SCMR 1345 rel.

Malik Muhammad Latif Khokhar and M. Ahmad Khan Sial for Appellant.

Nemo for the Complainant.

Muhammad Abdul Wadood, Deputy Prosecutor-General for the State.

Date of hearing: 17th April, 2019.

JUDGMENT

ANWAARUL HAQ PANNUN, J.---Through the titled appeal under section 410, Cr.P.C., the appellant Qaiser Nadeem has challenged the vires of judgment dated 19.06.2015 passed by learned Addl. Sessions Judge, Jalalpur Pirwala, on the conclusion of trial, in case FIR No.285/2011, for offence under sections 302/337-F(i)/394/411, P.P.C., registered at Police Station Saddar, Jalalpur Pirwala, whereby he has been convicted and sentenced as under:-

Under section 302(b), P.P.C.

Imprisonment for life as Ta'zir with fine of Rs.50,000/- and in case of default, the convict shall further undergo one year's S.I. The convict is also liable to pay Rs.200,000/- as compensation to the legal heirs of the deceased under section 544-A, Cr.P.C. and in default whereof, he shall further undergo one year simple imprisonment.

Benefit of section 382-B, Cr.P.C. was extended to the convict.

2. The prosecution's story unfolded through FIR (Ex.PA/2) lodged on written complaint (Exh.PA) of Saeed Ahmad (PW-1) is to the effect that during the preceding night of 11.06.2011, he along with Ijaz Ahmad, Mehboob Ahmad alias Boba and Khalil Ahmad, deceased was irrigating his crop through tube-well. At about midnight, two persons bearing features, one tall height, medium body wearing Shalwar Qameez aged about 20 to 25 years old, other medium height and body, curly hair wearing white Shalwar and Qameez were present suspiciously at Pull Vereero Wala near the shop of Iqbal Shah son of Sardar Shah. His brother namely Khalil Ahmad inquired from the accused, the reason for their presence there, whereupon they told that they had come to meet one Ibrahim Langha. Khalil asked them to get themselves connected with Ibrahim through Cell Number 0342-2771476 but in vain. Ijaz PW armed

with 44 bore licensed gun, when tried to put them under search, the tall heighted person overpowered Ijaz and caught hold his rifle and the other accused, medium height brought out a pistol fastened with his calf and made fire shot which hit on the right side of the belly of Khalil while passing through his body. Khalil fell down, tall heighted person snatched rifle from Ijaz and brought his pistol and made fire shot on Mehboob, causing a grazing wound on his right shoulder. They also injured Ijaz PW with their fists blows. The accused though made firing upon the complainant, who luckily survived. On their hue and cry, his brother Zafar along with other people of the locality came over there but the accused fled away while making aerial firing. They immediately tried to shift Khalil to Civil Hospital, Jalalpur Pirwala, but on their way to hospital, he succumbed to his injuries.

3. Registration of the case, after its usual investigation encapsulated into a report under section 173, Cr.P.C. which was duly submitted before the learned trial court, the appellant and his co-accused, after supplying them with the copies of incriminating material under section 265(c), Cr.P.C., were charged sheeted to which they denied and pleaded not guilty, while professing their innocence and claiming trial, the prosecution was directed to produce evidence.

4. The medical evidence in the case has been furnished by Dr. Shoukat Ali M.O. T.H.Q Jalalpur Pirwala (PW-6). He conducted post-mortem examination on the dead body of the deceased Khalil Ahmad and observed the following injuries:-

i. Wound of entry A lacerated fire arm wound measuring 1 x 1 cm on right side of chest. 11 cm below from right nipples. Blackening present round the margin of the wounds. No tattooing seen. Corresponding tear present on qamiz.

ii. Wound of exit A fire arm lacerated wound measuring 2 x 2 cm on left lumber region 10 cm above from posterior superior iliac spine. Margins are everted. No burning blackening or tattooing seen.

Opinion

In his opinion, all injuries are ante-mortem in nature. Injury No.1 and 2 are sufficient to cause death in ordinary course of life. Hypovolemia and shock lead to death and injury to vital organs like liver and kidney as well.

Probable time that elapsed

Between injury and death----within one hour.

Between death and postmortem within 9-11 hours.

Dr. Abdullah Khan, M.O T.HQ Hospital Jalalpur Pirwala (PW-3) conducted medical examination of injured Ejaz Hussain on 15.06.2011 who was brought by Toqeer Nasir 2771-C and noted the following injuries:-

i. An abrasion size 2 cm x 1 cm on upper part of left side of back of chest.

ii. An abrasion size 4 cm x 6 cm on lower part of back of right chest.

iii. An abrasion size 4 cm x 2 cm on front of left knee joint.

Injuries Nos.1, 2 and 3 were declared as Jurh Ghair Jafia Damia and probable duration of injuries was within three to five days.

He also medically examined Mehboob Hussain and found the following injury.

A lacerated wound size 7 cm x 1.5 cm on upper part of right scapular region. Bone not exposed.

The injury No.1 was declared as Jurh Ghair Jafia Matlahima and probable duration of injury was three to five days back.

5. The ocular account in this case has been furnished by Saeed Ahmad, complainant (PW-17) and Ijaz Ahmad (PW-2). Liaquat Ali SI and Muhammad Farooq SI, the investigating officers have appeared as PW-9 and PW-15. Mohsin Raza, the then Magistrate Ist Class (PW-12) supervised the test identification parade of the accused Qaiser Nadeem and Imtiaz Hussain.

6. The prosecution has produced as many as 15 witnesses beside tendering, in evidence, reports of Chemical Examiner, Lahore and Serologist regarding blood stained earth, Exh.PX and Exh.PZ and photocopy of report of FSL regarding empties as Mark-A.

7. When examined under section 342, Cr.P.C., the appellant denied every bit of incriminating material so produced. While replying the question that as to why this case against him and why the prosecution witnesses had deposed against him, he replied as under:-

"This occurrence might have been a blind murder conducted by some un-known persons. The complainant party had merely found dead body of Khalil deceased and at that time, they were fully unaware of circumstances and happening of the occurrence as well as culprits, that was why, at the time of registration of case, the complainant gave vague features of the accused persons, so that he may nominate any person in the instant case. Alleged occurrence was of night time and there was no source of light, in these circumstances, nobody could identify or recognize the real culprits. The deceased might have made an attempt to commit dacoity at Pul Veero Wali and on resistance, he was murdered as he himself was a criminal person. Allegedly, injured PWs do not

seem to be present and made injured at the time of occurrence. Both the injured PWs remained reluctant of joining investigation and to get medically examined only a considerable time. It seems that both the alleged injured PWs were not ready to become false witnesses of the instant case. I and my co-accused person were dragged in this criminal case by a suspicion and doubtful manner. Even the prosecution has mala fide withheld its own evidence of our nomination in the case. The complainant has falsely implicated me and my co-accused person in the instant case on the asking of some political figure. The complainant is a greedy person and want to grab money from me and my co-accused person. He has also offered monitory share to the PWs that was why on the asking of complainant have falsely deposed against me."

8. The appellant neither opted to appear under section 340(2), Cr.P.C. nor has produced any defence evidence.

9. Learned trial court, on conclusion of the trial, proceeded to convict the appellant as aforesaid. Hence, the titled appeal.

10. Arguments heard. Record perused.

11. Before judicious analysis, it will be appropriate to state broadly prosecution's, the bare facts of the case. According to the prosecution's own version, the occurrence took place at midnight (2/2.30 a.m.) on 11.06.2011 in the fields. No source of light existed in the fields for identification of the accused with exactitude. Saeed Ahmad, complainant (PW-1) reported the matter through rappat No.34 dated 11.6.2011 at 5.10 a.m. while making his statement (Exh.PA) on the basis of which formal FIR (Exh.PA/2) was registered. The post mortem examination over the dead body of the deceased was conducted at 11.30 a.m. on 11.06.2011 by Dr. Shoukat Ali M.O THQ Jalalpur Pirwala (PW-6) who noted down the

aforesaid two injuries on the person of the deceased and according to his opinion, both injuries (injuries Nos.1 and 2) were sufficient to cause death in ordinary course of nature. According to him, vide post mortem report (Exh.PK), probable time that elapsed between injury and death was within one hour while between death and postmortem was within 09-11 hours. Furthermore, according to prosecution's own version two persons namely Ijaz Hussain (PW-2) and Khaleel Ahmad (given up PW) had also received injuries at the hand of the accused. But interestingly, the said Ijaz Hussain (PW-2) and Mehboob Hussain have been medically examined by Dr. Abdullah Khan, M.O, THQ Hospital Jalalpur Pirwala (PW-3), after unexplained delay of about 04 days on 15.06.2011. He observed duration of injuries as 3 to 5 days back. They also got recorded their statements under section 161, Cr.P.C. recorded on 15.06.2011.

12. The ocular account in this case has been furnished by Saeed Ahmad, complainant (PW-1) and Ijaz Hussain, injured (PW-2). Since the accused were not named in the FIR, therefore, after their arrest on 27.06.2011, they were put to identification parade. It was conducted under the supervision of Mohsin Raza, Magistrate 1st Class (PW-12) on 04.07.2011. From the place of occurrence, the police took into possession blood stained earth through recovery memo (Exh.PB), one empty of pistol .30 bore vide recovery memo (Exh.PC), one empty of pistol .30 bore from a distance of 10 steps and 04 empties from a distance of further 10 steps, vide recovery memo (Exh.PD).

13. The evidence of Saeed Ahmad, complainant (PW-1) has been scanned. During the course of cross-examination, he states that "It is correct that I have narrated in my statement Ex.PA that features of the accused persons were 1-tall height, medium body age 20/25 years, 2-medium height, medium body, curly hair. As it was darkness and due to

occurrence I could not identify the accused persons. Again said that there was no darkness and I had identified the accused." He further deposed that "The height of both the accused is almost similar. I cannot say that Qaiser Nadeem accused is inch taller than Imtiaz accused. At present hairs of both the accused are not curly but at the time of occurrence hair of one accused were curly."

14. Moreover, Saeed Ahmad, complainant (PW-1) has also made many dishonest improvements while recording his statement in the Court, with his previously recorded statements, which have been duly confronted by defence, which are as under:-

"In my statement Ex.P-A I have narrated that accused Imtiaz over powered Ejaz Ahmad and caught hold rifle. Confronted with Ex.PA wherein it is not so recorded rather there is recorded that on hearing word of search tall heighted person caught hold Ejaz Ahmad along with his rifle. I have narrated in Ex.PA that Qaisar accused brought out pistol from his calf and made fire which hit on the right side of belly of Khalil deceased. Confronted with Ex.PA wherein name of Qaisar accused is not mentioned rather it is mentioned that other person fired upon deceased. I have narrated in Ex.PA that Khalil fell down and Imtiaz accused gave him butt blow with rifle. Confronted with Ex.PA wherein it is not so recorded. I have narrated in Ex.PA that then Imtiaz accused also made fire with his own pistol at Mehboob which left a grazing mark on the right shoulder of Mehboob. Confronted with Ex.PA wherein the name of accused Imtiaz is not mentioned rather according to statement Ex.PA this act is attributed to the tall heighted person. I have narrated in Ex.PA that we call a motor car

and brought the deceased Khalil to Civil Hospital, Jalalpur Pirwala wherein the factum of to be called the motorcar is not mentioned."

15. The another eye-witness of the occurrence is Ijaz Hussain (PW-2), who allegedly received injuries during the occurrence. The occurrence in this case taken place on 11.6.2011, whereas Ijaz Hussain (PW-2) along with Mehboob Hussain (Given up PW) were medically examined on 15.6.2011, vide medico legal certificates (Exh.PH and Exh.PI). Liaquat Ali SI (PW-9), who partly investigated the case during the course of cross-examination deposed that "PWs Ijaz and Mehboob did not meet me during my first visit at the place of occurrence. On the same day, I also searched the accused persons in the relevant locality. I could not see said PWs in the locality during my search. On the next day of registration of case, I investigated the case, in the relevant locality but Ijaz and Mehboob PWs were not seen by me. I also did not meet witnesses during investigation of 13 and 14 June, 2011. Volunteered that witnesses joined the investigation on 15.06.2011. I visit THQ Hospital, Jalalpur Pirwala where dead body and relatives as well as companions were available but Ijaz and Mehboob PWs were not available there. On 15.06.2011, when Ijaz and Mehboob PWs joined the investigation at that time what ever I did, I wrote down in the police diary and whatever PWs stated I recorded under section 161, Cr.P.C. It is correct to suggest that in the statements under section 161, Cr.P.C. of Mehboob and Ijaz PWs, there was no explanation that for a period of four days why they did not join investigation and made their statements." The non-appearance of this PW before the I.O, non-examining him medically and non-recording of statements of the injured PWs, with the Investigating Officer, for four days after the occurrence i.e. till 15.06.2011, in absence of any explanation casts serious doubt about their presence at the spot. The

learned trial Judge also observed in para No.37 of the impugned judgment that:-

> "As such the allegation of sustaining some bodily injuries by injured PWs at the hands of accused Imtiaz in view of medical evidence has not been proved because it did not corroborate with the ocular account of the PWs against the accused Imtiaz. So, keeping in view afore-going discussion, it could be assumed that charge under section 337-F(i), P.P.C. for causing injuries on the person of PWs is disproved."

16. Furthermore, Ijaz Hussain (PW-2) while facing the test of cross-examination has made many dishonest improvements which, after duly confronting the PWs with their previously made statements, have been brought on record by the defence. The relevant portion of his statement is as under:-

> "It was night occurrence. One accused was taller and the other was of short height. I narrated these facts to the police. I narrated to the police that features of one accused were tall heighted, medium body and age 20/25 years. While the features of second accused were medium height, medium body and curling hair. These features were narrated by me in Ex.DB. At this time both the accused persons are present in the court. I have seen them. Accused Qaisar is of tall height while accused Imtiaz is of short height. I have seen accused persons present in court. Hair of both the accused are not curly. It was night occurrence."

In view of above, both the aforesaid PWs (PW-1 and PW-2) have made dishonest improvements, therefore, their presence at the spot appears to be highly doubtful.

17. So far as identification of the accused by the PWs during their test Identification Parade is concerned, Saeed Ahmad, complainant (PW-1) stated that about 20/22 days after the occurrence, they received information and went to Central Jail Multan for identification parade and in the jail, he, Zafar, Mehboob and Ijaz identified the accused Imtiaz and Qaiser, in the presence of Illaqa Magistrate. Ijaz Hussain (PW-2) deposed on the same lines as deposed by the complainant (PW-1). During cross-examination, PW-1 deposed that he along with Ejaz, Mehboob and Zafar joined identification parade proceedings. They were called by the Judicial Magistrate who asked them as to whether they can identify their accused persons and thereafter their statements were recorded. He has narrated in Ex.DA that Imtiaz accused fired upon Mehboob and gave butt blows to Khalil deceased. Confronted with Ex.DA, wherein it is not so recorded. Ijaz Hussain (PW-2) during cross-examination deposed that he along with Saeed, Mehboob and Zafar joined proceedings for identification parade of the present accused persons in the New Central Jail, Multan. During the same proceedings learned Magistrate recorded his statement Ex-DC. He narrated in Ex.PC that Qaiser Nadeem fired upon Khalil whereas Imtiaz accused snatched his rifle. At the time of recording Ex.DC he narrated to the learned Magistrate that Imtiaz accused made fire upon mehboob. Confronted with Ex.DC wherein it is not so recorded. He also narrated the learned Magistrate that Imtiaz accused hit him with rifle butt blows. Confronted with Ex.DC wherein it is not so recorded.

18. It is trite law that holding of test identification parade was not a mandatory requirement as identification would be essential for establishing the identity of the accused only if there is any doubt in this regard. Reliance in this case be placed on case reported as "Abdul Aziz and others v. The State" (2019 PCr.LJ 12). According to prosecution, the witnesses duly identified the accused persons during the wake of

identification parade. In order to rely upon the said identification parade, I am of the opinion that it will be necessary for the prosecution to establish, at the first instance, whether there existed, the circumstances in which a prudent man can recognize the feature of the persons under identification. In this case, the occurrence had taken place during at 2.30 a.m. during the midnight of 11.6.2011. No source of light has been alleged to be in existent at the time of occurrence, therefore, I hold that it was not humanly possible to give the description of features of the accused persons by the PWs at the time of occurrence, hence, despite the fact that the accused had raised no objection over the identification parade, I am not inclined to rely upon the said identification parade because of non-existence of sufficient light, at the place of occurrence for recognizing the features, role and face complexions of the accused persons at the time of occurrence, hence, the identification parade is rejected on this score. Reliance in this case be placed on case reported as Kamal Din alias Kamala v. The State (2018 SCMR 577).

19. So far as recovery of weapon of offence i.e. pistol 30 bore is concerned, Muhammad Farooq SI (PW-15) deposed that on 28.07.2011 he interrogated the accused Qaiser Nadeem and Imtiaz Hussain and they one after the other made disclosure in pursuance whereof, Qaiser Nadeem accused got recovered 30 bore pistol along with five bullets from the Chah Verow Wala and same was taken into possession and sealed into parcels vide recovery memo Ex.PE, Pistol (P-4), bullets P4/1-5. He further stated that on the same day and place, Qaiser Nadeem accused got recovered 44 bore rifle P-5 along with seven live bullets P-5/1-7 and the same were taken into possession, sealed into parcels vide recovery memo Ex.PF. Saeed Ahmad, complainant (PW-1) deposed that in their presence, accused Qaiser made a disclosure and led to the recovery of pistol .30 bore from the bank of a canal. The pistol was buried under earth. The

accused himself while digging earth recovered pistol along with five live bullets, which I took into possession vide recovery memo Exh.PE. He further deposed that from a distance of 4 steps accused Qaiser also got recovered rifle 44 bore with 7 live cartridges which were taken into possession through recovery memo Exh.PF. Khurshid Ahmad 1520-HC is silent about handing over, of the recovered empties of pistol .30 bore, taken into possession by Liaquat Ali SI (PW-9) vide recovery memos (Exh.PC and Exh.PD) to anyone, for keeping the same in the malkhana for safe custody. Tariq Mehmood 1927/C (PW-13) deposed that he transmitted sealed parcel of pistol .30 bore for its transmission to the Forensic Science Laboratory, Lahore on 06.08.2011. He is also silent about the transmission of crime empties recovered from the spot vide recovery memo (Exh.PC and Exh.PD) to the office of PFSA, Lahore. Furthermore, Mark-A is the photocopy of report of Punjab Forensic Science Agency, Lahore, which is not admissible in evidence under section 510, Cr.P.C., hence same cannot be relied upon. Reliance in this regard is placed upon the case titled "Ghayour Abbas v. The State" (2018 YLR 2494), wherein it is observed that:-

> "However, the report of the concerned quarter available on file as Exh.PE reflects that it is neither original report nor it is true/certified copy of the report rather it is a duplicate copy, which was issued on 13.01.2017 i.e. four years after the occurrence. Moreover, it does not carry signature of the Bio-Chemist or Chemical Examiner and only signatures of one Additional Medical Superintendent (Admn), Benazir Bhutto Hospital, Rawalpindi, are affixed on it and underneath his stamp it is mentioned ex-Chemical Examiner. No doubt the report of Chemical Examiner is to be brought on record in terms of section 510, Cr.P.C. and that could be without summoning its author, however, admittedly it should be

in original form and in case its original is not available, then on the basis of very cogent reasons then its certified copy should be presented for consideration by the learned trial court. However, perusal of Exh.PE reflects that neither it is original report nor it qualifies to be a certified/true copy, hence, it cannot be read in evidence against the appellant to connect him with the case. Moreover, there is no provision of law to deviate from the requisite mode of proof of a document. Respectful reliance in this regard is placed on the ratio decidendi of august Supreme Court of Pakistan in Province of Punjab case reported as 2017 SCMR 172; wherein following principle was laid down:--

"---Chap. V [Arts. 72 to 101]---Documents brought on record---Mode of proof---Provisions governing the mode of proof could not be compounded or dispensed with, nor could the Court, which had to pronounce a judgment, as to the proof or otherwise of the document be precluded to see whether the documents had been proved in accordance with law and could, as such, form basis of a judgment."

When facts of the case in hand are examined on the touchstone of the case law referred to above, we have been persuaded to hold that the report of Chemical Examiner (Exh.PE) in this case is neither a legal document nor it carries any sanction of law, hence the same being vague/invalid document could not be read against the appellant. Therefore, the learned trial court was not justified in recording conviction against the appellant on the basis of such a indistinct document."

20. As stated above, the recoveries of weapon of offence shown to have been effected from the open plot, taken into possession by the I.O.

vide recovery memos (Exh.PE and Exh.PG) attested by the PWs, which was accessible to the public-at-large. Such type of pieces of recovery, is nothing, but trash and had failed to render any corroboration to the prosecution's case. Reliance in this regard is placed upon case titled "Muhammad Saleem v. Shabbir Ahmad" (2016 SCMR 1605) wherein their Lordships have pleased to observe as under:-

> "We have noticed that the weapon in issue had allegedly been recovered from a place which was open and accessible to all and sundry and, thus, it was unsafe to place reliance upon such recovery."

21. The nutshell of the above discussion is that the prosecution's case is not free of doubts, benefit of doubt has accrued in favour of the accused as the apex Court has held in case titled "Muhammad Khan and another v. State" (1999 SCMR 1220) that it is axiomatic and universal recognized principle of law that conviction must be founded on unimpeachable evidence and certainty of guilt and hence any doubt that arises in prosecution case must be resolved in favour of accused. Moreover it is cardinal principle of criminal jurisprudence that a single instance causing a reasonable doubt in the mind of Court entitles the accused to the benefit of doubt not as a matter of grace but as a matter of right. Reliance is placed on case law reported as "Muhammad Akram v. The State" (2009 SCMR 230) and "Tariq Pervaiz v. The State" (1995 SCMR 1345). Consequently, the instant appeal is allowed, the conviction and sentence awarded to the appellant by the learned trial Court, vide impugned judgment dated 19.06.2015 is set aside and the appellant is acquitted of the charge by extending him the benefit of doubt. The appellant is detained in jail, directed to be set at liberty forthwith in this case, if not liable to be detained in any other case.

JK/Q-4/L **Appeal allowed.**

2020 P Cr. L J 271

[Lahore (Bahawalpur Bench)]

Before Anwaarul Haq Pannun, J

ASHIQ ELAHI and another---Appellants

Versus

The STATE and others---Respondents

Criminal Appeal No. 689 of 2017 and Criminal Revision No. 35 of 2018, decided on 13th February, 2019.

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

----Ss. 319 & 80---Qatl-i-khata---Appreciation of evidence---Accidental fire shot---Deceased handed over the gun to accused for killing the snake which went off suddenly hitting the deceased---Accused had neither used the gun nor had fired any shot therefrom by design or with intention to do so---Nothing was available on record to show that accused had not used proper care and caution---Gun having gone off accidentally invoking of provisions of S. 319, P.P.C., was not justified---Case was fully covered by provisions of S. 80, P.P.C.---Conviction and sentence passed by lower court was set aside in circumstances.

Nasir Abbas v. The State and another 2011 SCMR 1966 and Munir Ahmad v. The State PLD 2000 Lah. 425 ref.

(b) Criminal trial---

----Conviction---Benefit of doubt---Scope---Conviction must be founded on unimpeachable evidence and certainty of guilt---Any doubt arising in prosecution case must be resolved in favour of accused.

Muhammad Khan and another v. State 1999 SCMR 1220 ref.

(c) Criminal trial---

----Benefit of doubt---Single instance giving rise to a reasonable doubt in the mind of court, entitled the accused to benefit of doubt not as a matter of grace but as a matter of right.

Muhammad Akram v. The State 2009 SCMR 230 rel.

Malik Muhammad Sajid Feroze and Azeem Ashraf Cheena for Appellants.

Abdul Rasheed Rashid for the Complainant.

Shahid Farid, Assistant District Public Prosecutor for the State.

Date of hearing: 13th February, 2019.

JUDGMENT

ANWAARUL HAQ PANNUN, J.---This single judgment shall decide Criminal Appeal No.689 of 2017, filed under section 410, Cr.P.C. by the appellant and Criminal Revision No.35 of 2018 filed by the complainant against the judgment dated 04.12.2017, on the conclusion of trial in case FIR No.285/2015, dated 26.08.2015, offence under section 302, P.P.C., registered at Police Station Abadpur, District Rahimyar Khan by the learned Sessions Judge, Rahimyar Khan, whereby the appellant has been convicted and sentenced as under:-

Under section 319, P.P.C.

"to pay "Diyat" i.e. 16,80,320/- to the legal heirs of the deceased along with rigorous imprisonment for five years as Ta'zir. Benefit of section 382-B, Cr.P.C. is extended to the convict."

2. The case of the prosecution as contained in the FIR (Exh.PC/1) lodged on the written complaint (Exh.PC) of the complainant Noor Ahmad (PW-4) is to the effect that on 26.08.2015, at about 6.30 a.m., Hafiz Samdani Kamboh being panic stricken came to him clamouring that earlier one of his buffalo had died, due to snake biting, once again a black snake has come to his house, whereupon the complainant and Nafees

Ahmad, while armed with rifle started walking towards the house of Hafiz Samdani, his son Muhammad Altaf and one Muhammad Bakhsh followed them, when they reached at the house of Hafiz Samdani, in the meantime, the appellant came there, who started abusing to Nafees Ahmad whereupon an altercation took place between Nafees Ahmad and the accused. The accused became infuriated and after snatching the gun from Nafees Ahmad, made straight fire with it landing on his back and near right elbow of Nafees Ahmad, deceased, who fell down and succumbed to the injuries on his way to Sheikh Zayed Hospital, Rahimyar Khan. The motive behind the occurrence was that there were litigation and dispute between the deceased and the accused.

3. The investigation was encapsulated into a report under section 173, Cr.P.C., which was duly submitted before the learned trial Court, while taking cognizance of the offence, the learned trial Judge after supplying the requisite copies of the statements to the accused as required under section 265C, Cr.P.C., charge sheeted him, to which he pleaded not guilty, while professing his innocence and claimed trial. The learned trial Judge directed the prosecution to produce its evidence for establishing the charge. The prosecution has produced as many as 11 PWs, in order to prove the charge against the appellant. The medical evidence has been furnished by Dr. Haji Ahmad Khan Durrani, M.O (PW-1), who on 26.8.2015 conducted postmortem examination on the dead body of deceased Nafees Ahmad and issued his postmortem report Exh.PA and pictorial diagrams Exh.PA/1. He noted the following two injuries on the dead body of deceased:-

1. Circular penetrating wound having burning with inverted margins on right upper portion of back of chest just below right scapula 2 cm from mid line, 13 cm below from base of neck, 3 x 3 cm in diameter (entry wound). On deep dissection, cartridge and some pellets recovered which were sealed and handed over to police p/s Abadpur.

2. Multiple lacerated abrasions on right elbow area measuring 0.5 x 0.5 cm, 0.4 x 0.3 cm, 0.2x 0.5 cm, 0.4 x 0.3 cm. All injuries are skin deep. All abrasions are in area of 6 x 6 cm diameter.

OPINION:-

"After conducting autopsy, I was of the opinion that injury No.1 by fire arm leading to severe damage to right lung, excessive hemorrhage, hemorrhage, shock and caused death in ordinary course of nature. All injuries were ante-mortem in nature. Fracture of 5th rib was seen in skiagrams.

Probable time that elapsed

Between injury and death within 1-2 hours.

Between death and post mortem within 2 to 4 hours.

Noor Ahmad, complainant (PW-4) and Muhammad Bakhsh (PW-5) have furnished the ocular account. Matloob Ahmad Bajwa, Inspector RIB (PW-8) and Abdul Hadi SI (PW-9) are the Investigating Officers of the case. The evidence of rest of the PWs being formal in nature, except PW-2 Riaz Ahmad Patwari, who prepared Exh.PB/1, the scaled site plan showing the house of Hafiz Samdani as the place of occurrence, needs no serious debate. The learned Prosecutor, while giving up witnesses namely Muhammad Altaf, Najeeb Ullah, Hafiz Samdani, Irfan Afzal 266/C, and after tendering positive reports of Forensic DNA and Serology Analysis and Firearms and Toolmarks Examination (Exh.PJ and Exh.PK) closed the prosecution's evidence. The accused/appellant, when examined under section 342, Cr.P.C., refuted the evidence put to him and in reply to a question as to "why this case and why the PWs have deposed against him", replied as under:-

"The story of prosecution is fabricated. FIR is concocted and based on mala fide intention. Complainant/PW4 and PW.5 Muhammad Bakhsh were not present at the time and place of incident.

Complainant is a greedy person and PW.5 lives under his supervision and is dependent upon PW.4. The FIR has been registered by complainant for blackmailing and taking punitive benefit from me. The local police has also registered and investigated this case with mala fide intention and in collusion with the complainant. I had no grudge, dispute, litigation or any previous enmity with the deceased and his family. I cannot even think of killing the deceased and his any family member.

The real facts are that on 26.08.2015 in early morning, I heard noises that a dangerous snake had come in the house of Hafiz Samdani which had also previously appeared in his house and bit his buffaloes and resultantly some of the buffaloes died. On hearing out cry, I also went there. When I reached there, number of people from locality were already present. Meanwhile, Altaf Ahmad (given up PW) son of Noor Ahmad complainant along with his gun reached there. Altaf Ahmad (given up PW) requested me to take his gun and kill the snake. Other people present there also asked me to kill the snake with gun. Meanwhile, Hafiz Samdani (given up PW) asked the people present over the place of occurrence that they should get away and disperse them from the place of incident, and they started getting away. Altaf Ahmad (given up PW) voluntarily handed over his gun and cartridges to me for killing snake, in the presence of other people. When I was loading the gun and closing the same, the fire was made itself suddenly. I had no intention to cause the death of or harm to any person. I am innocent and have been involved falsely in this case. The PWs being relatives of deceased have deposed falsely. PWs are related inter se and deposed against me with some ulterior motive.

The appellant neither opted to appear as his own witness under section 340(2), Cr.P.C. nor produced any evidence in his defence. On the conclusion of trial, the learned trial Court has convicted and sentenced the

appellant vide its impugned judgment dated 04.12.2017 as alluded to in paragraph No.1 of the instant judgment. Hence, this appeal.

4. Learned counsel for the appellant submit that the ocular account furnished by PW-4 and PW-5 is not worthy reliance for the reason that (i) being closely related to each-other and the deceased (ii) for making dishonest and deliberate improvements, in order to change the demeanor of occurrence as of an intentional murder, (iii) the recovery of double barrel gun .12 bore is not proved, (iv) Firstly there exists no motive with the appellant for committing the offence and secondly, the so-called subsequently motive introduced by the prosecution has even not been proved, (v) During the course of investigation, the case of the complainant has been nullified, (vi) The learned trial Judge while passing the conviction under section 319, P.P.C. had in-fact disbelieved the prosecution evidence, while acquitting the appellant from the charge under section 302, P.P.C., hence, conviction cannot sustain, which has been passed under the wrong legal assumptions, hence, it is liable to be set aside. Lastly he prayed for acquittal of the appellant from this case.

5. Conversely, learned Assistant District Public Prosecutor for the State has supported the impugned judgment whereas, learned counsel for the complainant while arguing the revision petition has also prayed for enhancement of sentence of the appellant.

6. Arguments heard and record perused.

7. Before analyzing the prosecution's evidence through a minute judicial scrutiny, it is straight away observed that (i) time of occurrence, as mentioned in the FIR, lodged by Noor Ahmad complainant, (ii) the place of occurrence as per site plan (Exh.PB) prepared by Riaz Ahmad, Patwari (PW-2) being the house of Hafiz Samdani, (iii) the death of deceased through firearm injuries, are not in dispute in this case. It will, thus, be appropriate, in the light of arguments of learned counsel of the parties to scrutinize the available prosecution ocular account furnished by

Noor Ahmad complainant (PW-4) and Muhammad Bakhsh (PW-5) to determine as to (i) whether there existed any previous ill-will or enmity between the deceased and the appellant as a motive prodding him for abusing, snatching .12 bore double barrel gun and then firing at him and if not (ii) whether the case of the appellant comes within the en-catchment of maxim "actus non facit reum nisi mens sit rea"? For this purpose, it will be relevant to refer certain excerpts from the evidence of prosecution.

Noor Ahmad, complainant (PW-4) deposed during the cross-examination that "No criminal case stood registered between the complainant party and the accused party prior to registration of this case. No civil litigation was pending between the parties prior to this case." Matloob Ahmad Bajwa, Inspector RIB/I.O (PW-8) stated during cross-examination that "Motive of the occurrence was the appearance of snake near the house of Hafiz Samdani PW . The accused also took the version before me that he had no enmity of any kind with the deceased . According to my investigation, version of complainant that before firing, altercation took place between the deceased and accused, was found false . In my investigation, incident took place due to negligence of accused Ashiq Elahi, and no intention of murder was found in my investigation.

The above referred evidence clearly shows that there existed no previous ill-will, enmity creating any mens rea in the mind of the appellant against the deceased. The learned trial Judge has also held that the prosecution has miserably failed to prove the existence of previous enmity between the parties, thus, the motive as alleged in the complaint (Exh.PC) is not established, therefore, it is held that there existed no reason with the appellant, for abusing him, while snatching his gun, for firing at the deceased.

8. From the facts of the case and the evidence available on record, it is quite discernable that the appellant had not snatched the rifle from the deceased for firing at him or at the snake, rather the rifle was handed over

to him by the deceased himself. He after having been handed over the rifle, was just filling the cartridges in the rifle, when it went off hitting unfortunately to the deceased, which resulted into his death. Abdul Hadi, SI/I.O (PW-9) has deposed that as per Hafiz Samdani (given up PW), the best evidence with the prosecution, the gun was handed over to Ashiq Elahi with the consent of the complainant party. The accused after taking the gun, loaded the same with two cartridges, when the gun itself went off suddenly and the fire hit Nafees deceased. Matloob Ahmad Bajwa, Inspector RIB (PW-8) deposed in cross-examination that the gun was very old and when he (accused Ashiq Elahi) was loading the gun, the fire was suddenly happened. He further deposed that in the light of evidence produced before him on 30.08.2016, he was of the opinion that at the time of occurrence Altaf Hussain brought double barre gun at the spot and handed over the same to Ashiq Elahi and requested to make fire at the snake, and when Ashiq Elahi loaded cartridge in the gun, fire was happened accidentally, and that Ashiq Elahi did not fire at the deceased intentionally. It is admitted by Noor Ahmad complainant (PW-4) that the rifle, which was being carried by Nafees was an unlicensed weapon. It can thus, be concluded that in-fact, it was the deceased, who himself handed over the gun to the appellant, which ultimately resulted into his unfortunate death without being any intention behind it on the part of the appellant. It has been held by the apex Court in case titled "Nasir Abbas v. The State and another" (2011 SCMR 1966) that:-

> "Act does not make a person guilty unless the mind is also guilty. Actus reus in simple parlance is the actual act of committing some offence contrary to the law of land mens rea is the intent to commit that offence. If either of the elements is missing, the conduct would not attract a penal provision unless it is a case of strict liability wherein absence of mens rea may not be fatal to prosecution."

Furthermore, the complainant did not challenge the result of investigation, conducted by the aforesaid Inspector RIB (PW-8) before any higher forum. In view of above analysis of the prosecution's evidence and in the light of above ratio, I hold that neither there existed any enmity or ill-will inter-se the appellant and the deceased for propelling him to commit the murder of the deceased nor he did any intentional act in order to murder the deceased.

9. So far as recovery of double barrel gun P-5 on the pointing out of the appellant and positive reports of Forensic DNA and Serology Analysis Exh.PJ and Firearms and Toolmarks Examination Exh.PK are concerned, the same do not render any corroboration to the prosecution for proving the recovery of the rifle on his pointing out for more than one reasons (i) it is admitted by Noor Ahmad (PW-4) that "the rifle which was being carried by Nafees Ahmad deceased was an unlicensed weapon, (ii) Matloob Ahmad Bajwa, Inspector RIB (PW-8) deposed that Hafiz Samdani got recorded his statement before him and according to his statement, the accused Ashiq Elahi threw the gun at the spot and went away, whereas Shafique Ahmad 921/C (PW-6) and Abdul Hadi SI/I.O (PW-9) deposed that on 26.11.2015, accused Ashiq Elahi made disclosure in the presence of PWs and got recovered a double barrel gun P-5 from a room towards south of brick kiln situated in Mouza Fazalabad, obviously an open place. In view of this situation, the recovery appears to be doubtful and is not believable, hence the recovery followed by positive report of PFSA (Exh.PK) is inconsequential in this case.

10. The learned trial Judge proceeded to convict the appellant under section 319, P.P.C., whereas the law laid down in case titled "Munir Ahmad v. The State" (PLD 2000 Lahore 425), wherein it has been held that Provision of section 318, P.P.C. would be attracted in case of a deliberate act on the part of accused person to do one thing but because of a mistake of act or of fact the end result of such an act was different from that intended by the accused person. Accused was charged and convicted

under section 319, P.P.C. for causing death by accidental firing Accused had neither used his rifle nor had fired any shot therefrom by design or with intention to do so .Where Trial Court admitted that the rifle had gone off accidentally, Court was not justified in invoking the provisions of section 319, P.P.C. against the accused as his case was fully covered by provisions of section 80, P.P.C. .Nothing was available on record to show that accused had not used proper care and caution in that regard . Sentence and conviction passed by Trial Court were set aside.

11. For what has been discussed above, the prosecution has miserably failed to prove its case against the appellant beyond any shadow of doubt. The benefit of doubt has accrued in favour of accused as the Hon'ble Supreme Court of Pakistan has held in case titled "Muhammad Khan and another v. State" (1999 SCMR 1220) that it is axiomatic and universal recognized principle of law that conviction must be founded on unimpeachable evidence and certainty of guilt and hence any doubt that arises in prosecution case must be resolved in favour of accused. Moreover it is cardinal principle of criminal jurisprudence that a single instance giving rise to a reasonable doubt in the mind of Court entitles the accused to the benefit of doubt not as a matter of grace but as a matter of right. Reliance is placed on case titled as "Muhammad Akram v. The State" (2009 SCMR 230) and "Tariq Pervaiz v. The State" (1995 SCMR 1345). Consequently, the instant Appeal is allowed, the conviction judgment dated 04.12.2017 passed by learned trial Court is set aside and the appellant is acquitted of the charge by extending him the benefit of doubt. The appellant Ashiq Elahi is directed to be released forthwith, if not required in any other case, whereas the Criminal Revision No.35 of 2018 filed by the complainant is dismissed.

MFB/A-70/L **Appeal accepted.**

2020 P Cr. L J 374

[Lahore (Multan Bench)]

Before Anwaarul Haq Pannun, J

SAQLAIN---Petitioner

Versus

The STATE and others---Respondents

Criminal Miscellaneous No. 1172-M of 2019, decided on 10th April, 2019.

(a) Juvenile Justice System Ordinance (XXII of 2000)---

----Ss. 7 & 2(b)---Determination of age---Ossification test---Duty had been cast upon Incharge of Police Station or Investigating Officer that if a person alleged to have committed an offence physically appeared or he himself claimed to be a juvenile, immediately an inquiry would be initiated for determination of his age.

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

----Ss. 324, 337-F(ii), 337-F(iii) & 34---Juvenile Justice System Act (XXII of 2018), S. 8---Juvenile Justice System Ordinance (XXII of 2000), S. 7---Attempt to commit qatl-i-amd, badiah, mutalahimah, common intention---Determination of age of accused person claiming himself to be minor---Application for ossification test was dismissed by Judicial Magistrate as well as by the Sessions Judge---Validity---Birth Certificate and Education Certificate were relevant material to inquire the actual age of the accused---Absence of stipulated documents was a condition precedent for seeking medical examination report---Court before authorizing further detention of an accused would record its findings regarding his age on the basis of available record---Section 8 of the Juvenile Justice System Act, 2018 was suggestive of holding medical examination only when the documents stipulated in the said section were

not forthcoming---If accused of an offence laid his claim, sought a declaration of his juvenility after submission of a report under S. 173, Cr.P.C. during trial, the Trial Court might entertain his claim but without defeating the object and without rendering the provisions of the Ordinance redundant---In the present case, the case was registered on 19.05.2018---Petitioner as per report under S. 173, Cr.P.C. was arrested on 22.05.2019---Juvenile Justice System Act, 2018 was promulgated on 22nd May, 2018---Petitioner remained with police on duly authorized physical remand by the Judicial Magistrate---Neither the petitioner appeared to the SHO or Investigating Officer from his physical appearance to be a juvenile nor the petitioner laid any claim about his juvenility---Petitioner, after submission of the challan, had moved application before the Trial Court claiming that his date of birth according to his school leaving certificate was 02.02.2003, therefore, he might be declared as a juvenile---Claim of the petitioner regarding juvenility was delayed one---Revisional court found that according to the voters list the name of the petitioner figured at Sr. No.180 with his CNIC number, issued on his attaining the age of 18 years---Perusal of the voter list further revealed that name of younger brother of the petitioner was also mentioned in the same voter list at Sr. No 181 with his CNIC number meaning thereby that even his younger brother was more than eighteen years of his age at the time of preparation of voters list---Petitioner had not been able to rebut the entries in the voters list or his CNIC---Petitioner at a belated stage was trying to make an abortive effort/attempt for getting himself declared as a juvenescent---Both the courts below had passed the impugned orders while taking into consideration the material available on the record in its true perspective which were quite in accordance with law, therefore, the same called for no interference by High Court---Application being patently devoid of any force was dismissed.

Qazi Sadar-ud-Din Alvi for Petitioner.

Abdul Wadood, DPG for the State.

M. Usman Sharif Khosa for Respondents.

ORDER

ANWAARUL HAQ PANNUN, J.---Through this petition under section 561-A, Cr.P.C., the petitioner, seeks the relief, contained in the prayer clause, which is as follows:-

"Uncle the above submissions, it is, therefore, most respectfully prayed that the instant petition may very kindly be accepted and impugned order dated 21.01.2019 passed by the learned Magistrate Section 30 Dera Ghazi Khan and order 12.02.2019 passed by the learned Sessions Judge, Dera Ghazi Khan may kindly be declared as illegal, unlawful against the law, facts and without lawful authority and the same may very kindly be set aside and in consequence thereof application filed by the petitioner for ossification test for determination of age of the petitioner may very kindly be accepted, in the interest of justice.

It is further prayed that till the final outcome of main petition, proceedings before the learned trial court may kindly be suspended/stayed, in the supreme interest of justice.

Any other relief which this Hon'ble Court deem fit may also be granted to the petitioner".

2. Tersely the facts out of which instant proceeding have arisen/emanated are that the petitioner stands booked in a case registered vide FIR No.136/2018, under sections 337-F(ii)(iii), 324, 34, P.P.C. with Police Station City Dera Ghazi Khan, on the complaint of respondent No.2 presently pending trial before the court of learned Magistrate Section-30, Dera Ghazi Khan. His application, for ossification test in

order to declare him a juvenile was dismissed by the learned trial Magistrate vide order dated 21.01.2019, which on challenge through a criminal revision petition has also been dismissed by the learned Sessions Judge vide his order dated 12.02.2019. The petitioner through the instant petition has challenged the propriety and legality of the above mentioned orders.

3. Learned counsel for the petitioner has mainly argued that holding of an ossification test is mandatory for declaring an accused juvenile, but both the courts below while ignoring this aspect, have passed the impugned orders illegally, which are not sustainable in the eyes of law and as such are liable to be set aside, and the application of the petitioner merits acceptance.

4. Contrarily, learned DPG assisted by learned counsel for the respondent/ complainant vociferously controverting the above noted/ submission have contended that under the provision of repealed Juvenile Justice System Ordinance, 2000, holding of an ossification test, while inquiring into the question of juvenility was a pre-requisite but under the provision of the Juvenile Justice System Act, 2018, to hold ossification test, as a mandatory requirement, for declaring the accused to be juvenescent is subject to certain conditions, which are not met in this case. Adds that as per voters' list not only the petitioner but also his younger brother are major; hence, both the courts below have rightly rejected the plea of the petitioner through the impugned orders, which are result of proper appreciation of facts and law, hence, do not warrant any interference.

5. Arguments heard. Record perused.

6. In the light of above noted contentions of the learned counsel for the parties, in order to decide the moot question it will be advantageous to compare the relevant provisions of the repealed law. Juvenile Justice System Ordinance, 2000, (hereinafter to be called the Ordinance) with the

relevant provisions of Juvenile Justice System Act, 2018, (hereinafter to be called as Act). Initially the Ordinance, was promulgated vide F.N.2(1)/2000-Pub., dated 01.07.2000, to provide for protection of the rights of children involved in criminal litigation. Child was defined in section 2(b) of the Ordinance ibid in definition clause, as under:-

(b) 'child' means a person who at the time of commission of an offence has not attained the age of eighteen years.

Upon raising, the plea of juvenility by an accused/person involved in criminal litigation, it was to be determined under section 7 of the Ordinance ibid, by the learned trial court, it is reproduced as under:-

7. Determination of age.----If a question arises as to whether a person before it is a child for the purposes of this Ordinance, the Juvenile Court shall record a finding after such inquiry which shall include a medical report for determination of the age of the child.

7. The perusal of the above provision indicates that upon arising a question as to whether a person before the Court, for the purpose of the Ordinance, is a child or not, the court after inquiring into the matter, had to record its findings on it. It will be important to mention that for quite sometimes, there remained a controversy regarding the relevancy of material and mode of inquiry before the courts, consequently, many cases were even litigated in the Hon'ble Supreme Court of Pakistan. While deciding a number of cases, under the Ordinance, certain guidelines were laid down by the Hon'ble Supreme Court of Pakistan. A synopsis of important case law, enunciating guidelines and principles, to be followed by the courts with their binding effect under constitution from determining age of persons, claiming themselves as juvenile is referred as under:-

In Muhammad Akram's case reported in 2004 SCMR 218 the Honorable Supreme Court observed that trial court committed

illegality by holding an enquiry without ossification test and found the accused under 18 years of age at the time of occurrence and directed him to be tried by the Juvenile Court. Honorable Supreme remanded the case to the Trial Court to re determine the age of the accused in terms of section 7 of the Juvenile Justice System Ordinance, 2000.

In Muhammad Jamil's case reported in 2004 SCMR 1871 the Honorable Supreme Court observed that question of minority was neither raised before Trial Court nor before High Court and as such leave to appeal was refused.

In Sultan Ahmed's case reported in PLD 2004 SC 758 the Honorable Supreme Court laid down following guidelines regarding dealing with juvenile accused cases:-

Irrespective of the fact whether the issue of the age of an accused person is or is not raised before the Court, it is the obligation of the learned Presiding Officer to suspend all further proceedings in a trial and to hold an inquiry to determine the age of an accused person if and whenever it appears to him that such a determination was necessary.

Whenever a Court is confronted with the question of the age of an accused person, it is incumbent upon it to hold an, inquiry and the learned Presiding Officer should always feel free to requisition the original record; to summon and examine the authors and the custodians of such record and documents to determine the genuineness of the same; to, summon persons, if need be, who on account of some special knowledge, could depose about the age of the concerned accused person and to take such other and further steps which could help the Court in reaching a just conclusion about the said matter.

Medical report/ossification test about the age of an accused person was a further aid placed at the disposal of a Court of law for the purpose of determining the age of an accused person. The opinion of medical experts could offer a valuable guide to a learned Presiding Officer in resolving the controversy in issue. Therefore, whenever, a question of the age of an accused person is raised or arises, he must be subjected to a medical test unless strong reasons existed or could he offered for not doing so.

A claim of minority should be lodged by an accused person at the earliest possible opportunity and preferably during the course of investigation so that the Investigation Officer could collect evidence even in this connection for the assistance of the competent Court. And adverse inference could be drawn where the concession in question was claimed after undue and un-explained delay.

In Muhammad Aslam's case reported in PLD 4009 SC 777 the Honorable Supreme Court while dilating upon the accused's plea of juvenility observed that the accused could not be deemed to have discharged the said burden by merely placing a School Leaving Certificate on record and more so when no opportunity had been provided to the other side to test the veracity or the genuineness of the said document or the contents thereof. The Honorable Court laid down following principles regulating the determination of age of accused persons vis-a-vis their claim of minority and the procedure to be followed for the purpose. The same are summarized as under:-

(a) the plea of minority by an accused is a special plea intended to take the accused off the noose and onus is thus on him to prove the same;

(b) such a plea of minority must be taken by the accused at the earlier possible opportunity, preferably during the course of investigation so that the requisite evidence about the age of the accused could also be properly collected during the said exercise of collection of evidence and any delayed claim on the said account should be met by adverse inferences;

(c) whenever such a question of age is raised or arises at the trial, the courts should not deal with the same in a cursory or in a slip-shod manner but must proceed to hold an inquiry in the matter as commanded by the provisions of section 7 of the Juvenile Justice System Ordinance including medical examination of the accused for the purpose;

(d) the said inquiry should not be understood to mean only to entertain documents from across the bar and then giving a decision thereon. Such a practice needs not only to be discouraged but, in fact, to be discontinued. Basing judicial decisions on untested and un-scrutinized documents was a dangerous path to tread;

(e) proper compliance of the said provisions of section 7 would be to call upon the parties to lead their evidence -- oral or documentary in accordance with the provisions of Qanun-e-Shahadat Order of 1984 with a right to the other party to test the veracity or the genuineness of the same in accordance with law and then to arrive at a judicial decision in terms thereof;

(f) a medical examination of the accused person could furnish a useful guideline in the matter and should be resorted to; and finally,

(g) we must always keep in mind that while it is important, being a legal command, that a "child" should not be sent to the gallows, it is equally important that the one who deserves death must not be

allowed to escape the same on the strength of false and fabricated material.

in Faisal Aleem's case reported in PLD 2010 SC 1080 the Honorable Supreme Court rejected the belated plea of juvenility and termed it as afterthought. The Court further observed that certificate issued by Director General of Registration, Ministry of Interior was of no use to accused wherein a futile attempt had been made to show the date of birth of accused as 6-5-1977, to make him a "child" for taking benefit as provided in section 2(b) of Juvenile Justice System Ordinance, 2000. Contents of the certificates showed that date of birth of accused had been shown 6-5-1977, while his brother was born on 4-1-1978 and another brother on 2-11-1978, which did not appeal to reason and logic and appeared to be incorrect. Appeal was dismissed.

In Muhammad Raheel's case reported in PLD 2015 SC 145 the Honorable Supreme Court rejected the delayed claim of juvenility. Accused had never claimed at any stage of the trial that he was a child, he had never agitated before the High Court that he was a juvenile and he had led no evidence before any court regarding his date of birth. Mere mentioning of the accused's age in his statement recorded under section 342, Cr.P.C. was not a conclusive determining factor regarding his actual age for the purposes of declaring him a juvenile. Appeal was dismissed accordingly.

In Sher Bahadur's case reported in 2015 SCMR 955 the Honorable Supreme Court set aside judgment passed by High Court in which conviction of accused was set aside while declaring him juvenile on the basis of school leaving certificate and CNIC without due verification of their genuineness and authenticity. The matter was remanded to the High Court for its hearing afresh, after calling for

ossification report of accused through medical board of specialist doctors in the required field.

In Sarfraz alias Shaffa's case reported in 2007 SCMR 758 the Honorable Supreme Court rejected the belated plea of juvenility. Petition for leave to appeal was dismissed.

In Nazeer alias Wazeer's case reported in PLD 2007 SC 202 the Honorable Supreme Court observed at para 14, that the prosecution has not challenged the genuineness of the school leaving certificate or the correctness of the entries contained in the register with which the presumption of truth would be attached and this presumption, in absence of any evidence to the contrary, remained un-rebutted. There is no cavil to the proposition that for the purpose of determination of age, the birth certificate is considered authentic evidence and more reliable as compared to the school leaving certificate but the prosecution has not brought on record any evidence in rebuttal challenging the correctness of the date of birth of accused given in his school certificate. It is provided in section 7 of the Juvenile Justice System Ordinance, 2000 that for determination of age, medical report regarding the age can also be considered and we in the light of the school leaving certificate of the appellant and the medical evidence, according to which he was less than 18 years at the time of commission of offence, have no hesitation to hold that at the relevant time, he was a juvenile.

The Juvenile Justice System Ordinance, 2000, was promulgated, at a time of our political and constitutional history, when, there did not exist any democratic, and political order, based on the Constitution in the country. Therefore, being an Ordinance, its provisions were neither deliberated upon nor debated in the assembly. It will not be out of place to mention that, despite availability of authoritative pronouncements, on the

subject, by the Hon'ble Supreme Court of Pakistan with their binding effect, whereby guidelines were laid down for the courts, for their decision, on the subject, still the necessity was being felt, that, the Legislature, should either bring appropriate amendments in the existing law or enact a new law on the subject. It may not be out of context to say that the world history, bears this testimony, that the nations have treaded hard, on the thorny path, during their struggle, to change, the monarchical rule into a political system, of self-rule. Most of the nations of the world have succeeded in adopting, the political and constitutional frame works, based on democratic values, catering the eternal desire of humanity, of participatory political system to regulate the order of their lives in line with their aspirations, ensuring, certainty and stability, of the system so evolved. The written Constitution, plays the role as a supreme guarantor for determining the limitations and jurisdiction of organs of the State. A written Constitution provides a nicely evolved self-executory system of check and balance. In case of any transgression, by any one, the judicature acts as a defender of the fundamental rights of the citizens. The Legislature is known as Law giver whereas the judicature pronounced authoritatively interpret those laws. The Legislature consists of periodically chosen representatives by the electorates with a mandate to regulate the affairs of the state and order of lives of the citizens to transform their aspirations into a reality, while adopting appropriate legislative process in their supreme interest and for their welfare. The relevancy of the above discussion is that after restoration of the constitutional order, in the country, finally, the Legislature, rose to the occasion by enacting the Juvenile Justice System Act (XXII of 2018), 2018. It may be observed that the perusal of the provisions of the Act ibid reflect that they are an epitome of pronounced judicial and legislative wisdom, synthesized through a legislative process. The said Ordinance with the promulgation of Juvenile Justice System Act, 2018 on 22nd May, 2018, had been repealed.

A COMPARATIVE ANALYSIS OF JJSO, OF 2090 AND JJSA, OF 2018 IS GIVEN HEREUNDER:-

Sr. No.	JJSO of 2000	JJSA of 2018
1.	Deleted Definitions: "Borstal Institution", "offence"	Added Definitions: "Best interest of the child", "diversion", "heinous offence", "juvenile", "Juvenile Justice Committee", "Juvenile Rehabilitation Centre", "juvenile offender", "major offence", "minor offence", "medical officer", "Observation Home", "suitable person"
2.		Changed Definitions: "child", "guardian",
3.	Sec.(sic.) 3. Legal Assistance i. Right of LA to accused child and victim child. ii. Qualification of Leg. Practitioner: 5 years	Sec. 3. Legal Assistance i. Right of LA to juvenile or victim. child ii. Qualification of Leg. Practitioner: 7 years Added clause. Duty to inform juvenile as to his rights
4.	Sec. 4 Juvenile Courts i. Establishment of Juvenile Courts ii. Power of HC to confer power or appoint presiding officer iii. Magistrate of 1st class may be a JC iv. Qualification of 7	Sec. 4 Juvenile Courts i. Establishment or designation of Juvenile Courts ii. Power of HC to confer power or appoint presiding officer ABOLISHED iii. Magistrate 1st class replaced with Sec. 30 iv. Qualification of 10 years for an

	years for an advocate to be a Presiding Officer v. Period of disposal of case Four months	advocate to be a Presiding Officer v. Period of disposal of case Six months extendable by HC vi. Place of sitting of court may be other than the court room
5.	Sec. 5 Joint Trial with Adult No joint trial of child with adult	Sec. 12 Joint Trial with Adult Joint trial, if in interest of justice, is permissible. Attendance of juvenile may be dispensed with without application if there is joint trial
6.	Sec. a Procedure of Court No fixation of case on the day of trial of juvenile case	Sec. 11 Procedure of Court Prohibition abolished
7.	Sec. 7 Determination of Age. Inquiry by court as to age of child.	Sec. 8 Determination of Age Newly Added Clause. Inquiry by OIPS/IO By Court
8.	Sec. 8 Prohibition to publicize proceedings No publication of proceedings disclosing closing identity of child save with permission of the court	Sec. 13 Prohibition to disclose identity Publication of child matter made an Offence with three years imprisonment except with permission of certain persons Publication of proceedings before court made an Offence punishable with 2 years except judgments of SC or HC
9.	Sec. 9 Probation Officer Making of report by Probation	Sec. 14 Report of Probation Officer Making of report by Probation

	Officer	Officer on the direction of court on stipulated points
10.	Sec. 10 Arrest and Bail This sec. contains provisions both for arrest and bail Arrested child may be kept in PS	Sec. 5 Arrest This sec. contains provisions only for arrest. Arrested juvenile shall be kept in Observation Home
11.	Sec. 10 Arrest and Bail i. Offences with ten or less than ten years imprisonment bailable for a child under age of fifteen years ii. -------- iii. Bail after one year, six months and four months respectively for different categories of offences, if trial delayed. iv. In above cases, bail may not be granted to child of 15 or above if offence is serious, heinous, gruesome etc. even if trial is delayed	Sec. 6 Release on Bail i. Offences up to seven years imprisonment bailable for a Juvenile ii. Bail may not be granted to juvenile of more than sixteen years if he is involved in heinous offence iii. Bail after six months, if trial delayed in all cases In no circumstances juvenile shall be kept in PS or in jail.
12.	Sec. 11 Release on Probation	Sec. 15 Power to order for release Almost same with added clauses
13.	Sec. 12. Orders not to be passed	Sec. 16. Orders not to be passed Almost identical with change that juvenile shall not be sent to Prison
14.	Sec. 13 Appeal	Sec. 18 Appeal Identical with modification that Guardian of

		juvenile may file appeal
15.	Sec. 14 Ordinance did not derogate other laws.	Sec. 23 Act has overriding effect
16.		Sec. 7 New Provision regarding Interrogation Interrogation by SI under supervision of SP or SDPO
17.		Sec. 9 New Provision regarding Disposal through Diversion
18.		Sec. 10 New Provision regarding Juvenile Justice Committee
19.		Sec. 17 New Provision. Special provisions for female juvenile
20.		Sec. 19. New Provision regarding Removal of Disqualification attached with conviction
21.		Sec. 20. New Provision regarding establishment of Observation Home and Juvenile Rehabilitation Centres.

Let's examine now the most relevant provisions 2(h) and 2(1) and Section 8 of the Act relating to the point in issue which are reproduced as under:-

2(h) "juvenile' means a child who may be dealt with for an offence in a manner which is different from an adult.

2(1) "Juvenile offender" means a child who is alleged to have committed or who has been found to have committed an offence.

Section 8 of the Act ibid is reproduced as under:-

8. Determination of age.---(1) Where a person alleged to have committed an offence physically appears or claims to be juvenile for the purpose of this Act, the officer-in charge of the police station or the Investigation Officer shall make an inquiry to determine the age of such person on the basis of his birth certificate, education certificates or any other pertinent documents. In absence of such documents, age of such accused person may be determined on the basis of a medical examination report by a medical officer.

(2) when an accused person who physically appears to be juvenile for the purpose of this Act is brought before a Court under section 167 of the Code, the Court before granting further detention shall record its findings regarding age on the basis of available record including the report submitted by the police or medical examination report by a medical officer.

9. Perusal of above provision reveals that a duty has been cast upon Incharge of Police Station or Investigating Officer that if a person alleged to have committed an offence, physically appears to them or accused himself claims to be a juvenile, immediately an inquiry shall be initiated for determination of his age. Under the previous dispensation, no such responsibility was placed either upon the shoulders of the SHO or the Investigating Officer of the case. In order to inquire into the factum of age, even some of the relevant material has also been pointed out, i.e. Birth Certificate, Educational Certificate or any other pertinent document (CNIC etc.) which may authenticate the actual age of the accused. The absence of stipulated documents, it appears, now is a condition precedent for seeking medical examination report. The scope of inquiry by the Investigating Officer, it looks, has been confined to the collection of stipulated document on the basis of which the police officer has to conclude his inquiry for determination of age. This is to eradicate the

possible future difficulties which may arise out of a delayed claim of juvenility. It will also discourage unscrupulous elements from having a resort to procure fabricated entries of date of birth for seeking benefit of the act. Needless to say that it will also reduce the litigation over the question of determination of juvenility. It will surely save precious public time of courts for its proper utilization for deciding some substantive litigation. It will also save the hard earned resources of the litigants. All the functions of inquiry by way of recording of finding on the point of juvenility of an accused, were previously encrusted to the court under the repealed Ordinance. Now, under the Act, 2018, function of inquiry has been assigned to investigating officer and that of recording of finding about the age of accused to the court on the basis of available record including report submitted by police and in absence of such report based on record of medical examination. It appears that the act, in the first place, has endeavoured the collection of all specific material for determination of question of juvenility to facilitate the court in recording a finding, at the time of very first appearance in the court under section 167, Cr.P.C.; The court before authorizing further detention of an accused shall record its finding regarding his age on the basis of available record. Owing to the above mentioned authoritative pronouncements of Honorable Supreme Court of Pakistan, under the repealed Ordinance, it was obligatory on the courts to get medical examination report, however, the phraseology employed in present section 8 of the Act, is suggestive of holding medical examination only when the documents stipulated in this section are not forthcoming. If a person of an offence lays his claim, seeks a declaration of his juvenility after submission of a report under section 173, Cr.P.C. during trial, the trial court may entertain his claim but without defeating the object, and without rendering the provisions of the Act redundant.

10. The case was registered on 19.05.2018. The petitioner as per report under section 173, Cr.P.C. was arrested in this case on 22.05.2019. The Juvenile Justice System Act, 2018 was promulgated on 22nd May, 2018. He remained on duly authorized physical remand by the Magistrate with police. It appears that neither the petitioner appeared to the SHO or Investigating Officer from his physical appearance to be a juvenile nor he laid any claim about his juvenility. After submission of the challan, the petitioner had moved application before the learned trial court claiming that his date of birth according to his school leaving certificate is 02.02.2003, therefore, he may be declared as a juvenile. The claim of the petitioner regarding juvenility is a delayed one. The revisional court found that according to the voters list, the name of the petitioner figures at Sr. No.180 with his CNIC number, issued on his attaining of 18 years of age. The perusal of the voter list further reveals that name of younger brother of the petitioner namely Muhammad Sabtain is also mentioned in the same voter list at Sr. No.181 with his CNIC number meaning thereby, even his younger brother was not less than eighteen years of his age at the time of preparation of voters list. The petitioner has also not been able to rebut the entries in the voters list or his CNIC. It appears that at a belated stage, the petitioner is trying to make an abortive effort/attempt for getting himself declared to be a juvenescent. Both the learned courts below have passed the impugned orders while taking into consideration the material available on the record in its true perspective which are quite in accordance with law, therefore, the same call for no interference by this Court.

11. For what has been discussed herein above, the petition in hand being patently devoid of any force is hereby dismissed.

JK/S-66/L **Petition dismissed.**

2020 P Cr. L J 497

[Lahore (Multan Bench)]

Before Anwaarul Haq Pannun, J

MUHAMMAD WASEEM---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No. 7065-B of 2018, decided on 15th April, 2019.

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

----Ss. 497 & 466---Penal Code (XLV of 1860), S. 295-B---Defiling, etc., of copy of Holy Quran---Bail, grant of---Release of lunatic pending investigation or trial---Scope---Petitioner sought post-arrest bail in FIR registered under S. 295-B, P.P.C.---Contention of petitioner was that he was a lunatic, therefore, not in a position to stand trial on account of his physical and mental health---High Court, after taking into consideration medical report of the petitioner, held that his case was fully covered by S. 466, Cr.P.C.---Petitioner, prima facie, was not mentally fit and was of unsound mind, so it was not possible for him to understand the proceedings of the trial---Petition for grant of bail was allowed, in circumstances.

Asghar Ali v. The State 1992 PCr.LJ 2083; Yasir v. The State and another 2018 YLR 379; Saifullah Khan alias Turab v. The State PLD 2006 Pesh. 140 and Ghulam Mustafa Waseem through Bashir Ahmad v. The State and another PLD 2013 Lah. 643 ref.

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

----S. 466---Release of lunatic pending investigation or trial---Scope---Section 466, Cr.P.C. envisages that, during an inquiry or a trial, if the

court, has a reason to believe that the accused is of unsound mind and consequently incapable of making his defence, the fact of unsoundness of mind of accused shall be inquired into and for this purpose the accused shall be caused to be examined by a civil surgeon of the district or any other Medical Officer, as the Provincial Government may direct---Medical Officer, after medical examination of such person shall reduce the examination into writing---During the pendency of such inquiry or trial, the court may deal the accused in terms of S. 466, Cr.P.C.---Consequential effect of the opinion of the Magistrate that the accused is of unsound mind and incapable of making his defence, a finding shall have to be recorded to such effect and the proceedings of trial postponed.

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

----S. 466---Release of lunatic pending investigation or trial---Scope---According to S. 466(1), Cr.P.C. whenever an accused person is found to be of unsound mind and incapable of making his defence, the Magistrate or the court, as the case may be, whether the case is one in which the bail may be taken or not, may release him on sufficient security being given that the accused shall be properly taken care of and shall be prevented from doing any injury to himself or any other person and for his appearance when required before the Magistrate or court or such officer as the Magistrate or the court may appoint in this behalf.

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

----S. 466---Lunacy Act (IV of 1912), Preamble---Release of lunatic pending investigation or trial---Scope---Section 466(2), Cr.P.C. deals with a situation where the court or Magistrate is of the opinion that neither the bail of the accused should be taken nor the sufficient security is given to the court or the Magistrate as the case may be, shall order that the accused be detained in safe custody in such place and manner, as he or it may think fit---Report, however, shall have to be made in this regard to

Provincial Government by Court or Magistrate, stating the action taken---However, under said provision, if the court considers it appropriate that the accused be detained in a lunatic asylum, it shall be made in accordance with such rules, made under Lunacy Act, 1912.

Syed Jaffar Tayyar Bokhari for Petitioner.

Abdul Wadood, DPG and Zulfiqar, ASI with Police Record for the State.

ORDER

ANWAARUL HAQ PANNUN, J.---After having been unsuccessful in obtaining the relief of post arrest bail from the learned subordinate court, by means of instant petition, the petitioner prays for the same relief, in a criminal case registered vide FIR No.345, dated 09.10.2017, offence under section 295-B, P.P.C., with Police Station Sadar Jalalpur Pir Wala, District Multan, at the instance of respondent No.2/complainant.

2. Allegation against the petitioner, in brief, as per contents of the crime report is that on 09.10.2017 he desecrated/defiled the copies/text of Holy Qur'an as well as extract therefrom by setting the same on fire.

3. Learned counsel for the petitioner while relying upon case titled Asghar Ali v. The State (1992 PCr.LJ 2083), case titled Yasir v. The State and another (2018 YLR Peshawar 379), case titled Saifullah Khan alias Turab v. The State (PLD 2006 Peshawar 140) and case titled Ghulam Mustafa Waseem through Bashir Ahmad v. The State and another (PLD 2013 Lahore 643) contends that petitioner being a lunatic is not in a position to stand trial on account of his physical and mental health, hence, he may be released on bail.

4. On the other hand, learned Law Officer has opposed the above contentions.

5. In order to appreciate the contention of learned counsel for the petitioner in the light of case law cited by him, it will be appropriate to reproduce sections 464 and 466, Cr.P.C. as under:-

464. Procedure in case of accused being lunatic.---(1) When a Magistrate holding an inquiry or a trial has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, the Magistrate shall inquire into the fact of such unsoundness, and shall cause such person to be examined by the Civil Surgeon of the district or such other medical officer as the Provincial Government directs, and thereupon shall examine such Surgeon or other officer as a witness, and shall reduce the examination to writing.

(1A) Pending such examination and inquiry, the Magistrate may deal with the accused in accordance with the provisions of section 466.

(2) If such Magistrate is of opinion that the accused is of unsound mind and consequently incapable of making his defence, he shall record a finding to that effect and shall postpone further proceedings in the case.

466. Release of lunatic pending investigation or trial.---(1) Whenever an accused person is found to be of unsound mind and incapable of making his defence, the Magistrate or Court, as the case may be, whether the case is one in which bail may be taken or not, may release him on sufficient security being given that he shall be properly taken care of and shall be prevented from doing injury to himself or to any other person, and for his appearance when required before the Magistrate or Court or such officer as the Magistrate or Court appoints in this behalf.

(2) Custody of lunatic. If the case is one in which, in the opinion of the Magistrate or Court, bail should not be taken, or if sufficient

security is not given, the Magistrate or Court, as the case may be, shall order the accused to be detained in safe custody in such place and manner as he or it may think fit, and shall report the action taken to the Provincial Government:

Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the Provincial Government may have made under the Lunacy Act, 1912.

{The Lunacy Act, 1912 has been repealed through the Mental Health Ordinance, 2001 (No.VIII of 2001); section 61 of the Ordinance ibid is reproduced infra:-

"61. Repeal and saving.---(1) The Lunacy Act, 1912 (IV of 1912), is hereby repealed".

As a result of repeal of Lunacy Act through promulgating of Mental Health Ordinance, 2001, w.e.f. 20.02.2001, now the rules are to be made under section 59 of the Ordinance ibid which is reproduced as under:-

"59. Power to make rules.---(1) The Federal Government may, in consultation with the Provincial governments, by notification in the official Gazette, make rules for carrying out the purposes of this Ordinance".}

Section 466, Cr.P.C. envisages that, during an inquiry or a trial, if the court, has a reason to believe that the accused is of unsound mind and consequently incapable of making his defence, the fact of unsoundness of mind of accused shall be inquired into and for this purpose the accused shall be caused to be examined by a civil surgeon of the district or any other Medical Officer, as the Provincial Govt. may direct. After medical examination of such person, the Medical Officer shall reduce the examination into writing. During the pendency of such inquiry or trial, the

court may deal the accused in terms of section 466, Cr.P.C. The consequential effect of the opinion of the Magistrate that the accused is of unsound mind and incapable of making his defence, a finding shall have to be recorded to this effect and the proceedings of trial postponed.

According to section 466(1), Cr.P.C. whenever an accused person is found to be of unsound mind and incapable of making his defence, the magistrate or the court as the case may be whether (i) the case is one in which the bail may be taken or not, may release him on sufficient security being given that the accused shall be properly taken care of and shall be prevented from doing any injury to himself or any other person and for his appearance, when required before the Magistrate or court or such officer as the Magistrate or the court may appoint in this behalf.

Section 466(2), Cr.P.C. deals with a situation, where the court or the Magistrate is of the opinion that neither the bail of the accused should be taken, nor the sufficient security is given to the court or the Magistrate as the case may be, shall order that the accused be detained in safe custody in such place and manner, as he or it may think fit. A report, however, shall have to be made in this regard to Provincial Government by Court or Magistrate, stating the action taken. However, under this provision, in case the court consider it appropriate that the accused be detained in a lunatic asylum, it shall be made in accordance with such rules, made under Lunacy Act, 1912.

6. Initially, in pursuance of order of the learned Addl. Sessions Judge, Jalal Pur Pirwala, Multan conveyed vide letter No.14 dated 24.1.2018, the Medical Superintendent, Nishtar Hospital, Multan constituted Medical Board comprising of Dr. Naeem Ullah Leghari, Dr. Owais Kareem and Dr. Abrar Ahmad Khan as members and Dr. Abdul Rehman Qureshi, Medical Superintendent, Nishtar Hospital, Multan as Chairman on 06.2.2018 to examine petitioner and relevant portion of the report of the

Medical Board No.PTS/Board/13281 dated 14.3.2018 (available on file as annexure-D) is reproduced as under:-

> "Based on the available facts it is inferred that Mr. Muhammad Waseem (petitioner) is suffering from mild to moderate learning disability (Mental retardation) with deficiency in adaptive functioning with Psychotic disorder and not sane at present".

During the pendency of instant petition, in pursuance of order dated 17.1.2019 passed by this Court, report from the learned trial court, about adoption of procedure prescribed by section 465, Cr.P.C. has been resorted to or not was requisitioned and vide report No.17 dated 26.01.2019 was received from the learned trial court. A relevant portion out of the report is reproduced as under:-

> "Keeping in view the said report of Medical Board submitted to the court, Muhammad Waseem accused was insane and case was consigned to record room till his recovery of disease. Superintendent New Central Jail, Multan was directed to shit the accused lunatic asylum or in any other hospital for his treatment with the direction that after recovery from the disease informed the court and request for restoration of his case".

7. After taking into consideration the report of the Medical Board submitted vide No.13281 dated 14.3.2018 and that of report of the learned trial Court submitted vide No.17 dated 26.01.2019, the law on the point as discussed above and the case laws relied upon by the learned counsel for the petitioner, this Court is of the view that the petitioner's case is fully covered by section 466 of Cr.P.C. From the above facts and circumstances prima facie it is observed that the petitioner at present is not mentally fit and is of unsound mind and so it is not possible for him to understand the proceedings of the trial. Under these circumstances, instant petition is allowed and petitioner is admitted to post arrest bail subject to

his furnishing two solvent sureties in the sum of Rs.1,00,000/- (one lac each) each to the satisfaction of the learned trial court as surety bond obtained in terms of subsection (1) of section 466, Cr.P.C. is altogether different from simple surety for appearance of the accused before a court. The persons who would offer themselves as sureties for the petitioner shall also be required to give an undertaking to the effect that they will keep the petitioner in safe custody, and that due care shall be taken of the petitioner even to the extent that they will prevent the petitioner from doing injury to even himself or to any other person. The sureties are further required to bind themselves that they will produce the petitioner before the court as and when directed and or called for, as provided under section 466, Cr.P.C.

SA/M-117/L **Bail granted.**

2020 P Cr. L J 693

[Lahore (Bahawalpur Bench)]

Before Ch. Abdul Aziz and Anwaarul Haq Pannun, JJ

ALI AHMAD---Appellant

Versus

The STATE and others---Respondents

Criminal Appeal No. 406 and Murder Reference No. 49 of 2016, heard on 15th January, 2019.

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

----S. 302(b)--- Qatl-i-amd--- Appreciation of evidence---Benefit of doubt---First Information Report was lodged promptly---Scope---Accused was charged for committing murder of the brother of the complainant---Alleged incident took place at about 1.30 a.m. (night) and was reported to the police at 1.30 a.m. the same night---Facts remained that the distance between the place of occurrence and the police station was 1/2 kilometre-Complainant had not mentioned the time of occurrence in the complaint---Police Officer had endorsed the time 1:30 a.m. (night) on receiving the complaint-Since police station statedly was not located at a far away from the place of occurrence, therefore, reaching of the police at the spot within a short period after the occurrence being possible, could not be ruled out---Even otherwise, the FIR recorded at the spot or elsewhere from the police stations was suspicious as the possibility of its having been lodged after due deliberation and preliminary inquiry could not be ruled out---Promptitude in lodging the FIR could not be readily accepted, as a complimentary factor, for believing the prosecution story contained in the FIR to be true---Promptitude in lodging the FIR did not necessarily exclude the chances of consultation and deliberations by the complainant,

therefore, it could not be treated as a substantive piece containing an element of correctness about the story of the prosecution.

Ata Muhammad and another v. The State 1995 SCMR 599 rel.

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

----S. 302(b)--- Qatl-i-amd---Appreciation of evidence---Benefit of doubt---"Ocular account" and "medical evidence"---Contradiction---Effect---Accused was charged for committing murder of the brother of complainant---Complainant was the real brother, whereas other witness was happened to be paternal cousin of the deceased---Both the witnesses were not residents of the locality, where the alleged occurrence had taken place---Said witnesses had also not given any plausible reason for their presence at the relevant time at the place of occurrence---Bald assertion of witnesses of having been invited by the groom at the function could not be accepted on its face value, therefore, the evidence of said witnesses needed serious scrutiny---No other independent witness had entered appearance as a witness in the case; so much so, the groom in whose mehndi ceremony the deceased had come to participate as a guest, in which the deceased lost his life, did not come forward to substantiate the prosecution's version---Trial Court in view of the peculiar circumstances of the case did not exercise its jurisdiction and power to summon the groom even as a court witness---Complainant had deposed that there was a distance of three feet between the accused/appellant and the deceased at the time of his sustaining firearm injury---Said fact was also confirmed by the entries of site plan, drafted by draftsman/witness on the instructions of the eye-witnesses as well as the Investigating Officer---If a fire shot is made from a distance of less than 3 feet, there might be blackening or charring marks on the corresponding wounds---Medical Officer who conducted post-mortem examination did not observe any sign of

blackening or burning over the dead body of the deceased---Ocular account was in contrast with the medical evidence---Occurrence had not taken place in the mode and manner, in which the prosecution had claimed---Eye-witnesses had utterly failed to prove their presence---Appeal was allowed and accused was acquitted by setting aside conviction and sentence recorded by the Trial Court, in circumstances.

Amin Ali and another v. The State 2011 SCMR 323 and Nooro alias Noor Muhammad Shar and another v. The State 2018 PCr.LJ Note 52 rel.

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

----S. 302(b)--- Qatl-i-amd--- Appreciation of evidence--- Benefit of doubt---Recovery of weapon of offence---Delay in dispatch of recovered weapon---Effect---Accused was charged for committing murder of the brother of complainant---Record showed that .30-bore pistol was recovered at the instance of the accused and positive report of Forensic Science Laboratory was received---Recovery of empty of pistol .30-bore had been shown to be effected by the Investigating Officer on 24.10.2014, whereas the accused was arrested on 17.11.2014---Recovery of pistol .30-bore was allegedly effected by the accused-appellant from the iron box lying in his residential room on 20.11.2014---Forensic Science Laboratory Report showed that the said empty was sent to the said office on 17.11.2014 and weapon of offence i.e. pistol .30-bore on 19.12.2014---Said fact showed that the recovered empty was sent after the arrest of the accused/appellant and after 23 days of the occurrence---Positive report of the Laboratory lost its evidentiary value, in circumstances.

Jehangir v. Nazar Farid and another 2002 SCMR 1986; Israr Ali v. The State 2007 SCMR 525 and Ali Sher and others v. The State 2008 SCMR 707 rel.

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

----S. 302(b)--- Qatl-i-amd-Appreciation of evidence---Benefit of doubt---Motive was not proved---Effect---Accused was charged for committing murder of the brother of the complainant---Motive for the occurrence was that the accused persons had committed the murder of brother of complainant on the instigation of some of their opponent---No personal grudge/motive had been attributed to the appellant for the commission of the alleged offence---Complainant had stated that his brother sat with the groom on a sofa set---At about 01:00 a.m., accused armed with pistol .30-bore along with an unknown person came there---Accused had asked his brother to get up from the said sofa, his brother refused, on which the unknown persons asked accused to shoot his brother---On which accused took out his pistol from the "nefa" of his "shalwar" and made straight fire which landed on the back side of head of his brother---Complainant further deposed in examination-in-chief that the accused persons had committed the murder of his brother on the instigation of their opponents---Both the said stances of the complainant regarding the motive were mutually destructive and inherently, inconsistent with each other---Said facts fully established that there was no motive behind the occurrence as alleged by the prosecution---Circumstances established that motive was non-existent and had been introduced by the complainant to furnish a justification for giving a be-suiting turn or colour to the occurrence, instead of bringing on record the true facts.

Muhammad Khan and another v. State 1999 SCMR 1220 rel.

(e) Criminal trial---

----Benefit of doubt---Principle---Single instance giving rise to a reasonable doubt in the mind of the court entitled the accused to the benefit of doubt not as a matter of grace but as a matter of right.

Muhammad Akram v. The State 2009 SCMR 230 and Tariq Pervaiz v. The State 1995 SCMR 1345 rel.

Syed Asim Ali Bukhari for Appellant.

Nemo for the Complainant.

Najeeb Ullah Khan Jatoi, Deputy Prosecutor-General for the State.

Date of hearing: 15th January, 2019.

JUDGMENT

ANWAARUL HAQ PANNUN, J.---This single judgment shall decide Murder Reference No.49 of 2016 submitted under section 374, Cr.P.C. by the learned trial Court and Criminal Appeal No.406 of 2016, filed under section 410, Cr.P.C. by the appellant against the judgment dated 30.06.2016 passed in case FIR No.439/2014, dated 24.10.2014, offence under section 302, P.P.C., registered at Police Station Mecloed Gunj, District Bahawalnagar by the learned Addl. Sessions Judge, Minchinabad, whereby the appellant has been convicted and sentenced as under:-

Under section 302(b), P.P.C.

"Death sentence along with Rs.2,00,000/- as compensation under section 544-A, Cr.P.C. payable to the legal heirs of the deceased or in default thereof, to further undergo S.I. for six months. The compensation amount shall be recoverable as arrears of land revenue."

2. The case of the prosecution as contained in written complaint (Exh.PB), on the basis of which, FIR (Exh.,PB/1) was chalked out, reiterated by Muhammad Umar, complainant, resident of Mauza Sharafpur, Tehsil Minchanabad, District Bahawalnagar, while appearing in the Court as (PW-4) is, to the effect that:-

"On the night of 24-10-2014, I along with my younger brother Zahid Hussain deceased of this case, Iftikhar Hussain and Muhammad Nazim PW went to attend Rasm-e-Hina ceremony of Naveed Iqbal Bhandara at Mohallah Gulab Shah, Mecloed Gunj. The host had arranged a stage and a tent was established for this ceremony. My brother Zahid Hussain sat with the groom on a Sofa set. At about 01:00 a.m., Ali Ahmad accused present in the Court armed with pistol .30-bore along with an unknown person came there. They asked my brother to get up from the said Sofa. My brother refused, on which the unknown persons asked Ali Ahmad to shoot my brother and murder him, on which Ali Ahmad accused present in the Court took out his pistol from the 'nefa' of his 'shalwar' and made straight fire which landed on the back side of head of my brother Zahid Hussain, who after sustaining the fire shot fell on the Sofa while both of the accused persons fled away from the spot. I along with other PWs attended my brother but he succumbed to the injuries at the spot. The accused persons had committed the murder of my brother on the instigation of our some opponent. Police reached at the spot and I made statement Exh.PB which was read over to me and I signed the same as token of its correctness. My signature is Exh.PB/1."

3. The investigation was encapsulated into report under section 173, Cr.P.C., which was duly submitted before the learned trial Court, after taking cognizance of the offence, the learned trial Judge after supplying the requisite copies of the statements under section 265(C), Cr.P.C., charge sheeted the accused, to which he pleaded not guilty, while professing his innocence, claimed trial. The learned trial Judge directed the prosecution to produce its evidence for establishing the charge. The prosecution has produced as many as 10 PWs, in order to prove the

charge against the appellant. The medical evidence in the case, has been furnished by Dr. Syed Hasnain, M.O (PW-1), who deposed that on 24.10.2014, while conducting postmortem examination over the dead body of Zahid Hussain, he observed the following injuries:-

1. A lacerated wound about 1 cm in diameter on the posterior side of the skull in the occipital region. Wound track goes inward towards the skull cavity. Blood and brain matter was coming out of the wound edges.

2. A lacerated wound about 1-1/2 cm in diameter with everted margin on the right side of vault of skull. Blood and brain matter was coming out of the wound.

CRANIUM AND SPINAL CORD

Scalp was torn on the posterior and lateral side of skull. Skull bone in the occipital and right temporal region was fractured and pieces of wound were missing from the fracture side. Membranes were damaged. Brain matter was damaged and fresh blood was present in the skull and wound track in the brain.

OPINION:-

"In my opinion, the cause of death in this case is the injury No.1 which damaged the brain matter. Injury to the brain resulted in severe bleeding and immediately death occurred. This injury was ante-mortem and caused by firearm and sufficient enough to cause death in normal course of life. Probable time between injury and death was within 15 minutes and between death and post mortem was within 12 hours.

Muhammad Umar, complainant (PW-4) and Iftikhar Hussain (PW-5) have furnished ocular account. Muhammad Aslam SI (PW-10), the

Investigating Officer of the case, arrested the appellant, recovered pistol .30 bore on his pointing out, took the same into possession through recovery memo (Exh.PE). The evidence of rest of the PWs is formal in nature, therefore, it needs no discussion. The learned Prosecutor gave up the prosecution witnesses namely Shahid Hussain, Aftab Hussain and Muhammad Nazam, and after tendering positive reports of PFSA, Lahore (Exh.PM and Exh.PN) closed the prosecution's evidence. The accused/appellant when examined under section 342, Cr.P.C., refuted the entire evidence produced by the prosecution and in reply to a question as to why this case against him and why the PWs have deposed against him, replied as under:-

> "The PWs have deposed against me maliciously in order to extort money from me and while substituting the real culprit. The roznamcha of police station was stopped and the case was registered after consultation and deliberation with ulterior motive."

In responding to question have you anything else to say, the accused/appellant replied as under:-

> "I am innocent. I had not committed the murder of deceased. I had neither any motive nor had any weapon at the time of above detailed ceremony. Many persons of "bradari" of deceased made aerial firing while standing besides the stage as well as from behind the stage while being drunk and watching "Mujra" etc. All of a sudden a fire shot hit the deceased. Instead of actual culprits, I was arrayed in this case due to malice and ulterior motive. Previously a murder case was registered and tried by this Court against my two brothers who were acquitted by this Court, so, on the instigation of our previous opponent, I was involved in this case. I am innocent. I pray acquittal.

The appellant neither opted to appear as his own witness under section 340(2), Cr.P.C. nor produced any defence evidence. On the conclusion of trial, the learned trial Court has convicted and sentenced the appellant through the impugned judgment dated 30.06.2016 as alluded to in para No.1 of the instant judgment. Hence, this appeal.

4. Arguments heard and record perused.

5. According to the FIR, the alleged unfortunate incident took place at about 1.30 a.m. (night) on 24.10.2014, and was allegedly reported to the police at 1.30 a.m., also the same night. The distance between the place of occurrence and the police station is kilometer. Muhammad Umar complainant had not mentioned the time of occurrence in complaint (Exh.PB). However, Muhammad Aslam SI (PW-10) has endorsed the time 1:30 a.m. (night) on receiving the complaint at Mohallah Ghulab Shah, Mecload Gunj. Since the police station statedly was not located at a far away from the place of occurrence, therefore, reaching of the police at the spot within a short period after the occurrence being possible, cannot be ruled out, but the presence of the eye-witnesses at the relevant time at the place where the occurrence took place is a different phenomenon. Even otherwise, the FIR recorded at the spot or elsewhere from the police stations are always seen with suspicious eyes, as the possibility of having it been lodged after due deliberation and preliminary inquiry cannot be ruled out. Hence, avowed promptitude of the prosecution in lodging the FIR cannot be readily accepted, as a complimentary factor, for believing the prosecution story contained in the FIR to be true as a gospel truth. The promptitude in lodging the FIR, does not necessarily exclude the chances of consultation and deliberations by the complainant, therefore, it cannot be treated as a substantive piece containing an element of correctness

about the story of the prosecution. Each criminal case has to be decided while taking into consideration the overall circumstances of the case.

6. The promptitude shown by the prosecution in lodging the FIR and in conducting the post-mortem examination over the dead body is belied by the inherent flaws in existence in the evidence of PW-4 and PW-5, rendering their claim of being eye-witnesses of the occurrence to be doubtful. The Superior Courts time and again have shown their judicial anxiety, while noticing that the police either being in league with the complainant for some obvious reasons or for arranging a suitable complainant, capable of narrating the occurrence in the be-suiting manner through FIR or in order to show their efficiency do not hesitate in stopping the Roznamcha for later on proceed to make relevant entries therein for showing the FIR to have been lodged promptly. It has been held in case titled "Ata Muhammad and another v. The State" (1995 SCMR 599) that:-

> "Time of recording of FIR is not always genuine. The police, after learning about the commission of the crime keeps the space in the daily diary (Roznamcha) and a page in the FIR. Register blank for incorporating therein the gist of the information, the factum of registration of the case and the detailed report subsequently, in the light of preliminary investigation made by it. Furthermore, in the present case the FIR was lodged by eye-witness himself. So, his previous statement recorded in the FIR does not come from any distinct source. A witness cannot corroborate himself by repeating the version before different persons on different occasions. The evidence at the trial cannot be corroborated or reinforced by proving that the witness had made a similar statement to a third

party on a previous occasion. Mere repetition of a story will not give it any force or prove its truth."

Muhammad Umar complainant (PW-4) is the real brother, whereas Iftikhar Hussain (PW-5) happens to be paternal cousin of the deceased i.e. closely related, who both are residents of Mauza Sharfpur, Tehsil Minchanabad. The occurrence had taken place at Mohallah Ghulab Shah, Mecload Gunj. Both of these PWs are not residents of the locality, where the alleged occurrence had taken place. They have also not given any plausible reason for their presence at the relevant time at the place of occurrence. Their bald assertion of having been invited by the groom at the function cannot be accepted on its face value, therefore, the evidence of these PWs needs serious scrutiny.

7. Before undertaking analytical discussion over the ocular account furnished by Muhammad Umar complainant (PW-4) and Iftikhar Hussain (PW-5), it is observed that the place of assemblage for celebrating "Rasm-e-Hina" of groom Naveed Iqbal Bhandara, is to be the place of occurrence, in view of the statement of Muhammad Aslam, SI/I.O. (PW-10), who has stated that "it is correct that according to my investigation at the spot, it came to limelight that on the night of occurrence, it was 'Rasm-e-Hina' of Naveed Iqbal Bhandara" are the undisputed facts and realities of this case. In order to believe the evidence of a witness, furnishing the ocular account regarding some occurrence/crime, in view of the established principles, laid down by the Superior Courts, for the criminal dispensation of justice, it is the first requirement, whether the witness has established his presence at the place of occurrence, subject to the judicial scrutiny, undertaken by the Courts in order to satisfy its judicial conscious. Secondly, the conduct of the witnesses is always seen through the prism of circumstances. The Courts are always firm that in

case a witness fails in satisfying a judicial mind by establishing his presence at the relevant time at the spot, his evidence cannot be relied upon despite his parrot like narration of the occurrence. The demonstration of a natural conduct by a witness at the time of occurrence attaches with itself an intrinsic evidentiary worth for a good ground for believing the evidence of such a witness, but if the conduct of the witness is either found to be unnatural at the relevant time by the Court or it appears to be in contradiction with other realities of the relevant facts, the Court will always be ready to discard such an evidence. The Superior Courts of this country are always consistent in expressing their views through their authoritative pronouncements that the evidence of such a witness, who fails in satisfying a judicial mind by giving a reasonable explanation for his presence at the place of occurrence, his evidence may not be relied upon for holding an accused guilty or for upholding already recorded conviction by some lower forum.

8. In the instant case, both the PWs i.e. Muhammad Umar, complainant (PW-4) and Iftikhar Hussain (PW-5), the alleged eye-witnesses of the occurrence are the real brother and paternal cousin of the deceased respectively. They are not the residents of the locality, where the alleged occurrence had taken place. No other independent witness has entered appearance as a witness, in this case. So much so, the groom in whose "mehndi ceremony", the deceased had come to participate as a guest, in which the deceased lost his life, did not come forward to substantiate the prosecution's version. Neither the trial Court in view of the peculiar circumstances of the case exercised its jurisdiction and power to summon the groom even as a C.W. The prime object behind the establishment of judicature under the constitution and the law is to do justice, in accordance with law while exercising their powers, so vested in it. The personality of groom namely Naved Iqbal Bhandara had the status of a

bastion in this case. It was none else except him in whose "mehndi ceremony", this occurrence had taken place. By all stretch of imagination, his presence at the spot is well established, therefore, the learned trial Judge ought to have exercised his jurisdiction for summoning him, not only in order to do the justice but also to un-earthen the truth also, but he had failed in exercising his power in this regard. He was not expected to sit like an idle rather he was bound by his duty to exercise his jurisdiction in search of truth and truth alone. According to the admission of the complainant Muhammad Umar (PW-4), regarding inter-se distance between the accused/appellant and the deceased at the time of his sustaining firearm injury, he deposed that "they were at a distance of three feet", which fact is also confirmed by the entries of site plan (Exh:PF), drafted by Muhammad Saeed Rana, draftsman (PW-6) on the instructions of the eye-witnesses as well as the Investigating Officer. As per medical jurisprudence, when a fire shot is made from a distance of less than 3 feet, there may be blackening or charring marks on the corresponding wounds, but in the instant case, after going through the Post Mortem report, we find no blackening or charring marks, even the Medical Officer i.e. Dr. Syed Hasnain (PW-1), who conducted post-mortem examination over the dead-body of the deceased, did not observe any sign of blackening or burning over the dead body of the deceased. He during cross-examination admitted it correct that "he did not note any blackening, burning or tattooing around the wound mentioned in examination-in-chief." He further deposed that "he did not find any burning of the hair of the scalp of the deceased". It has been held in case titled "Amin Ali and another v. The State" (2011 SCMR 323) that:-

> "None of the witnesses deposed that any of the appellants had caused the injuries from a close range but on the contrary in the site plan the place of firing has been shown 8 feet away from the deceased.

Thus from such a distance injury with blackening cannot be caused as it can be caused from a distance of less than 3 feet as per Modi's Medical Jurisprudence.

Reliance can also be placed upon case titled "Nooro alias Noor Muhammad Shar and another v. The State" (2018 PCr.LJ Note 52). Hence, it can safely be concluded that the ocular account is in contrast with the medical evidence. The medical evidence being a corroboratory piece of evidence, should have been in conformity with the ocular account for believing their evidence furnished by ocular account, but in case, it is found that the same, instead of being in conformity, has given rise to a doubt regarding the claim of the eye-witnesses of having seen the occurrence, which has to be resolved in favour of the accused, who is legally termed as a benefic i.e. the accused.

9. Unfortunately, it is little common in our cultural background, especially in the rural areas that some of the people celebrate the marriage, birth of a child, or alike nature occasions by arranging and indulging themselves in it in such manners, which becomes offensive and cannot be approved under any norm of civilized code of life but being a ground reality, which is hardly checked by law enforcing agencies, has been resulting into deaths of innocent participants of such ceremonies and as a result, un-intended deaths ensue into creating animosity against those persons from whose hands their near and dear lose their lives and while reporting the occurrence even do not hesitate in giving it a be-suiting colour as an intended crime. But the pretended story hardly sustains, either during investigation or the trial on judicial scrutiny, the benefit thereof, goes to the accused. In the instant case, neither the occurrence has taken place in the mode and manner, in which the prosecution had claimed nor the alleged motive had prodding the accused for committing

the offence appears to be genuine. None has come forwarded out of the participants of the ceremony to tell the truth either before the I.O or before the Court. Even no attempt has been made by the Court despite possessing inherent powers with it for calling any person as a Court witness, whose evidence in order to un-earthen the truth could have been brought on record, which would have been necessary for just decision of the case. Therefore, in such circumstances, when the eye-witnesses have utterly failed to satisfy our judicious consideration regarding their presence.

10. As regards recovery of 30 bore pistol (P-4) at the instance of the appellant and positive report of Forensic Science Laboratory (Ex.PN) are concerned, we have noted that in the present case, the recovery of empty of pistol .30 bore has been shown to be effected by the Investigating Officer (PW-10) on 24.10.2014, whereas the accused was arrested on 17.11.2014. The recovery of pistol .30 bore (P-4) was allegedly effected by the appellant from the iron box lying in his residential room on 20.11.2014, which was taken into possession by the I.O through recovery memo (Exh.PE). As per report of Punjab Forensic Science Agency, Lahore (Exh.PN), the aforesaid empty was sent to the said office on 17.11.2014 and weapon of offence i.e. pistol 30 bore (P-4) on 19.12.2014, meaning thereby, the recovered empty was sent after the arrest of the accused/appellant and after 23 days of the occurrence. It is, by now, well-established that if the crime empty is sent to the Forensic Science Laboratory after the arrest of the accused or together with the crime weapon, the positive report of the said Laboratory loses its evidentiary value. Reliance in this respect is placed upon the case titled "Jehangir v. Nazar Farid and another" (2002 SCMR 1986), "Israr Ali v. The State" (2007 SCMR 525) and "Ali Sher and others v. The State" (2008 SCMR 707). In Israr Ali's case, the Hon'ble Supreme Court has observed that

when the crime empties are sent to the Forensic Science Laboratory with delay, the recovery of the same does not provide strong corroboration qua the prosecution version. Moreover, Iftikhar Hussain (PW-5) deposed that "on 20.11.2014, he along with Aftab Ahmad joined investigation before the police. On that day, accused Ali Ahmad present in the Court while under custody made disclosure and led to the recovery of pistol .30-bore. The police made the pistol into a sealed parcel and took into possession vide recovery memo Ex.PE. He along with Aftab PW had attested the recovery memo. The above portion of statement of said PW clearly indicate that he had failed to point out the place wherefrom the alleged weapon of offence was recovered by the appellant. Hence, in view of the above, the recovery is inconsequential.

11. Coming to the motive part of the occurrence, according to the complainant Muhammad Umar (PW-4), the motive behind the occurrence was that the accused persons had committed the murder of his brother Zahid Hussain, on the instigation of some of their opponent. It is interesting to note that as per the case set out by the prosecution, no personal grudge/motive has been attributed to the appellant for the commission of the alleged offence. It has been alleged by Muhammad Umar, complainant (PW-4) in his complaint (Exh.PB), which he reiterated while appearing in the witness box as PW-4 that "his brother Zahid Hussain sat with the groom on a Sofa set. At about 01:00 a.m., Ali Ahmad accused present in the Court armed with pistol 30-bore along with an unknown person came there. They asked his brother to get up from the said Sofa. His brother refused, on which the unknown persons asked Ali Ahmad to shoot his brother and murdered him. On which Ali Ahmad accused present in the Court took out his pistol from the "nefa" of his "shalwar" and made straight fire which landed on the back side of head of his brother Zahid Hussain, who after sustaining the fire shot fell on the

Sofa while both of the accused persons fled away from the spot. Interestingly, Muhammad Umar, complainant (PW-4) further deposed in examination-in-chief that "the accused persons had committed the murder of his brother on the instigation of their some opponent." Both the aforesaid stances of the complainant regarding the motive are mutually destructive and inherently inconsistent with each other. The complainant in his first breath stated that the occurrence had taken place at the spur of the moment on refusal of the deceased to vacate the seat of sofa set, but in the subsequent breath, he had stated that the accused persons had committed the murder of his brother on the instigation of some of their opponents, even the motive could not have been established even during the investigation. Muhammad Aslam SI, Investigating Officer (PW-10) during cross-examination, admitted it as correct that during investigation neither rivalry nor enmity between accused Ali Ahmad and Zahid deceased was established. Even the identity of the unknown co-accused has neither could be established nor he ever had come on the surface. It will also be advantageous to note here that Iftikhar Hussain (PW-5) deposed during cross-examination that "neither himself nor any PWs had disclosed the name and identity of that unknown person who asked Ali Ahmad for making fire on the deceased. It is correct that the name of said unknown person could not be traced/detected by the police. Muhammad Aslam SI (PW-10) stated that "during investigation, presence of unknown accused was not proved and he deleted section 34, P.P.C." Furthermore, Muhammad Umar, complainant (PW-4) deposed during cross-examination that "they had neither any altercation, nor any dispute, nor any litigation with the accused Ali Ahmad as well as his family member prior to the occurrence." These facts fully establish that there was no motive behind the occurrence as alleged by the prosecution. The motive was non-existent and only had been introduced by the complainant to

furnish a justification for giving a be-suiting turn or colour to the occurrence, instead of bringing on record the true facts.

12. For what has been discussed above, keeping in view the ocular account being in contrast with the medical evidence, coupled with the pseudo promptitude in lodging the FIR by the complainant, and doubtful presence of eye-witnesses at the place of occurrence at the relevant time, failure of the prosecution in proving the motive and recovery against the appellant accumulatively, we are of the view that the prosecution has miserably failed to prove its case against the appellant beyond any shadow of doubt. The benefit of doubt must accrue in favour of accused as the Hon'ble Supreme Court of Pakistan has held in case titled "Muhammad Khan and another v. State" (1999 SCMR 1220) that it is axiomatic and universal recognized principle of law that conviction must be founded on unimpeachable evidence and certainty of guilt and hence any doubt that arises in prosecution case must be resolved in favour of accused. Moreover it is cardinal principle of criminal jurisprudence that a single instance giving rise to a reasonable doubt in the mind of Court entitles the accused to the benefit of doubt not as a matter of grace but as a matter of right. Reliance is placed on case titled as "Muhammad Akram v. The State" (2009 SCMR 230) and "Tariq Pervaiz v. The State" (1995 SCMR 1345). Consequently, we accept this appeal, set aside conviction and sentence of appellant Ali Ahmad, awarded by learned trial Court vide impugned judgment dated 30.06.2016 and acquit him of the charge by extending him the benefit of doubt. The appellant Ali Ahmad is directed to be released forthwith, if not required in any other case. The death sentence awarded to appellant Ali Ahmad is not confirmed and Murder Reference No.49/2016 is answered in negative.

13. Before parting this judgment, I gratefully acknowledge the material assistance rendered by Lahore High Court Bahawalpur Bench, Research Center headed by Mr. Muhammad Javed Khan, Civil Judge/Research Officer of this Bench.

JK/A-74/L **Appeal accepted.**

2020 P Cr. L J 742

[Lahore (Multan Bench)]

Before Anwaarul Haq Pannun, J

Ch. MUHAMMAD ASLAM and others----Petitioners

Versus

SESSIONS JUDGE, MUZAFFARGARH and others----Respondents

Writ Petition No.11067 of 2016 and Criminal Miscellaneous No.14-Q of 2016, decided on 30th April, 2019.

(a) Jurisprudence---

----"Crime"---Connotation---Wrongs are divisible in two sorts or species (i) personal wrong and (ii) public wrong---Crime is a public wrong, breach and violation of public right effects whole community---Crime is deemed by law to be harm to society in general.

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

----S. 154---Registration of FIR---Complainant---Scope---In absence of availability of any private person to be a complainant, State functionaries themselves can report a crime for bringing to book, person who had committed crime---Any individual cognizant of commission of crime can put machinery of law in motion---In doing so, individual is not under any legal obligation to show that personally he is aggrieved of an act complained of---Commission of crime is deemed not only a wrong against individual but same is deemed to be a crime against society---Object behind putting machinery of law against person accused of commission of criminal wrong is to get person punished for act illegal he had done---Punishment may be corporeal or in fine or in both.

(c) Illegal Dispossession Act (XI of 2005)---

----Ss. 3, 5 & 7--- Illegal dispossession--- Impleading of parties--- Jurisdiction of court--- Complainant was aggrieved of authorities not

handing over possession of his illegally dispossessed property despite there being order from the High Court---Accused persons during pendency of proceedings, filed application seeking adding of parties to proceedings which was allowed by Trial Court---Validity---No provision was available in Criminal Procedure Code, 1898 enabling a criminal court to exercise its jurisdiction for impleading any person even at his own as a party during proceedings while trying an offence---Trial Court while passing order failed to consider that criminal court was not conferred upon jurisdiction under any law, either to strike or add any party in pending criminal proceedings---High Court set aside order passed by Trial Court as same was passed illegally, without jurisdiction, without lawful authority and as such same was of no legal effect--- High Court declined to interfere in orders for handing over possession of land in question to complainant as it was unchallenged and attained finality---Constitutional petition was disposed of accordingly.

Muhammad Saleem v. Muneeza Begum and 6 others 2019 PCr.LJ 364; Captain S.M. Aslam v. The State and 2 others PLD 2006 Kar. 221; Muhammad Akram and 9 others v. Muhammad Yousaf and another 2009 SCMR 1066; Mst. Gulshan Bibi and others v. Muhammad Sadiq and others PLD 2016 SC 769; Dossan Travels Pvt. Ltd. and others v. Messrs Travels Shop (Pvt.) Ltd. and others PLD 2014 SC 1; District Bar Association, Rawalpindi and others v. Federation of Pakistan and others PLD 2015 SC 401 and S.M. Waseem Ashraf v. Federation of Pakistan through Secretary, M/o Housing and Works, Islamabad and others 2013 SCMR 338 ref.

Muhammad Shakeel-ur-Rehman's case PLJ 2014 Lah. 1192 distinguished.

(d) Punjab Civil Courts Ordinance (II of 1962)---

----S.3---Constitution of civil courts--- Scope--- Provisions of Punjab Civil Courts Ordinance, 1962 constitutes classes of courts to be

established for civil justice and also authorizes Provincial Governments to demarcate civil district and headquarters.

(e) Civil Procedure Code (V of 1908)---

----O. I, R. 10--- Necessary and proper party--- Scope--- Necessary or proper party to suit is that party whose presence is necessary before court to effectively adjudicate upon suit---Such party can be ordered to be impleaded in suit at any stage of proceedings.

Ch. Abdul Ghaffar and Ali Akhtar Bodla for Petitioners.

Sardar Mahboob for Petitioner (in Criminal Miscellaneous No.14-Q of 2016) and for Respondents (in Writ Petition No.11067 of 2016).

Ch. Zulfiqar Ali Sidhu, Assistant Advocate General Abdul Wadood, Deputy Prosecutor General for the State.

Date of hearing: 30th April, 2019.

JUDGMENT

ANWAARUL HAQ PANNUN, J.-----Through this single judgment, I propose to decide the instant Writ Petition No.11067/2016 filed under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, calling in question the vires of order dated 11.07.2016 passed by the learned Sessions Judge, Muzaffargarh whereby "application filed by respondents Nos. 2 to 10, herein, for impleading them as party in a private complaint" filed by the petitioner/complainant titled "Ch. Muhammad Aslam v. Mushtaq Ahmad and others" under sections 3, 5 of Illegal Dispossession Act, 2005, has been accepted with the following observation:-

> "In these circumstances, the petitioners are necessary and proper party to be heard for just disposal of this complaint. Hence relying upon PLJ 2014 Lahore 1192, Muhammad Shakeel-ur-Rehman, etc. petitioners are directed to be impleaded as respondents and after

their impleadment amended complaint be submitted in the court on 15.07.2016.

and

Criminal Miscellaneous No.14-Q of 2016 titled "Muhammad Shakeel-ur-Rehman and others v. District and Sessions Judge, Muzaffargarh and others" which has arisen out of the same proceedings, seeking setting aside the order dated 31.05.2016, the operative part of the said order is reproduced hereunder:-

" .Report of the SHO obtained from Patwari endorsed by the Assistant Commissioner, Kot Addu has earlier been declared unsatisfactory vide order of this court dated 21.02.2015 which still holds the field. Same is the position of report dated 27.05.2016 submitted to this court. In these circumstances, the SHO police station Kot Addu and the Assistant Commissioner, Kot Addu are directed to deliver possessions of above said land to complainant through coercive measures otherwise they shall deem this order as show cause notice as to why proceedings for violation of this court's order may not be initiated against them . ."

2. Precisely, the relevant facts leading to this petition are that the petitioner filed a complaint titled "Ch. Muhammad Aslam v. Mushtaq Ahmad and others" under sections 3/5 of the Illegal Dispossession Act, 2005 (hereinafter to be called as the complainant) against respondents Nos.12 to 24 in the year 2012 wherein, after recording of Cursory evidence, the learned trial court issued process against the proforma accused for facing the trial. The accused filed an application under section 265-K, Cr.P.C. seeking their acquittal, before trial court which was dismissed vide order dated 06.05.2014, aggrieved whereof, they filed Writ Petition No.7297/2014 before this Court which had also been dismissed vide order dated 30.05.2014.

3. It is important to note that the petitioner/complainant moved an application under section 7 of Illegal Dispossession Act, 2005 before the learned trial court for handing over the possession of the land to him. It was allowed vide order dated 10.01.2015. This order remained unimplemented, resultantly, the complainant filed a Writ Petition No.16587/2015 in which vide order dated 13.05.2016, this Court issued a direction to the learned trial court to implement the order dated 10.01.2015. The complainant pursuant to above order, moved a miscellaneous application before the learned trial court seeking implementation of order dated 10.01.2015 which was accepted vide order dated 31.05.2016 and the SHO, Police Station Kot Addu and Assistant Commissioner, Kot Addu have been directed to deliver the possession of the land to the complainant through coercive measures, hence Criminal Miscellaneous No.14-Q/2016, as mentioned in para-1 of this petition.

4. Learned counsel for the complainant has argued that the impugned order dated 10.01.2015, impleading respondents Nos.2 to 10 as party in the titled complaint passed by the learned trial court, is nullity in the eyes of law. There exists neither any provision, nor any concept for adding or striking of a party in criminal law. Application seeking impleadment, cannot be entertained for impleading someone as an accused except where on the basis of some material, the court itself consider a particular person to be summoned as an accused. While opposing Criminal Miscellaneous No.14-Q/2016, learned counsel for the complainant submits that since the order dated 13.05.2016 passed in Writ Petition No.16587/2015, has attained finality, therefore, impugned order cannot be challenged, thus the application is not maintainable and prays for its dismissal.

5. Learned counsel for the respondents submits that since the titled complaint is collusive, the matter pertains to possession of the property, therefore, application of the respondents for impleading them has rightly been accepted by the learned trial court in order to avoid any possible prejudice as a result of implementation of order dated 31.05.2016.

6. The arguments advanced by the learned counsel for the parties have been heard and record perused.

7. Till 6th July, 2005 the day on which The Illegal Dispossession Act, 2005 as special law, was promulgated, the persons, without adopting due course of law and illegally dispossessed from their properties could seek certain remedies under ordinary criminal as well as civil law.

i) A remedy by way of putting the machinery of law into motion under section 154, Cr.P.C. in case of commission of criminal trespass, house trespass, lurking house trespass, lurking house trespass by night, house breaking and house breaking by night was available to the aggrieved persons.

ii) Under the provisions of section 145, Cr.P.C., a Magistrate has been empowered to restore the possession of a person, dispossessed within a period of two months of passing of order by the Magistrate on receiving an information after being satisfied from a police report or other information about the likelihood of breach of peace concerning any land, water or boundaries thereof within the local limits of his jurisdiction, after holding an inquiry, the Magistrate can restore the possession of a party so wrongfully dispossessed by the other party within two months next before the date of passing of his order. He has also been empowered to attach the property. The Magistrate, however, has not been invested with the power to entertain and decide finally the claim of title between the parties. For guidance, in the case law reported in Muhammad Saleem v. Muneeza Begum and 6 others (2019 PCr.LJ 364) wherein it is held that,

"(b) Criminal Procedure Code (V of 1898)---

----S. 145---Procedure where dispute concerning land is likely to cause breach of peace---Power to attach subject of dispute---pendency of civil litigation----Scope---Whenever Magistrate was satisfied that

dispute likely to cause breach of peace existed regarding any land and considered it a case of emergency, he could attach the subject and order for its proper custody---Section 145, Cr. P.C. nowhere provided that in presence of civil litigation Magistrate could not exercise his powers conferred on him---Mere filing of suit did not debar the Magistrate to proceed under S. 145, Cr.P.C. unless interim injunction was issued or Receiver was appointed or decree was finally passed, or possession was regulated by the Civil Court.

iii) A person illegally and without adopting due course of law dispossessed from his property, has also been provided a remedy by way of filing of a civil suit under section 8 of the Specific Relief Act, 1877 on the basis of title in the manner provided by the Code of Civil Procedure, 1908, subject to law of limitation.

iv) Another remedy, by means of a civil suit, was also available to a person dispossessed of his immoveable property, as envisaged under section 9 of the Specific Relief Act, 1877 against the persons causing dispossession. The provisions of section 9 of Specific Relief Act, 1877 gives a special privilege to persons in possession who takes action primary on their dispossession of immoveable property. Under section 9 of the Act, ibid, summary procedure has been provided, to persons dispossessed from immoveable properties without their consent. It is, for bringing the cause under this Section, it is required to show that the person invoking the jurisdiction of the Court had actual physical possession of immoveable property from which he was dispossessed without any consent by defendants within six months prior to the institution of the suit. It is not mandatory for the parties claiming retrieval of the possession over the property, who have been dispossessed from his possession over the property, to establish his title simply it is sufficient to prove that the pretty

claiming retrieval has been dispossessed within the period of six months.

..crime remained an unwanted companion of man throughout history from stone ages to the modern era of information technology .."

8. Hike up in price of real estates, time taking process involving procedural technicalities, rendering the available legal remedies, in public perceptions almost ineffective, the dwindling state superstructure not providing swift measures, the porous and posting seeker bureaucracy pliant before their political masters, gradual decay in value system of society, alarming increase in the illegal public and private land grabbing incidents by the powerful individual and organized groups backed by un-scrupulous elements, ignoring the voice of their conscience, eager to make their fortune, without distinguishing between the right and wrong unfortunately the incidents of illegally occupying the valuable properties owned by weak segments of the society and Pakistani immigrants abroad, gained currency in absence of any deterrent remedial legislation; in this back drop, the legislature felt it expedient to enact The Illegal Dispossession Act, 2005 (hereinafter to be called as the Act) for providing protection to lawful owners and occupants of immoveable properties from their illegal and forcible dispossession therefrom by the property grabbers. The act being a special law has an over riding affect upon prevalent laws. Through the provisions of the Act "everyone" has been prohibited in clear words from entering into or upon any property to dispossess, grab, control or occupy it, without having any lawful authority to do so with the intention to dispossess, grab, control or occupy the property form the "lawful owner" or "occupier of such property". For ready reference, it will be advantageous to produce section 3 of Illegal Dispossession Act, 2005:-

3. Prevention of illegal possession of property, etc.---(1) No one shall enter into or upon any property to dispossess, grab, control or

occupy it without having any lawful authority to do so with the intention to dispossess, grab, control or occupy the property from owner or occupier of such property.

(2) Whoever contravenes the provisions of the subsection (1) shall, without prejudice to, any punishment to which he may be liable under any other law for the time being in force, be punishable with imprisonment which may extend to ten years and with fine and the victim of the offence shall also be compensated in accordance with the provision of section 544-A of the Code.

(3) Whoever forcibly and wrongfully dispossesses any owner or occupier of any property and his act does not fall within subsection (1), shall be punished with imprisonment which may extend to three years or with fine or with both, in addition to any other punishment to which he may be liable under any other law for the time being in force. The person dispossessed shall also be compensated in accordance with provisions of section 544-A of the Code.

9. It will be very important to say that through the enforcement of the Act, a contravention of subsection (1) of section 3 has been made a punishable offence with imprisonment besides imposition of fine upon the person found guilty of commission of offence under subsections (2), (3) of section 3 ibid. Awarding of compensation has also been made permissible. In the case reported as Captain S.M. Aslam v. The State and 2 others (PLD 2006 Karachi 221) wherein it is held that,

"Subsection (1) of section 3 forbids any person from entering into or upon any property with the intention to dispossess, grab, control, or occupy any property from its owner or occupier, whereas subsection (2) of section 3 provides that any person who contravenes the provision of subsection (1) of section 3 shall be liable for a punishment of imprisonment which may extend to ten

years and with fine and also provide compensation to the victim in accordance with section 544-A of the Code. The punishment provided in subsection (2) of section 3 is beside and without prejudice to any punishment provided under any other law."

10. Any act, without any lawful authority doing so by any person, in contravention of subsection (1) of section 3, constitutes an offence under the Act ibid which according to its gravity has been made punishable under subsections (2) and (3) of section 3 of the Illegal Dispossession Act, 2005. In the case of Muhammad Akram and 9 others v. Muhammad Yousaf and another (2009 SCMR 1066) it is held that,

"---S. 3 (1) & (2)---Scope and application of S.3(1)(2) of the Illegal Dispossession Act, 2005----Essentials for Complainant to allege and show before the court and the defence line of the accused enumerated.

The Illegal Dispossession Act, 2005, is a special enactment which has been promulgated to discourage the land grabbers and to protect the right of owner and the lawful occupant of the property as against the unauthorized and illegal occupants. The careful examination of the relevant provisions in the Act would reveal that all cases of illegal occupants without any distinction, would be covered by the Act, except the cases which were already pending before any other forum. The purpose of this special law was to protect the right of possession of lawful owner or occupier and not to perpetuate the possession of illegal occupants.

The provisions of subsection (1) of section 3 of the Illegal Dispossession Act, 2005 are in the form of preventive provisions. The section begins with the words: "no one shall .". This is a prohibitory mandate. There is no restriction as to the class of persons. All persons have been prohibited to commit the offence detailed in this provision, be he male or female. In order to

constitute an offence under section 3(1) of the Illegal Dispossession Act, 2005, the Complainant is to allege and show before the Court:-

(i) That the Complainant is the actual owner (or occupier i.e. in lawful possession) of the immovable property in question.

(ii) That the accused has entered into (or upon) the said property.

(iii) That the entry of the accused into (or upon) the said property is without any lawful authority.

(iv) That the accused has done so with the intention to dispossess (to grab or to control or to occupy) the Complainant.

The provision of section 3(2) is salutary and mandatory. It is with the purpose to alleviate the suffering and is also effective deterrent against crime. The Legislature has taken full care to close all doors of any injustice to the parties.

11. For quite some-time, there remained a debate in the annals of the courts that as to whether the provisions of Illegal Dispossession Act, 2005 can be invoked against the persons holding the credentials of land grabbers and "Qabza Mafia" only, the Hon'ble Supreme Court of Pakistan in its celebrated judgment reported as Mst. Gulshan Bibi and others v. Muhammad Sadiq and others (PLD 2016 SC 769) while removing the confusion, earlier caused through various shades of opinions has held as under:-

Legislation---

----Special law enacted to curb a crime----Scope and applicability---Category of persons who could be prosecuted---Legislature while enacting a special law for awarding punishment for a crime, in its wisdom, may or may not describe any particular category of persons who could be prosecuted----Where a special law after making a particular act an offence also described the category of

persons who could be prosecuted then unless such person fell within the described category, he could not be prosecuted---Where the special aw only described the offence or a set of offences and sought to punish any person and every person who was found to have committed the described offence then terms like "anyone", "any person" "whoever" and "whosoever" were used for the offenders in order to include all offenders without any distinction---In such a case, the offender may belong to any class of offenders, he as an accused could be prosecuted under such law."

Needless to say that through the above ratio, a question of law has been decided, which has its binding effect under Article 189 of the Constitution upon all the courts.

12. In the light of arguments advanced by the learned counsel for the parties, the facts and law reiterated hereinabove, the issue seeking its determination, which will also decide the fate of this lis, is WHETHER A CRIMINAL COURT HAS A POWER TO STRIKE OUT OR ADD PARTIES, EITHER IN THE CAPACITY OF COMPLAINANT OR THE ACCUSED, IN PENDING CRIMINAL CASES. In order to examine the legality of the impugned order dated 11.07.2016 and reply the above question, let us first, examine certain relevant provisions of (i) The Illegal Dispossession Act, 2005, (ii) Code of Criminal Procedure, 1898; (iii) Code of Civil Procedure, 1908, (iv) The Punjab Civil Courts Ordinance, 1962 and (v) the relevant provisions of The Constitution of Islamic Republic of Pakistan, 1973.

13. Shorn of verbiage, I firstly propose to decide the legality of impugned order dated 11.07.2016 whereby the trial court, allowed the application of respondents Nos.2 to 10 for their impleadment as party in the pending complaint, with a direction to the complainant to file amended complaint. It will be appropriate to observe that the Pakistan Penal Code as well as the Code of Criminal Procedure, 1898 were enacted

during the days of The British Raj, following Anglo Saxon jurisprudence. As to what, jurisprudence is best may be stated in the words from "Salmond on Jurisprudence":

> "The distinction between crimes and civil wrongs is roughly that crimes are public wrongs and civil wrongs are private wrongs. As Blackstone says:" "Wrongs are divisible into two sorts or species, private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed civil injuries; the latter are a breach and violation of public rights and duties which affect the whole community considered as a community; and are distinguished by the harsher appellation of crimes and misdemeanours." A crime then is an act deemed by law to be harmful to society in general, even though its immediate victim is an individual. Murder injures primarily the particular victim, but its blatant disregard of human life puts it beyond a matter of mere compensation between the murder and the victim's family. Those who commit such acts are proceeded against by the State in order that, if convicted, they may be punished. Civil wrongs such as breach of contract or trespass to land are deemed only to infringe the rights of the individual wronged and not to injure society in general, and consequently the law leaves it to the victim to sue for compensation in the court."
>
> "From a practical standpoint the importance of the distinction lies in the difference in the legal consequences of crimes and civil wrongs. Civil justice is administered according to one set of forms, criminal justice according to another set. Civil justice is administered in one set of courts, criminal justice in a somewhat different set. The outcome of the proceedings, too, is generally different. Civil proceedings, if successful, result in a judgment for damages, or in a judgment for the payment of a debt or (in a penal

action) a penalty, or in an injunction or decree of specific restitution or specific performance, or in an order for the delivery of possession of land, or in a decree of divorce, or in an order of mandamus, prohibition, or certiorari, or in a writ of habeas corpus, or in other forms of relief known distinctively as civil. Criminal proceedings, if successful, result in one of a number of punishments, ranging from hanging to a fine, or in a binding over to keep the peace, release upon probation, or other outcome known to belong distinctively to criminal law."

14. In case of commission of an offence, under Section 3 of Illegal Dispossession Act, 2005, which is public wrong, a remedy by way of filing of a complaint before the court is provided. The court upon a complaint may direct the officer in charge of the police station to investigate the complaint. The offence in this Act (under section 3 of the Act) shall be non-cognizable. The court has been empowered to direct the police to arrest the accused at any stage of the trial. It has manifestly been made clear that "notwithstanding anything contained in the Code or any laws for the time being in force", the offence shall be triable by the court of sessions. To regulate the court proceedings for holding trial of an accused, it has been provided under section 9 of the Act that "unless otherwise provided in this Act," the provisions of the Code of Criminal Procedure 1898 (Act V of 1898) shall be applicable. Needless to say, the Illegal Dispossession Act is a special law, having overriding effect upon other laws. Under the provisions of Section 2, certain terms which are relevant have been defined as under:-

(a) "Court" means the Court of Session;

(b) "Code" means the Code of Criminal Procedure, 1898 (Act V of 1898);

For ready reference, the provision of section 9 of the Illegal Dispossession Act, 2005 is also reproduced hereunder:-

9. Application of Code.---Unless otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1898 (V of 1898), shall apply to proceedings under this Act.

15. In the light of above discussion, legal position emerges that besides the special provisions contained in the Act ibid, the provision of "Code of Criminal Procedure" are applicable for holding a trial of an offence under this Act before the Court. In order to further elucidate the issue under discussion, a necessity has arisen to examine certain provision of Code of Criminal Procedure. Let's now examine the preamble of the Code of Criminal Procedure to know the purpose behind its promulgation which says that it is an act to consolidate and amend the law relating to criminal procedure. Prior to enactment and promulgation of this Code, there existed no uniform procedural law for regulating the proceeding before criminal courts during the colonial era. The scheme behind the criminal procedure code is to streamline, channelize and facilitate the smooth running of system of criminal justice. THE OBJECT IS TO PROVIDE A MACHINARY FOR PUNISHMENT OF OFFENDERS AGAINST THE SUBSTATIVE CRIMINAL LAW UNDER THE CODE.

16. I have found that under section 2(a) of the Illegal Dispossession Act, 2005 the Court has been defined, as the court of session. About the constitution of courts, it mention in Chapter II, Part-II as under:

Section 6. Classes of Criminal Courts Magistrates.

(1) Besides the High Courts and the Courts constituted under any law other than this Code for the time being in force, there shall be two classes of Criminal Courts in Pakistan, namely:

(i) Courts of Session;

(ii) Courts of Magistrates.

Section 9 of the Code speaks that the Provincial Government shall establish a Court of Sessions for every sessions division, and appoint a judge of such Court. Under subsection (3) of this section, the Provincial

Government may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in one or more such Courts. It evinces that the criminal courts are constituted under the above referred provisions of Cr.P.C. A description of offences triable by each court, constituted, under the above referred provision has been given (under sections 28 and 29 of the Code, of Chapter III). According to section 28 subject to the other provision of the Code, any offence under the Pakistan Penal Code may be tried (a) by the High Court or (b) by the court of session or (c) by any other court by which such offence is shown in the eighth column of II schedule to be triable. For the offences under other laws, section 29 of the Code provides as under:-

Subsection 29(1) subject to other provision of this Code, any offence under any other law shall when any court is mentioned in this behalf in such law be tried by such court.

(2)

17. The above discussion, has led to this Court to conclude that the offence under section 3 of the Illegal Dispossession Act, in view of section 29(1) of Cr.P.C., while adopting the procedure given in Cr.P.C. to regulate its proceedings, is triable by a court of sessions. As noted above, wrongs are divisible into two sorts or species, (i) personal wrong and (ii) public wrong. The crime is a public wrong, a breach and violation of pubic right affects the whole community. The crime is deemed by law to be a harm to the society in general. Irrespective of the fact that its immediate victim is an individual, therefore, even in absence of availability of any private person to be a complainant, the State functionaries himself can report a crime for bringing to book the person who had committed a crime. It may be pointed out that, any individual cognizant of the commission of crime, can put the machinery of law into motion. In doing so the individual, is not under any legal obligation to show that personally he is aggrieved of the Act complained of. This is

because that the commission of crime is deemed not only a wrong against the individual but the same is deemed to be a crime against the society. The object behind putting the machinery of law against a person accused of commission of any criminal wrong is to get the person punished for the act illegal he had done. The punishment may be corporeal or in fine or in both. It is observed that (i) the provisions of Cr.P.C. constitute criminal courts, (ii) confer on the courts, the jurisdiction to try the offences and impose the penalty upon the accused for committing, the public wrong, (iii) it also provides procedure to regulate the proceedings before criminal courts. No provision has been found in the Code enabling a criminal court, to exercise its jurisdiction for impleading any person either on his own application as a party during the proceedings while trying an offence.

18. Unlike what has been said above, the preamble of Code of Civil Procedure (Act No.V of 1908) states that it is an Act to consolidate and amend the laws relating to the procedure of courts of civil judicatures. According to subsection (1) of section 2 of C.P.C., Code includes Rules. By virtue of section 121, C.P.C., the rules are to have effect as if enacted in the body of the Code. Some relevant provisions in verbatim are reproduced, for facility to grasp the point under decision.

Section 5 of Code of Civil Procedure 1908 "Application of the Code to Revenue Courts" (1) Where any Revenue Courts are governed by the provisions of this Code in those matters of procedure upon which any special enactment applicable to them is silent, the {Provincial Government} may, by notification in the {Official Gazette}, declare that any portions of those provisions which are not expressly made applicable by this Code shall not apply to those Courts, or shall only apply to them with such modifications as the {Provincial Government} may prescribe.

(2) "Revenue Court" in subsection (1) means a Court having jurisdiction under any local law to entertain suits or other

proceedings relating to the rent, revenue or profits of land used for agricultural purposes, but does not include a Civil Court having original jurisdiction under this Code to try such suits or proceedings as being suits or proceedings of a civil nature.

Section 9 of C.P.C. Courts to try all Civil Suits unless barred.--

Jurisdiction. The maxim 'ubi jus ibi remedium' (wherever there is a right, there is a remedy), is a fundamental principle of law (a). Any person having right has a corresponding remedy to institute suits in a court unless the jurisdiction of the court is barred (ab). By virtue of the provisions of this section, civil courts are granted general jurisdiction to try all suits of a civil nature. (ac) In other words wherever the objection of proceedings is the enforcement of civil rights, a civil court has jurisdiction to entertain the suit independently of any statute unless its cognizance is either expressly or impliedly barred (ad). Though the Code does not define the term "Court", it means the forum created by the Civil Courts Ordinance, 1962 (ae).

Under the Code of Civil Procedure under Order I, Rule 10, C.P.C.

Sub-Rule (2) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely, to adjudicate upon and settle all the questions involved in the suit, be added.

The perusal of above provisions is sufficient to hold that the Code of Civil Procedure is aimed to regulate the proceedings of civil courts besides arming them to exercise all ancillary powers in the interest of justice for deciding the lis before the courts.

19. Contrary to The Code of Criminal Procedure, 1898 (Act V of 1898), The Code of Civil Procedure, 1908 (Act V of 1908) despite recognizing through implication it does not create classes of courts. The Punjab Civil Courts Ordinance, 1962 (Ordinance II of 1962) says, that it is an Ordinance to amend and to consolidate the law relating to Civil Courts in the Province of the Punjab. Under section 3 of the Ordinance which reads as under:-

> 3. Classes of Courts.-Besides {a court established under the Small Claims and Minor Offences Courts Ordinance, 2002 (XXVI of 2002}, and the Courts established under any other enactment for the time being in force, there shall be the following classes of Civil Courts, namely:-
>
> (a) the Court of the District Judge;
>
> (b) the Court of the Additional District Judge; and
>
> (c) the Court of the Civil Judge.

Moreover, the provisions contained in Chapters II, III and other supplemental provisions are relevant for determination of pecuniary territorial trial and appellate jurisdictions of the civil courts.

20. As noted above, the preamble of C.P.C. evinces that it has consolidated and amended the laws relating to procedure of court of civil judicature. This is a law of general application and the courts namely civil courts apply it in the enforcement of civil rights and obligations is ordinary course of civil jurisdiction. The distinguishing feature of C.P.C. is that it divides into two parts, its body which consists of sections 1 to 158 and the First Schedule which comprises of Orders 1 to 50. These Orders contain the rules which, as section 121, C.P.C. says, "shall have effect as enacted in the body of this Code until annulled or altered in accordance with the provisions of this Part (Part X, C.P.C.). Unlike the Code of Criminal Procedure, 1898 the C.P.C. itself does not create any court; it does not even define the expression court. It merely is intended to

regulate the procedure of civil judicature and its section 3 lays down that the District Court is subordinate to the High Court and every civil court of a grade inferior to that of a District Court and every court of small causes is subordinate to the High Court and the District Court. In other words, it is only by implication that the C.P.C. recognizes civil courts of various grades. The provisions of Civil Court Ordinance, 1962 constitute the classes of courts to be established for civil justice. It also authorizes provincial Government to demarcate civil district and headquarters. Under Order I, Rule 10, C.P.C., the civil court has the power to strike or add a party. The necessary or proper party to the suit whose presence is necessary before the court effectively adjudicate upon the suit at any stage of the proceedings can be ordered to be implead in the suit. This power is only conferred upon a civil court and not upon the criminal court, quite in accordance with the Constitution.

21. It will be appropriate to refer Article 175 of the Constitution of Islamic Republic of Pakistan, 1973. Establishment and jurisdiction of Courts

Sub-Article (1) THERE SHALL BE A SUPREME COURT OF PAKISTAN, A HIGH COURT FOR EACH PROVINCE AND A HIGH COURT FOR THE ISLAMABAD CAPITAL TERRITORY AND SUCH OTHER COURTS AS MAY BE ESTABLISHED BY LAW.

Sub-Article (2) No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.

Sub-Article (3) ..

22. As observed hereinabove, the criminal courts have been conferred jurisdiction under the Code of Criminal Procedure quite in line with command contained in Article 175(2) of the Constitution of Islamic Republic of Pakistan, 1973. The criminal courts have been constituted under a law known as the Code of Criminal Procedure, 1898. The civil

courts on the other hand have been constituted under the Punjab Civil Courts Ordinance (W.P. Ordinance II of 1962) and had been conferred jurisdiction in line with the above quoted Constitutional provisions also. The Code of Civil Procedure regulates the proceedings before the civil courts for the decision of the lis. The civil courts and not the criminal courts, Rule 10, C.P.C. are empowered to add or strike any person as a party in the lis before them. The application of the petitioner in absence of any provision of law enabling it to pass such order illegally has been accepted by the trial court. Reliance is placed on the case law reported in Dossan Travels (Pvt.) Ltd. and others v. Messrs Travels Shop (Pvt.) Ltd. and others (PLD 2014 Supreme Court 1).

(a) Constitution of Pakistan---

---Arts. 199, 175(2) & 187---Constitutional jurisdiction of High Court---Parameters of jurisdiction under Art. 199 of the Constitution, enumerated.

While exercising powers under Article 199(1) of the Constitution, Courts should always keep in view the following three parameters of their jurisdiction;

(i) A High Court is the apex court in the province or in the case of Islamabad, of the capita territory, but they are the creatures of the Constitution and they have only that jurisdiction which has been conferred by the Constitution or under any law for the time being in fore. Article 175(2) specifically mandates "no court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law."

23. The above ratio has been followed in the following case laws i.e. District Bar Association, Rawalpindi and others v. Federation of Pakistan and others (PLD 2015 Supreme Court 401) and S.M. Waseem Ashraf v. Federation of Pakistan through Secretary, M/O Housing and Works, Islamabad and others (2013 SCMR 338).

24. After going through the Muhammad Shakeel-ur-Rehman's case (PLJ 2014 Lahore 1192) relied upon by the leaned trial court while passing the impugned order dated 11.07.2016. with utmost respect and humility on my command, it is observed that in the cited case either the court was not properly assisted or the provisions quoted above have escaped the notice of his lordship at the time of passing of the judgment. The court below while passing the impugned order has failed to consider that the criminal court, has not been conferred upon jurisdiction, under any law, either to strike or add any of the party in the pending criminal proceedings, therefore, the impugned order is not sustainable in the eyes of law.

25. For what has been discussed above, this Writ Petition No.11067 of 2016 is allowed, the order passed by the learned trial Judge dated 11.07.2016 is set aside declaring the same to have been passed illegally, without jurisdiction, without lawful authority, and as such the same is of no legal effect.

26. So far as Crl. Misc. No.14-Q of 2016 titled "Muhammad Shakeel-ur-Rehman and others v. District and Sessions Judge, Muzaffargarh and others" is concerned, suffice it to observe that the complainant's application under section 7 of Illegal Dispossession Act, 2005 seeking handing over possession of the land, remained undecided, resultantly, the complainant filed a Writ Petition No. 16587/2015 in which vide order dated 13.05.2016, this Court issued a direction to the learned trial court to implement the order dated 10.01.2015. The complainant pursuant to above order, moved a miscellaneous application before the learned trial court seeking implementation of order dated 10.01.2015 which was accepted vide order dated 31.05.2016 and the SHO, Police Station Kot Addu and Assistant Commissioner, Kot Addu have been directed to deliver the possession of the land to the complainant while adopting coercive measures. Since, the petitioner has not challenged the order passed in Writ Petition No.16587/2015 vide order dated 13.05.2016,

which has attained finality. The order, impugned herein, has been passed in pursuance of the afore-referred order which had already attained the finality, thus this petition is not maintainable and the same is liable to be dismissed.

MH/M-132/L **Petition dismissed.**

2020 P Cr. L J 789

[Lahore (Multan Bench)]

Before Anwaarul Haq Pannun, J

ARFAN---Appellant

Versus

The STATE and others---Respondents

Criminal Appeal No. 573 of 2017, heard on 9th October, 2019.

Penal Code (XLV of 1860)---

----S. 376---Rape---Victim, a deaf and dumb female---Examination of victim by Medical Board---Scope---Accused assailed the judgment of Trial Court whereby he was convicted under S. 376, P.P.C.---Record of Trial Court revealed that the complainant had filed application for summoning the Deaf and Dumb Expert for examination of victim, which was allowed, however, the application filed by accused for constitution of Medical Board to medically examine the victim was dismissed---Interpreter reported that the victim was not only deaf and dumb but she was also mentally retarted and was unable to make her statement---Dismissal of application filed by accused was not sustainable since the victim was stated to be deaf and dumb---Held, Trial Court should have got the victim medically examined from a medical expert; examined the expert in the court; provided an opportunity to the defence to cross-examine the said witness and decided the matter accordingly---Appeal was partially allowed, conviction and sentence awarded to the accused was set aside, matter was remanded to the Trial Court to refer the victim to a Medical Board and re-write the judgment after examination of the Chairman of Medical Board.

Prince Rehan Iftikhar Sheikh for Appellant.

Muhammad Abdul Wadood, Deputy Prosecutor General for the State.

Mehar Ali Raza for the Complainant.

Date of hearing: 9th October, 2019.

JUDGMENT

ANWAARUL HAQ PANNUN, J.---Through the titled appeal under section 410, Cr.P.C., appellant Arfan has challenged the vires of judgment dated 17.01.2017 passed, on the conclusion of trial, in case FIR No.116/2015, dated 23.02.2015 for an offence under section 376, P.P.C., registered at Police Station Yousafwala, District Sahiwal by the learned Additional Sessions Judge, Sahiwal, whereby he has been convicted and sentenced as under:-

Under section 376, P.P.C.

Imprisonment for life, fine of Rs.1,00,000/- and compensation of Rs.2,00,000/- under section 544-A, Cr.P.C. and in case of non-payment of fine, to further undergo six months' SI each.

The appellant was held entitled to the benefit of section 382-B, Cr.P.C.

2. At the very outset, learned Deputy Prosecutor General has pointed out that when the interpreter summoned by the learned trial court to translate the evidence of victim, being deaf and dumb, had submitted a report that victim is not only deaf and dumb but she is also mentally retarded and suffering from brain ailment as well as multiple disabilities and is unable to make the statement before the court, under the law, his statement should have been recorded as court witness and learned counsel for the parties should provide opportunity to cross-examine him, if so desired but the same has not been done which is a legal infirmity making the impugned judgment liable to be set aside.

3. Although, learned counsel for the appellants, initially resisted the objection on the ground that the appellant has already endured the agony of protracted trial, therefore, remanding the case to the trial court, for rewriting of judgment, would serve no other purpose but to add the predicament of the appellant who is behind the bars since long, however, there was consensus that the impugned judgment failed to meet the

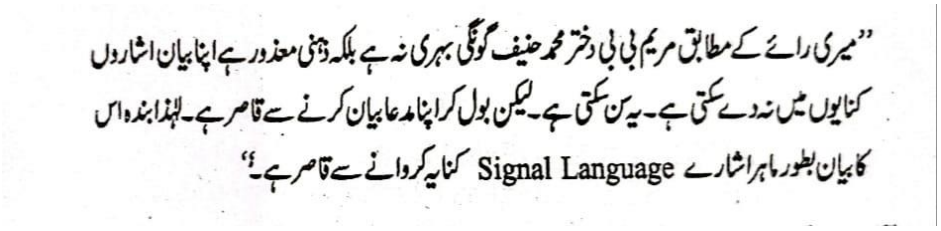
mandatory requirements of law as mentioned above owing to omission on the part of the learned trial Court.

4. Arguments heard. Record perused.

5. Perusal of order sheet of the learned trial court reveals that on 13.10.2015, an application for summoning the deaf and dumb expert has been filed on behalf of the complainant, which was allowed vide order dated 23.02.2016 and consequently, letter bearing No.69, dated 23.02.2016 was issued to the Principal, Deaf and Dumb School, Sahiwal to do the needful. Furthermore, on 04.11.2015, another application was filed on behalf of the appellant for constitution of medical board for the medical examination of alleged victim, which has been dismissed vide order dated 25.01.2016 with the following observations:-

"File is showing that this fact is mentioned in the FIR that the victim is deaf and dumb. The case was registered on 23.02.2015 and status of the lady was never challenged by the defence. Now after recording the examination in chief of the PW instant application is moved and after hearing both the parties I have reached to the conclusion that the purpose of this application is nothing but only to linger on the matter. Thus, the application of the defence for medical examination of the victim is dismissed."

6. Perusal of record further reveals that on 15.03.2016, the alleged victim was brought in the witness box and Mirza Pervaiz Akhtar, Senior Special Education Teacher appeared in the court to translate her statement. As interpreter, he tried to understand the court's question to the alleged victim but she did not reply, whereupon, he submitted report to the following effect:-


”میری رائے کے مطابق مریم بی بی دختر محمد حنیف گونگی بہری نہ ہے بلکہ ذہنی معذور ہے اپنا بیان اشاروں
کنایوں میں نہ دے سکتی ہے۔ یہ سن سکتی ہے۔ لیکن بول کر اپنا مدعا بیان کرنے سے قاصر ہے۔ لہٰذا بندہ اس
کا بیان بطور ماہر اشارے Signal Language کنایہ کروانے سے قاصر ہے۔“

7. Dismissal of application filed on behalf of the accused-appellant is not sustainable since the victim has been stated to be deaf and dumb and the defence side moved a formal application for her medical examination. It was proper for the learned trial court to pass an order to get medically examined the victim from some medical expert having qualification in the relevant medical field and examine him in the court and provide an opportunity to the defence to cross-examine the said witness and thereafter, decide the matter but the same has not been done by the learned trial court. The learned trial court, by allowing the said application, referred the alleged victim to the medical board consisting of neurologist, psychiatrist and other medical officers having qualification in the relevant medical field in order to obtain its opinion in respect of her mental condition.

8. For what has been discussed above, the appeal in hand is partially allowed, conviction and sentence awarded to the appellant is set aside and the matter is remanded to the learned trial court with the direction to firstly, refer the alleged victim to a Medical Board headed by a Professor of Neurology and other medical officers having qualification in the relevant field. The said Board will examine the alleged victim and submit comprehensive report regarding her mental condition/capacity. The learned trial court shall also summon Chairman of the said Board as court witness, record his/her statement, provide opportunity to the learned counsel for the parties of cross-examination and thereafter, decide the matter afresh. It is, however, made clear that till re-writing the judgment, the trial of the case in hand shall be deemed pending before the learned trial court and during this period, the appellant will be treated as under trial prisoner. Office is directed to sent record of the case along with a copy of this judgment, forthwith, to the learned Sessions Judge, Sahiwal for the needful within a period of two months from the receipt of certified copy of this judgment.

9. Case remanded.

SA/A-98/L **Case remanded.**

2020 P Cr. L J 1048

[Lahore (Rawalpindi Bench)]

Before Anwaarul Haq Pannun, J

MUHAMMAD USMAN and another---Appellants

Versus

The STATE and others---Respondents

Criminal Appeals Nos. 19-J and 20-J of 2017, decided on 31st January, 2019.

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

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Benefit of doubt---Ocular and medical evidence---Contradiction---Prosecution case was that the accused/appellants gave hatchet blows at the neck, face and head of the deceased, whereas the proclaimed offender caught hold of the deceased from his legs---Motive behind the occurrence was previous quarrel took place between the accused and the deceased---Ocular account of the incident had been furnished by two witnesses including complainant---Said witnesses, while deposing in the court, had claimed that they had seen the occurrence in the torch light from a distance of 8 Karam i.e. 44 feet---Distance between the eye-witnesses and the assailants was duly established from scaled site plan---Assembly of all the prosecution witnesses at the place of occurrence, during the dead hours of night, who were neither related to each other nor had a common business, appeared to be doubtful---Over anxious photographic account of the occurrence by the prosecution witnesses vis-a-vis, the weapon of offence, number and locale of injuries allegedly caused by the appellants to the deceased, witnessed from a distance of about 44-feet, appeared to be a self-harming maneuvered, improbable and preposterous when the occurrence had taken place in a 'Khaal' surrounded by sugarcane fields from both sides---During the

month of December, the sugarcane crop stood tall in the fields and created a blur in the smooth and uninterrupted vision of a person out of the crop and moreso, in the small alley surrounded by thick and tall sugarcane crop, which was not acceptable---Inquest report indicated that the mouth of the deceased was found open at that time meaning thereby that the dead body remained unattended which was brought to the hospital for conducting post mortem examination under the surveillance of Police Official and identified by official witness and not by a private person---Neither the complainant nor any other prosecution witness had accompanied the Police Officials escorting the dead body of the deceased to the hospital for post-mortem examination nor they had identified the same at that time---Medical Officer had stated that although he received the dead body of the deceased at 03:30 a.m. but he had to wait for the police documents for conducting the post-mortem examination and on request of police he conducted the post-mortem of deceased after about 12 hours of the occurrence---Unexplained delay of 12-hours in conducting the post-mortem examination on the dead body of the deceased pointed out a real possibility that the time had been consumed by the local police and the complainant party in order to procure and plant the eye witnesses after cooking up a false story for the prosecution---Nothing could have been brought on record during the course of investigation about the previous quarrel took place between the accused and the deceased---Said facts clearly established that the claim of the prosecution's witnesses regarding having seen the occurrence was nothing but a pretention---Circumstances established that present case was replete with doubts---Appeal was allowed and accused were acquitted by setting aside the conviction and sentence recorded by the Trial Court, in circumstances.

Muhammad Rafique v. State 2014 SCMR 1698; Faqeer Muhammad v. Shahbaz Ali and others 2016 SCMR 1441 and Muhammad Ilyas v. Muhammad Abid alias Billa and others 2017 SCMR 54 rel.

(b) Criminal trial---

----Identification of accused---Night time occurrence---Source of light---Scope---Identification of the accused through light of torch was a weak type of source and was unsafe to be relied upon.

The State v. Hakim Ali and 3 others 1996 PCr.LJ 231 rel.

(c) Criminal trial---

----Medical evidence---Scope---Purpose of post-mortem examination was to ascertain the cause of death, number and locale of injuries, kind of weapon used in the crime and duration between injuries and death as well as death and post mortem---Medical evidence by itself did not raise finger towards any specific culprit.

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

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Benefit of doubt---Recovery of weapon of offence---Delay in dispatch of recovered weapon---Effect---Prosecution case was that the accused/appellants gave hatchet blows at the neck, face and head of the deceased, whereas the proclaimed offender caught hold of the deceased from his legs---Record showed that accused/appellants were arrested and allegedly on their pointing out two hatchets were recovered from the sugarcane fields by way of their digging out each but the same, in the given facts of the case, did not appeal to the logic---If the claim of witnesses regarding making of their hue and cry, attracting a number of persons from the village and then the making of search about the accused was believed to be true then it could more safely be presumed that the accused/appellants, being perplexed, full of anxiety and fear, had no opportunity to avail for concealing the hatchets underneath the soil---Claim that hatchets, which were concealed in a sugarcane crop, during the night hours, in a state of fear of own safety of accused persons could have straight away got recovered with exactitude pointing out the relevant

place of their concealment was not believable---Such recovery was of inconsequential, in circumstances.

(e) Criminal trial---

----Direct evidence---Scope---Where the prosecution had relied upon the direct evidence in the form of ocular account and the same was disbelieved by the court, medical evidence and recoveries, if any, which otherwise only rendered corroboration to the ocular account were of no avail to the prosecution for securing conviction.

(f) Criminal trial---

----Benefit of doubt---Principle---Benefit of reasonable doubt would favour the accused as a matter of right and not of grace.

Muhammad Akram v. The State 2009 SCMR 230 rel.

Afzar Saeed Jillani for Appellants.

Nemo for the Complainant.

Shahid Fareed, Assistant District Public Prosecutor for the State.

Date of hearing: 31st January, 2019.

JUDGMENT

ANWAARUL HAQ PANNUN, J.---Through the titled appeals under section 410, Cr.P.C., appellants Muhammad Usman and Muhammad Faraz have challenged the vires of judgment dated 22.12.2016 passed, on the conclusion of trial, in case FIR No.253/13 dated 15.12.2013, for offences under sections 302 and 34, P.P.C., registered at Police Station Head Rajkan, District Bahawalpur by learned Additional Sessions Judge/Judge Juvenile Court, Bahawalpur whereby, they have been convicted and sentenced as under:-

Under section 302(b), P.P.C.

Imprisonment for life each and to pay compensation of Rs.1,00,000/- each payable to the legal heirs of deceased under section 544-A, Cr.P.C. and in case of default, to undergo six months' S.I.

Benefit of section 382-B, Cr.P.C. was extended to the appellant.

2. The prosecution's story, unfolded through FIR (Ex.PA/1), lodged on the written complaint (Ex.PA) of complainant Abdul Rauf (PW-2) on 15.12.2013, is to the effect, that during the preceding night, in order to avail his water turn, at about 3:30 a.m., he along with Muhammad Zahid son of Muhammad Yousaf (PW-3) and Muhammad Abbas son of Jan Muhammad were proceeding towards his fields for irrigation of his crops, when they reached near the sugarcane crop, they heard hue and cry and in the light of a torch witnessed that Muhammad Usman and Muhammad Faraz (appellants), being armed with hatchets, were giving hatchet blows at the neck, face and head of Rasheed alias Sunni (deceased) whereas Faisal (since P.O) had caught hold of the deceased from his legs, on seeing them, Usman raised Lalkara that no one should come closer to them as they were teaching a lesson to the deceased for quarrelling with them, Usman gave a hatchet blow which had hit the deceased on left side of his neck, Muhammad Faraz had given a hatchet blow which hit on his head, the accused persons repeated their blows, although the witnesses tried to rescue the deceased but due to the threats of the accused persons, they could not interfere, the deceased Rashid alias Sunni succumbed to his injuries at the spot. The accused persons succeeded in making their escape good with their weapons.

3. Registration of the case after its usual investigation encapsulated into report under section 173, Cr.P.C. which was duly submitted before the learned trial court, the appellants, after supplying them with the copies of incriminating material under section 265(C), Cr.P.C., were charged sheeted to which they denied and pleaded not guilty, while professing

their innocence and claiming trial, the prosecution was directed to produce evidence.

4. It is pertinent to mention over here that accused Faisal absented himself, therefore, he has been declared proclaimed offender in this case during the trial.

5. The investigation was conducted by Shabbir Ahmad S.I and Muhammad Akbar S.I (PW-8), while furnishing secondary statement, identified his hand writing as well as signatures on the crime report (Bx.PA/1), injury statement (Ex.PG), inquest report (Ex.PF), recovery memo (Ex.PN) pertaining to battery (P-7), rough site plan (Ex.PQ) and statements of the PWs recorded under section 161, Cr.P.C. Ocular account has been furnished by Abdul Rauf complainant (PW-2) and Muhammad Zahid (PW-3).

6. The prosecution has produced as many as eight witnesses besides tendering, in evidence, reports of Punjab Forensic Agency, Lahore regarding Serology Analysis Ex.PR and Ex.PS.

7. Dr. Muhammad Asif Manzoor (PW-6), stated that on 15.12.2013, he was posted as Medical Officer at Rural Health Centre, Head Rajkan, Ahsan Nazir constable 2163/C handed over to him inquest report Ex.PF, injury statement as Ex.PG alongwith dead body of Mr. Rashid alias Sunni son of unknown, aged 22/23 years, caste unknown, resident of unknown whereafter he conducted post mortem over the same, at 03:00 p.m., brought to him by the Police Constable Ahsan Nazir 2163/C, P.S Head Rajkan, Bahawalpur and identified by Nadeem Iqbal constable 2046/C and Ahsan Nazir 2163/C and observed the following injuries on his person:-

1. Multiple injuries were seen on head as follows:-

i) There was an incised wound on anterior of head, transverse lying measuring about 8 cm x 2 cm, bone was also cut, brain matter visible and damage, about 11 cm from left eye brow.

ii) There was an incised wound in sagittal direction measuring about 7 cm x 3 cm, cutting bone, 9 cm from left eye, anteriorly crossing injury No. (i).

iii) There was an oblique incised wound measuring 9 cm x 2 cm, bone cutting up brain membranes, about 12 cm from right ear.

iv) There were three incised wound near left ear measuring 8 cm x 2 cm, 7 cm x 2 cm, 6 cm x 2 cm, all were bone cutting up to brain matter.

v) There was an incised wound measuring about 4 cm x 4 cm bone not cutting, flap of scalp was attached at posterior and about 6 cm from left ear.

vi) There was an incised wound measuring 6 cm into 2 cm, bone was cutting, 3.5 cm from left car on left side of head.

vii) There was an incised wound measuring 6 cm x 2.5 cm, bone is cutting up to brain matter, 2.5 cm from left ear.

viii) There was also a small incised wound near left ear which was not bone deep.

2. There was an incised wound on left cheek measuring about 8.5 cm x 2 cm, about 2 cm from left eye and 4 cm from nose, cutting muscle and underlying bones.

3. There were multiple incised wound on left side of neck collectively measuring about 13 cm x 15 cm cutting underlying muscles, major addresses upto cervical vertebra (half neck was almost cut).

4. There was an incised wound measuring about 8 cm x 3 cm situated on left hand dorsal aspect of base of thumb, underlying muscle and bones were cut, thumb of left hand was hanging freely.

Initial Final Opinion

After thorough external and internal postmortem examination of head body, this was of my opinion that injuries Nos.1 and 3 were caused by sharp edge instrument causing neurogenic shock and acute hemorrhagic shock (damaging vital organs) resulting in the form of death and these injuries were sufficient to cause death in ordinary course of nature, however, final opinion will be given after report from the Chemical Examiner. All these injuries were ante-mortem in nature and caused by sharp edge weapon.

Final Opinion:

After receiving the report from the office of chemical examiner PFSA Lahore, I am of the opinion that the cause of death of neurogenic shock and acute hemorrhagic shock as mentioned in my initial Opinion.

8. He further deposed that on 18.12.2013, at about 8:30 a.m., Ahsan Nazir 2163/C brought before him Faisal Qureshi son of Allah Din (arrested later on), caste Qureshi, aged about 13/14 years, for conducting medical examination.

History

He was labourer by profession. He came along with his friends from Yazman, they walked together from Chak No.16/DNB.

According to him one of the two friends killed Mr. Rashid alias Sunni after that he conducted act of sodomy with him. He also told that previously he was made subject of sodomy by some people.

External Examination

External examination done in knee elbow position.

On external perianal examination there was no laceration, no tearing seen. Mild redness seen at 12 o'clock position. On inspection sphincter was loose.

Digital Examination

External sphincter was loose, no pain on passing index finger. External swabs 03 in number were taken.

Internal Examination

Referred to THO Yazman for proctoscopy and to take internal swabs.

Report from the Surgeon

Having OPD No.194/5682 at 12:30 p.m. Proctoscopy done under general anesthesia. Following findings noted:-

(a) Anal canal was loose and lax.

(b) No mark of injury seen.

(c) Three internal swabs were taken.

Opinion

After external examination and receiving report from the surgeon, I was of the opinion there was nothing to suggest that act of sodomy was conducted, however, final opinion will be given after report of chemical examination.

9. When examined under section 342, Cr.P.C., the appellants denied very bit of incriminating material so produced and while replying the question that as to why this case against them and why the prosecution witnesses have deposed against them, they have replied as follows:-

Muhammad Usman

"I am innocent in this case. I have not committed murder of Rashid alias Sunni. Dead body was found in sugar cane crops which

belong to complainant. The complainant lodged the false and frivolous FIR against me to save his own skin. I have been involved in this case due to clash of residential Ahata situated in Chak No.16/DNB Tehsil Yazman District Bahawalpur. Complainant want to snatch this land from my family involved me falsely in this case."

Muhammad Faraz

I am innocent in this case. I have not committed murder of Rashid alias Sunni. 'Dead body was found in sugar cane crops which belong to complainant. The complainant lodged the false and frivolous FIR against me to save his own skin.

10. The appellants neither opted to appear under section 340(2), Cr.P.C. nor have produced any defence evidence.

11. Learned trial court, on conclusion of the trial, proceeded to convict the appellants as aforesaid. Hence, the titled appeal.

12. Learned counsel for the appellants submits that it was an un witnessed night occurrence; that identity of the appellants in the so called torch light is impossible; that no motive has come on surface; that the recoveries have been planted; that the prosecution has failed in proving its case against the appellants. At the end, he has prayed for acquittal of the appellants.

13. Conversely, learned Assistant District Public Prosecutor General appearing for the State has contended with vehemence that the appellants are named in the FIR with specific roles of committing the murder of the deceased; that the recoveries of weapons of offence have been effected; that identity of the appellants has fully been established in the light of the torch which has been taken into possession by the investigating officer; that the impugned judgment does not warrant interference by this Court.

14. Arguments heard. Record perused.

15. As per prosecution's version, the complainant Abdul Rauf (PW 2), Muhammad Zahid (PW-3) and Muhammad Abbas (given up) are the eye-witnesses of the occurrence, who, while deposing in the court, had claimed that they had seen the occurrence in the torch light from a distance of 8 Karam i.e. 44 feet. The distance between the eye -witnesses and the assailants is duly established from another source i.e. scaled site plan (Ex.PE/1), prepared by Muhammad Shabbir (PW-5) who, during cross-examination, deposed as under:-

"It is correct that the distance between point 1 and point 2 at about 36 feet. It is correct that in point-2 the difference between points Nos.1 and 2 is written as 8-Karam. One Karam is equal to 5-1/2 feet.

16. Now, the moot point requiring its determination, is, whether it will he safe to rely upon the evidence of PW-2 and 3 who deposed that they had seen the occurrence taken place at 03:30 a.m., in the middle of a 'Khaal', away from the village Abadi admittedly surrounded by fully grown up sugarcane crop standing on both sides of it, in the darkness of a chilling winter season night, from a distance of 44 feet in the light of a torch. Moreover, assembling of all the PWs at the place of occurrence, during the dead hours of night, who are neither related to each other nor had a common business, also appears to be doubtful. The over anxious photographic account of the occurrence by the PWs vis-a-vis, the weapon of offence, number and local of injuries allegedly caused by the appellants to the deceased, witnessed from a distance of about 44-feet, appears to be a self-harming maneuver, improbable and preposterous when the occurrence had taken place in a 'Khaal' surrounded by sugarcane fields from both sides. During the month of December, the sugarcane crop, stands tall in the fields along with its spreading long leafs like wings of an eagle taking off for a flight creates a blur in the smooth and uninterrupted vision of a person out of the crop and more so, in the small alley surrounded by thick and tall sugarcane crop. Therefore, I am not inclined

to accept the claim of the prosecution witnesses of seeing the occurrence taken place in a watercourse surrounded by tall with sprawling leaves sugarcane crop from a distance of 44-feet in the light of torch.

17. It is settled by now that identification of the accused through light of torch is a weak type of source and is unsafe to be relied upon. Reliance in this regard can be placed on the case reported as The State v. Hakim Ali and 3 others (1996 PCr.LJ 231) wherein it has been held as under:-

> "Evidence relating to identification of accused in the torch light has always been treated as weak piece of evidence by superior Courts. It was held by a Division Bench of this Court in the case of Muhammad and others v. The State 1968 PCr.LJ 590 that the identification of the assailants by witness on dark night through his torch may lead to the possibility of mistaken identity and particularly in view of the previous enmity existing between the parties. In Suwali v. The State 1982 PCr.LJ 808, a Division Bench of this Court declared identification by flash of torch as highly suspicious. In the case of the State v. Fazal Muhammad and another 1970 PCr.LJ 633 it was held that the identification of the accused in the light of torch was never considered as sufficient piece of evidence."

18. The occurrence had allegedly taken place during the intervening winter night of 14/15.2013 at 03:00 a.m., therefore, extreme cold can be well imagined. The matter was reported to the police on 15.12.2013 at 08:30 a.m. Shabbir Ahmad S.I, after inspecting the place of occurrence, prepared inquest report (Ex.PF) perusal whereof indicates that the mouth of the deceased was found open at that time meaning thereby, that the dead body remained unattended which was brought to the hospital for conducting post mortem examination over it under the surveillance of Ahsan Nazir 2163/C and identified by Nadeem Iqbal 2046/C (PW-7) and not by a private person. Neither the complainant nor any other PW either

had accompanied the police officials escorting the dead body of the deceased to the hospital for post-mortem examination nor they had identified the same at that time. The so called promptitude in lodging the FIR has been smashed by PW-6 by stating that although he received the dead body of the deceased at 03:30 A.M but he had to wait for the police documents for conducting the post-mortem examination and on request of police he conducted the postmortem of deceased after 12 hours. The post-mortem examination over the dead body of the deceased was conducted on 15.12.2013 at 03:00 p.m., i.e after about 12 hours of the occurrence. Dr. Muhammad Asif Manzoor (PW-6), who conducted the post-mortem examination over the dead body of the deceased, has deposed as under:-

"It is correct that I have received the dead body of deceased Rashid alias Sunni through Ahsan Nazir 2163/C at the time of postmortem. I received the dead body of deceased at 03:30 a.m. and conducted postmortem of dead body at 03:00 p.m. It is correct that on postmortem report in column of death it is written dead body of deceased was received at 03:30 a.m. as per police record. It is correct that I had not mentioned on postmortem report time of receiving of dead body. I conducted the postmortem of deceased after 8/9 hours after receiving the dead body. I cannot tell the exact time of receiving of dead body of deceased. It is correct that I have conducted the postmortem of deceased at about 12 hours after the death. I have not written the FIR number on postmortem report as there is no column in postmortem report for writing of FIR number. It is correct that the police has identified the dead body of deceased by name because no relatives of deceased was present.--- It is correct that complainant of this case Abdul Rauf did not come with dead body and I have not mentioned the name of complainant in inquest report.---- I waited for documentation of police and after receiving complete documentation from police and on request of police conducted the postmortem of deceased after 12 hours. I

have received documents from the police at about 03:00 p.m. and started autopsy.----After completing postmortem I handed over the dead body of deceased to Ahsan Nazir 2163/C and Sarfraz Ahmad 23/C at about 04:00 p.m. It is correct that no private person was present with them at that time. It is correct that clothes of deceased were not stained with mud at the time of receiving dead body.---- Dead body was un-identified when that was brought to me. Rigor mortis was in developing stage when dead body was brought to me."

The above excerpts from the deposition of PW-6 at least disclose that the post-mortem examination over the dead body of the deceased was conducted after unusual delay of 12 hours. The unexplained delay of 12-hours in conducting the post-mortem examination on the dead body of the deceased points out a real possibility that the time had been consumed by the local police and the complainant party in order to procure and plant the eye-witnesses after cooking up a false story for the prosecution. A reference can be made to cases titled "Muhammad Ilyas v. Muhammad Abid alias Billa and others" (2014 SCMR 1698), "Faqeer Muhammad v. Shahbaz Ali and others" (2016 SCMR 1441) and "Muhammad Ilyas v. Muhammad Abid alias Billa and others" (2017 SCMR 54) wherein it has been held as under:-

"Post-mortem Examination of the dead body of Muhammad Shahbaz deceased had been conducted after nine hours of the incident which again was a factor pointing towards a possibility that time had been consumed by the local police and the complainant party in procuring and planting eye-witnesses and cooking up a story for the prosecution."

The purpose of post mortem examination is always to ascertain the cause of death, number and locale of injuries, kind of weapon used in the crime and duration between injuries and death as well as death and post

mortem but the medical evidence by itself does not raise finger towards any specific culprit. The ocular account has already been discarded by this Court and, thus, the medical evidence lends no support to the ocular version.

19. According to PW-2, "on seeing them, Usman raised Lalkara that no one should come closer to them as they were teaching a lesson to the deceased for quarrelling with them" was stated to be a motive behind the occurrence. During the investigation, one of the accused Faisal, after his arrest, was got medically examined on 18.12.2013, at about 8:30 a.m by the Medical Officer (PW-6) and while deposing the history, this PW has stated that "According to him one of the two friends killed Mr. Rashid alias Sunni after that he conducted act of sodomy with him. He also told that previously he was made subject of sodomy by some people." This PW, after consulting the report of the surgeon, has opined that there was nothing to suggest that the act of sodomy was committed with him. He although reserved his final opinion till the receipt of report of Chemical Examiner report which has never been given meaning thereby that the prosecution has been vacillating being not sure, about the motive behind the occurrence. Nothing could have been brought on record during the course of investigation about the previous quarrel taken place between the accused and the deceased. All the above facts clearly establish that the claim of the prosecution's witnesses regarding having seen the occurrence is nothing but a pretention, hence, I hold that the occurrence was an un witnessed one.

20. So far as the recovery of alleged weapons of offence is concerned, suffice it to observe that the appellants were arrested on 23.12.2013 and allegedly on their pointing out, recoveries of two hatchets (P-1 and P-2), which were taken into possession through recovery memo Ex.PD and Ex.PE in the presence of witnesses Muhammad Zahid (PW-3) and Muhammad Abbas (given up), were effected from the sugarcane fields by way of their digging out the earth but the same, in the given facts of the

case, does not appeal to the logic. If the claim of witnesses regarding making of their hue and cry, attracting a number of persons from the village and then the making of search about the accused is believed to be true then it can more safely be presumed that the appellants, being perplexed, full of anxiety and fear, had no opportunity to avail for concealing the hatchets underneath the soil. It was also amazing and unbelievable that how the hatchets, which were concealed in a sugarcane crop, during the night hours, in a state of fear, of their own safety, could have been straight away got recovered with exactitude pointing out the relevant place of their concealment. Even otherwise, in a criminal case, if the ocular account is dis-believed by the court after judicial scrutiny, mere proving of recovery, which only renders corroboration to the ocular account, will not be sufficient to record or maintain the conviction. It is trite law in the criminal cases that where the prosecution relies upon the direct evidence in the form of ocular account, if the same is disbelieved by the court, medical evidence and recoveries, if any, which otherwise only render corroboration to the ocular account are of no avail to the prosecution, for securing conviction.

21. Having scanned the entire prosecution's evidence and material available on record, I am of the view that the case in hand is replete with doubts and the benefit of reasonable shadow of doubt would always favour, the accused as a matter of right and not of grace. Reliance is placed on the case reported as "Muhammad Akram v. The State" (2009 SCMR 230) wherein, it has been held as under:-

> "It is an axiomatic principle of law that in case of doubt, the benefit of thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervaiz v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance, which created reasonable doubt in a prudent mind about the guilt of the

accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

22. For what has been discussed above, since the prosecution fails in proving its case beyond shadow of doubt, hence, these appeals are allowed, the convictions and sentences of appellants Muhammad Usman and Muhammad Faraz are set aside and they are acquitted of the charge by extending the benefit of doubt to them. They are directed to be released forthwith from jail, if not required to be detained in connection with any other criminal case.

JK/M-130/L **Appeals allowed.**

2020 P Cr. L J 1084

[Lahore (Rawalpindi Bench)]

Before Sadaqat Ali Khan and Anwaarul Haq Pannun, JJ.

STATE through Prosecutor General Punjab---Appellant

Versus

MUHAMMAD ESA and others---Respondents

Criminal Appeal No. 519 of 2018, decided on 4th February, 2020.

(a) Interpretation of statutes---

----Special and general law--- Applicability--- In absence of any particular provision in special law dealing with any specific aspect, provisions of general law are to be applied and invoked.

(b) Limitation Act (IX of 1908)---

----Ss.3, 29(2)(a)(b) & First Sched.---Special and general law---Scope--- Where different period of limitation for institution of a suit preferring an appeal or making an application is prescribed under the provisions of any special or local law, then in Limitation Act, 1908, it is deemed as if the

same has been prescribed by First Schedule under S. 3 of Limitation Act, 1908.

(c) Limitation Act (IX of 1908)---

----S. 3---Limitation, application of---Scope---Law of limitation is not merely a reflection of public policy, it creates and extinguishes rights of parties with the efflux of time.

(d) Anti-Terrorism Act (XXVII of 1997)---

----S. 25(4)---Limitation Act (IX of 1908), Ss. 5 & 25---Criminal Procedure Code (V of 1898), Ss. 417 & 421---Appeal against acquittal---Condonation of delay---Maxim, actus curiae neminem gravabit---Applicability---Scope---Attested copy, non-availability of---Accused persons were acquitted of the charge by Trial Court---Appeal against judgment passed by Trial Court was filed beyond the period of 30 days from the date when judgment was pronounced---Plea raised by authorities was that copy of judgment was not supplied by Trial Court and delay was caused in procuring attested copy of the same---Validity---Even if the copy was not supplied either to the public prosecutor or the accused, there existed no bar under S. 25(4) of Anti-Terrorism Act, 1997, in filing an appeal after obtaining copy of judgment on their own---Maxim, actus curiae neminem gravabit had no applicability---Provision of S. 421, Cr.P.C. also permitted filing of appeal in the form of a petition in writing accompanied by a copy of judgment appealed against, however at the same time the Court to which appeal was presented, if requested could have dispensed with such requirement---Acquittal of the charge recorded by Court of competent jurisdiction was not appealable and was deemed to be final---Acquittal could be challenged in certain circumstances within a period of limitation prescribed by law---Request for condonation of delay by invoking jurisdiction of superior courts, in the larger interest of justice, if made, could only be entertained on showing that delay in filing appeal was caused either by an act of acquitted accused or by circumstances of

some compelling nature beyond human control---High Court declined to condone the delay caused in filing of appeal against acquittal as the same was filed beyond the prescribed period of limitation i.e. 30 days from the date of pronouncement of judgment---Appeal was dismissed in circumstances.

Khalid Pervaiz Uppal, DPG for the State.

Ahsan Bhoon, Zulfiqar Abbas Naqvi, Sheharyar Tariq, Ch. Hafeez-ur-Rehman and Mustafa Naqvi for Respondents.

Date of hearing: 4th February, 2020.

JUDGMENT

ANWAARUL HAQ PANNUN, J.---The State, through The Prosecutor General, Punjab, has filed instant appeal under section 25(4) of the Anti-Terrorism Act, 1997 (Act No.XXVII of 1997) as amended by way of Act, XIII and XX of 2013, (hereinafter to be called as "the Act"), while calling in question the vires of judgment dated 30.03.2018, whereby, learned Judge Anti-Terrorism Court, Rawalpindi Division, Rawalpindi (hereinafter to be called as the trial court) on the conclusion of trial held in case FIR No.17 dated 17.05.2017, under sections 4 and 5 of the Explosive Substances Act, 1908, sections 11-I, 11-K, 11-N, 21-C of the Act, section 13(2)(c) of Pakistan Arms Ordinance and Article 4 of the Prohibition (Enforcement of Hadd) Order, 1979, registered at P.S. CTD, Rawalpindi has acquitted respondents Nos.1 to 7, namely, Muhammad Ehsan, Ghulam Yasin, Muhammad Adeel Akram, Muhammad Fayyaz, Khawaja Ashar Fayyaz, Aslam Khan and Moeez Ahmad Khan respectively of the charge.

2. At the very outset, learned counsel for the respondents-acquitted accused questioned the maintainability of instant appeal by submitting that impugned judgment of acquittal was pronounced on 30.03.2018, the appeal as required under section 25(4) of the Act, could have been filed

within thirty days of its pronouncement, till 29.04.2020, instead thereof, the same was filed on 03.05.2018 which is clearly three days barred by limitation, therefore, the appeal may be dismissed on this score alone.

3. Conversely, learned Deputy Prosecutor General contends that in view of subsection (2) of section 25 of the Act, learned trial court was under a legal obligation to supply copy of the impugned judgment dated 30.03.2018, free of cost, on the day it was pronounced, instead it was supplied to the Public Prosecutor subsequently on 04.04.2018, therefore computing the prescribed limitation period of 30 days if the time consumed in supplying copy of the impugned judgment, is excluded, the appeal filed on 03.05.2018, is within time. He further contends that the above noted delay in supplying copy of the judgment to the Public Prosecutor is an act of the Court as the appeal can only be filed under section 25(4) of the Act after supplying copy of impugned judgment by the Court, therefore, the prosecution cannot be held responsible for the delay in filing the appeal, he prayed that in the interest of justice, the delay, if any, in filing the appeal may be condoned while exercising inherent powers of this Court.

4. Heard. Record perused.

5. In order to appreciate the above-noted rival contentions of the learned counsel for the parties, we feel it appropriate to examine the issue under discussion while seeing through the prism of provisions of relevant Statutes. For ready reference, section 25 of the Act is reproduced hereunder:-

> 25. Appeal.---(1) An appeal against the final judgment of (an Anti-terrorism Court) shall lie to [a High Court].
>
> (2) Copies of the judgment of (an Anti-terrorism Court) shall be supplied to the accused and the Public Prosecutor free of cost on the day the judgment is pronounced and the record of the trial shall

be transmitted to the "a High Court" within three days of the decision.

(3) An appeal under subsection (1) may be preferred by a person sentenced by (Anti-terrorism Court) to "a High Court" within [fifteen days] of the passing of the sentence.

(4) The Attorney General (Deputy Attorney General, Standing Counsel) or an Advocate General (or an Advocate of the High Court or the Supreme Court of Pakistan appointed as Public Prosecutor, Additional Public Prosecutor or a Special Public Prosecutor) may, on being directed by the Federal or a Provincial Government, file an appeal against an order of acquittal or a sentence passed by (an Anti-terrorism Court) within [thirty] days of such order.

[(4A) Any person who is a victim or legal heir of a victim and is aggrieved by the order of acquittal passed by an Anti-terrorism Court, may within thirty days, file an appeal in a High Court against such order.

(4B) If an order of acquittal is passed by an Anti-terrorism Court in any case instituted upon complaint and the High Court, on an Application made to it by the complainant in this behalf, grant Special leave to appeal from the order of acquittal, the complainant may within thirty days present such an appeal to the High Court.]

(5) An appeal under this section shall be heard and decided by [a High Court] within seven working days.

[(6) * * * * * *

(7) * * * * * *

(8) Pending the appeal a [High Court] shall not release the accused on bail.

[(9) For the purposes of hearing appeals under this section each High Court shall establish a Special Bench of Benches consisting of not less than two Judges.

(10) While hearing an appeal, the Bench shall not grant more than two consecutive adjournments.]

The above provision, without any ambiguity, determines forum for filing an appeal against the final judgment of the learned trial court, places the court under a statutory obligation to supply the copy of the final judgment free of cost on the day of its pronouncement to the accused and the Public Prosecutor, vests a statutory right of appeal in some persons, besides enabling the complainant, in case of acquittal of an accused in a private complaint to seek leave of the High Court for filing an appeal to challenge such acquittal, prescribes the period of limitation for filing appeal against the final judgment. The provision of subsection (3) of section 25 of the Act further enables to a person sentenced by the Anti-Terrorism Court to prefer an appeal, within fifteen days of the passing of sentence, to High Court. Under subsection (4) of section 25 of the Act, the Attorney General (Deputy Attorney General, Standing Counsel) or an Advocate General (or an Advocate of the High Court or the Supreme Court of Pakistan appointed as Public Prosecutor, Additional Public Prosecutor or a Special Public Prosecutor) may on being directed by the Federal or a Provincial Government, file an appeal against an order of acquittal or a sentence passed by (an Anti-terrorism Court) within [thirty] days of such order. Apart from above, under Section 4-A of the Act any person who is a victim or a legal heir of the victim or otherwise is a person aggrieved of the order of acquittal passed by the Anti-Terrorism Court, may also file an appeal against such order within a period of thirty days in the High Court. By providing a period of thirty days as limitation for filing an appeal to State i.e. the Federal or the Provincial Government, the victim or legal heir of the victim or any other person aggrieved by order of acquittal passed by the Court, they all have been treated at par.

6. On browsing of various provisions of the Act, one may not feel any difficulty in coming to the conclusion that enacting its provision to achieve its avowed object inter alia of speedy trial, behind the promulgation, a special emphasis has been made right from the registration of a case, in respect of the offence(s) triable under the provisions of the Act, cognizance, a special procedure prescribing a period for conclusion of trial including the provisions providing limitation for appeal and decision thereof by the appellate court. Before we leap forward, it may also be beneficial to consider some other important and relevant aspects of the matter. The Act is a Special Law and its provisions prevail upon, insofar as they are inconsistent with the provisions of General Law. However, in the absence of any particular provision in a Special Law dealing with any specific aspect, the provisions of the General Law are to be applied and invoked. Deeming it to be an opportune moment, after reaching at the trajectory of the discussion, it is observed that there exists no express provision in the Act, providing distinctly to regulate the special procedure of the appellate court except the pending appeal, the High Court shall not release accused on bail and the appeal shall be heard by a special Bench consisting of not less than two judges and the Bench while hearing an appeal shall not grant more than two consecutive adjournments and the appeal shall be heard and decided within seven working days. It appears that in absence of any express provision catering a legal requirement embodied in the provision of section 419, Cr.P.C., (hereinafter to be referred as "the Code") which states that an appeal shall be in the form of a petition in writing, accompanied by a copy of judgment appealed against unless directed otherwise by the Court it is presented, under section 25(2) of the Act, the Anti-Terrorism Court has been directed, to supply to the Prosecutor and the accused, as the case may be, copy of the judgment free of cost on the day it is pronounced.

7. After above analysis of section 25 of the Act, we feel it expedient, for measuring the substance and strength of the arguments of the learned Deputy Prosecutor General, regarding exclusion of time consumed in delivery of the copy of the judgment, to examine, as of necessity, section 3 of the Limitation Act (Act IX) of 1908 (hereinafter to be referred as 'the Limitation Act'), which reads as under:-

> "Dismissal of suits, etc., instituted, etc., after period of limitation. Subject to the provisions contained in sections 4 to 25 (inclusive), every suit instituted, appeal preferred, and application made, after the period of limitation prescribed therefore by the first schedule shall be dismissed, although limitation has not been set up as a defence."

8. The gist of command contained in the above-quoted provision, may be expressed in simple words by saying that subject to Provisions of sections 4 to 25 of the Limitation Act (both inclusive) every suit instituted, appeal preferred and application made, after the period of limitation prescribed therefor in the First schedule, inspite the Limitation is not set up as a defence by an adverse party, shall be dismissed. The Court, seized with the matter, of its own, shall examine the question of limitation and pass an order accordingly. Needless to observe that the Provisions of sections 4 to 25 of the Limitation Act are the exceptions meant for excluding such period by condoning the delay on the application of the concerned party on its showing sufficient cause in computing the period of Limitation. The First Schedule, which finds mention in Section 3 of the Limitation Act, being its progeny, has been divided into three parts i.e. (i) First Division: Suits, (ii) Second Division: Appeals, (iii) Third Division: Applications.

9. In order to elaborate the issue under discussion, the relevant Articles dealing with the appeals mentioned above, are reproduced as under:-

The First Schedule

(See Section 3)

Second Division: Appeals

	Description of suit	Period of limitation	Time from which period begins to run
	1	2	3
150	Under the Code of Criminal Procedure, (V of 1898), from a sentence of death passed by a Court of Session or by a High Court in the exercise of its original Criminal Jurisdiction.	Seven days	The date of the sentence
151	..	.	..
152.	.	.	..
153.	.	.	.
154.	Under the Code of Criminal Procedure, (V of 1898), to any Court other than a High Court.	Thirty days	The date of the sentence or order appealed from
155.	Under the same Code to a High Court, except in the case provided for by Article 150 and Article 157.	Sixty days	The date of the sentence or order appealed from.

156.	.		
157.	Under the Code of Criminal Procedure, 1898, from an order of acquittal.	Six months	The date of the order appealed from

10. The provision of subsection (4) of section 25 of the Act, when read parallel to the above Articles, makes it vivid that in the said schedule, a different period of limitation for filing appeals against an order/judgment of conviction or acquittal, under the Code of Criminal Procedure, 1998 as compared with the Act has been prescribed. Article 157 of the Act, referred above, is only relevant for the purpose of our discussion. It provides a period of six months as limitation for filing an appeal under section 417, Cr.P.C. against the acquittal order, from the date of passing of the impugned order/judgment by the State. Needless to observe that Criminal Procedure Code, 1998 is a procedural law generally regulating the procedure before the criminal courts established under it. A person aggrieved by order of acquittal passed by any Court, other than High Court, is vested with a right of appeal under section 417(2-A) of the Code to be filed within a prescribed period of 30 days as limitation against such order from the date of its pronouncement. Having discussed the above provisions in length and depth, still we feel ourselves tempted to examine the provision of section 29 of the Limitation Act 1908, being relevant, which reads as under:-

"29. Savings. (1) Nothing in this Act shall affect section 25 of the Contract Act, 1872 (IX of 1872).

(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by the First Schedule, the provisions of section 3 shall apply, as if such period were prescribed therefor in that

Schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law:

(a) The provisions contained in section 4, sections 9 to 18, and section 22 shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law; and

(b) The remaining provisions of this Act shall not apply."

3. ----------.

4. ----------."

11. The provision, reproduced hereinabove, on its close scrutiny, manifests that where a different period of limitation for the institution of a suit, preferring an appeal or making of an application is prescribed under the provisions of any Special or Local Law, than the Limitation Act, it shall be deemed as if the same has been prescribed by the First Schedule under section 3 of the Limitation Act. The provision of section 3 of the Limitation Act shall apply, as if such period of limitation were prescribed therefore in that schedule. It has further been mentioned that for the purpose of computing the period of limitation, prescribed for any suit, appeal or application under any Special or Local Law, the provisions of sections 4, 9 to 18 and 22 of the Limitation Act, shall apply only in so far as and to the extent to which they are not expressly excluded by special or local law and the remaining provisions of the Act shall not apply.

12. It may further be observed that section 4 of the Limitation Act extends the period of prescribed limitation where it expires on a day when the court is closed for institution of the suit, appeal or application, as the case may be, till the day the court re-opens. It is an established principle of law that section 5 of the Limitation Act, in its applicability, has a limited scope, as the same is only applicable where it has specifically been made applicable to certain kind of proceedings "by or under any

enactment". The conspicuous non-making of application to this provision in proceedings under Special or Local Laws thus has very obvious reasons. The law of limitation is not merely a reflection of public policy. It creates and extinguishes the rights of the parties with the efflux of time. Out of the remaining provisions of sections 9 to 18 and 22 of the Limitation Act, only Section 12 is relevant for advancing our discussion, which is reproduced as under:-

"12. Exclusion of time in legal proceedings. (1) In computing the period of limitation prescribed for any suit, appeal or application, the day from which such period is to be reckoned shall be excluded.

(2) In computing the period of limitation prescribed for an appeal, an application for leave to appeal and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed shall be excluded.

(3) Where a decree is appealed from or sought to be reviewed, the time requisite for obtaining a copy of decree on which it is founded shall also be excluded.

(4) In computing the period of limitation prescribed for an application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded.

(5) For the purpose of subsections (2), (3) and (4), the time requisite for obtaining a copy of the decree, sentence, order, judgment or award shall be deemed to be the time intervening between the day on which an application for the copy is made and the day actually intimated to the applicant to be the day on which the copy will be ready for delivery.

13. It may be reiterated that sections 4, 9 to 18 and 22, according to section 29(2)(a) of the Limitation Act, shall apply only insofar as and to the extent of which they are not expressly excluded by such special or local law and no other section shall apply. We have found no express provision in the Act excluding the application of section 12 of the Limitation Act but dealing with the arguments of the learned Deputy Prosecutor General that non-compliance of the provision of section 25(2) of the Act requiring supply of copy of the judgment, to the Public Prosecutor, free of cost, on the day it was pronounced, being an act of the Court, when the appeal can be filed under section 25(4) of the Act only after supplying of copy of impugned judgment free of cost to him, the prosecution therefore cannot be held responsible for the delay in filing the appeal, if any, and prayed for condoning the delay while exercising inherent powers by the Court, it may be observed with good quantum of ease that under subsections (1) and (2) of section 12 of the Limitation Act, it is legally permissible while computing the prescribed period of limitation only the exclusion of time requisite for obtaining a copy of decree, sentence or order appealed for or sought to be reviewed. Subsection (5) of section 12 of the Act further clarifies the position leaving no room for entertaining any doubt that for the purpose of subsections (2), (3) and (4), regarding exclusion of time, the time requisite for obtaining a copy of decree, sentence, order, judgment or award shall be deemed to be the time intervening between the day on which an application for the copy is made and the day actually intimated to the applicant to be the day on which the copy will be ready for delivery. In addition to above, even in case the copy of the judgment is not supplied either to the public prosecutor or the accused, as the case may be, there exists, under subsection (4) of section 25 of the Act, no bar in filing an appeal after obtaining a copy of the judgment on their own, therefore, the maxim "Actus Curiae Neminem Gravabit" has no application in the instant case. The above referred section 421 of Cr.P.C.,

also permits the filing of appeal in the form of a petition in writing accompanied by a copy of judgment appealed against, however, at the same time, the court to which the appeal is presented, if requested, can dispense with such requirement. Dealing with the second limb of arguments of learned Deputy Prosecutor General that while exercising inherent power vested with this Court, the delay in filing the appeal may be condoned, it may be suffice to observe that despite perusing the memorandum of appeal keenly we have found not a single word showing any sufficient cause for seeking condonation of delay. Even on Court's query, the learned Deputy Prosecutor General, after perusing the memorandum of appeal and copy of impugned judgment, failed to show that the copy of the judgment appended with this appeal was the first ever and no copy prior to that had been supplied to the Public Prosecutor. Even, the judgment is also silent in this regard. The doubt, which has arisen in the afore-referred circumstances about the exact date of supply of copy of judgment to the learned Prosecutor for computing the prescribed period of limitation for filing of appeal requires its resolve in favour of the respondents-accused, who have earned double presumption of their innocence. It may further be observed that in most of the criminal jurisdictions, acquittal of the charge recorded by the court of competent jurisdiction is not appealable and is deemed to be final. In our law, however, acquittal can be challenged in certain circumstances within a period of limitation prescribed by law. The request for condonation of delay by invoking jurisdiction of the superior courts, in the larger interest of justice, if made, can only be entertained on showing that delay in filing the appeal was caused either by an act of the acquitted accused or by circumstances of some compelling nature beyond human control, which as discussed above, do not exist in the instant case, therefore, repelling the arguments of learned Deputy Prosecutor General, we hold that the appeal at hand being barred by limitation is not maintainable .

14. For what has been discussed, it is un-hesitantly observed that the appeal in hand has been filed beyond a prescribed period of limitation i.e. 30 days from the date of pronouncement of the judgment, therefore, the same is dismissed on the score alone being barred by limitation.

MH/S-23/L **Appeal dismissed.**

2020 P Cr. L J 1201

[Lahore]

Before Anwaarul Haq Pannun, J

SHAHID IQBAL and others---Petitioners

Versus

STATION HOUSE OFFICER and others---Respondents

Writ Petition No. 32222-Q of 2019, decided on 16th March, 2020.

Criminal Procedure Code (V of 1898)---

----Ss. 173, 154, 249-A & 265-K---Constitution of Pakistan, Art. 199---Constitutional petition---Quashing of FIR after Trial Court had taken cognizance of the offence and after filing of report under S. 173, Cr.P.C.---Legality---Petitioner sought quashment of FIR against him, even though report under S. 173, Cr.P.C. had been submitted before court of competent jurisdiction---Validity---When report under S. 173, Cr.P.C. had been submitted before court of competent jurisdiction, then FIR could not be quashed and petitioner/accused could agitate his grievances by way of filing of appropriate application before Trial Court under relevant laws---Constitutional petition was disposed of, accordingly.

Dr. Syed Iqbal Raza and others v. Justice of Peace Islamabad and others 2019 CLD 642 and Director General, FIA and others v. Kamran Iqbal and others 2016 SCMR 447 ref.

Muhammad Abbasi v. SHO, Bhara Kahu and 7 others PLD 2010 SC 969 and Director-General, Anti-Corruption Establishment, Lahore and others v. Muhammad Akram Khan and others PLD 2013 SC 401 rel.

Sheraz Zaka for Petitioner.

Pervaiz Iqbal Gondal, Additional, A.-G. and Rasheed, SI with record for Respondents.

ORDER

ANWAARUL HAQ PANNUN, J.---Learned counsel for the petitioner seeks quashing of FIR inter alia mainly on the ground that under section 12(xix) read with section 39 of the Intellectual Property Organization of Pakistan Act, 2012, being Special Law, police was not competent either to lodge FIR or to investigate the matter under Ordinary Law. In order to elaborate his arguments, learned counsel has relied upon case titled Dr. Syed Iqbal Raza and others v. Justice of Peace, Islamabad and others (CLD 2019 Islamabad 642) and case titled Director General, FIA and others v. Kamran Iqbal and others (2016 SCMR 447) contends that superior courts have ample jurisdiction to quash the abuse of process of law while exercising extra ordinary jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 and has thus prayed for acceptance of instant constitutional petition.

2. Conversely, it has been apprised by the learned Law Officer after consulting record that report under section 173, Cr.P.C. has been submitted before the court of competent jurisdiction for trial on 30.09.2019, therefore, in view of the dictums of law laid down by the august Supreme Court of Pakistan in the reported cases of Muhammad Abbasi v. SHO, Bhara Kahu and 7 others (PLD 2010 Supreme Court 969) and Director-General, Anti-Corruption Establishment, Lahore and others v. Muhammad Akram Khan and others (PLD 2013 Supreme Court 401), the petition in hand has lost its relevance. Resultantly, the petition in hand is disposed of with the observation and expectations that in case the petitioner agitates his grievances by way of filing of an appropriate application before the court of competent jurisdiction under the relevant law for the relief prayed for through this petition, learned trial court shall decide the same before proceeding further, in accordance with law.

KMZ/S-40/L **Order accordingly.**

2020 P Cr. L J 1571

[Lahore (Multan Bench)]

Before Anwaarul Haq Pannun, J

MAZHAR ALI---Petitioner

Versus

The STATE and others---Respondents

Criminal Miscellaneous No. 4890-B of 2019, decided on 13th November, 2019.

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

----Ss. 497(2) & 498--- Penal Code (XLV of 1860), Ss. 337-A(i), 337-F(i)(v), 337-L(2) & 34---Shajjah-i-Khafifah,Damihah, Hashimah and other hurts---Pre-arrest bail, grant of---Further inquiry---Fabrication of injury---Determination---Failure to appear before District Standing Medical Board---Investigation---Object, purpose and scope---Two co-accused persons who were real sons of accused had already been extended benefit of pre-arrest bail while that of the accused was declined---Validity---Complainant who was injured despite service of process, deliberately did not appear before District Standing Medical Board, which was indicated through a letter issued by Medical Superintendent---Re-examination of injured complainant could be done---Deliberate and evasive attitude of the examinee amounted to cover up the alleged fabrication of injury---When realities of prosecution's case were not clear and transparent, possibility of false involvement and implication of accused by way of fabrication of injuries and by levelling exaggerated allegations with mala fide intention and ulterior motive of complainant while throwing a widened net to the extent of accused could not be ruled out---Investigating officer was supposed to find out truth of the matter under investigation---Object of investigating officer was to discover actual facts of the case and to arrest real offender or offenders and not to commit himself prematurely to any view of facts for and against any

person---Where investigating officer suspected that injuries were self-suffered, in order to further strengthen his opinion, besides an aggrieved party, investigating officer could invoke jurisdiction of Magistrate to exercise his power for reconstitution of District Standing Medical Board of Provincial Standing Medical Board---Case against accused was one of further inquiry---Bail was allowed in circumstances.

Muhammad Rizwan v. The State and others 2017 MLD 1828 and Muhammad Khalid and others v. State and others 2018 YLR 2433 rel.

(b) Police Rules, 1934---

----R. 25.22---Instructions regarding conduct of Medico Legal/Post-Mortem Examination, notification No. SO(H&D) 5-5/2002, dated 1.12.2004---Medical examination of women---Fabrication of injury---Opinion---Medical Officer/Woman Medical Officer, after physical examination of an injured person, while issuing Medico Legal Certificate, holding possibility of fabrication of any injury, as "Yes", he/she must record reasons in unambiguous terms on the basis of principles of Medical Jurisprudence---In case of more than one injury, Medical Officer/Women Medical Officer must mention regarding which injury there exists possibility of fabrication.

Sahibzada Nadeem Farid and Haji Tariq Aziz Khokhar for Petitioner and Petitioner in person.

Abdul Wadood, Deputy Prosecutor General with Safdar SI and Zulfiqar Ali Siddhu, Assistant Advocate General with Dr. Muhammad Ali Bukhari, Surgeon Medico Legal Punjab for the State.

ORDER

ANWAARUL HAQ PANNUN, J.---Through the instant petition under sections 498 and 498-A, Cr.P.C, the petitioner seeks confirmation of concession of ad-interim pre-arrest bail already extended vide order dated 06.08.2019 to him, which he has been declined while confirming pre-arrest bail of his co-accused Shahid Hussain and Asad, both his sons

and one Sana Ullah, vide order dated 21.12.2018 by the learned Additional Sessions Judge, Jampur, in case/FIR No. 227, dated 09.11.2018, offence under sections 337-A(i)/337-F(i)/337-F(v)/337-L(2)/34, P.P.C., registered at Police Station Hanif Ghauri Shaheed Dajal, District Rajanpur.

2. Precisely, according to the prosecution's case, on 14.10.2018 at 8.00 a.m., the petitioner along with his co-accused allegedly being armed with their respective weapons i.e. sotas, made house trespass, caused injuries to the complainant Mst. Ashraf Mai and her daughter namely Mst. Asima Bibi. With specificity, the role attributed to the petitioner is that he gave a sota blow hitting on right leg and fingers of Mst. Ashraf Mai, complainant.

3. Heard and record perused.

4. It has been noticed that though the medical examination of the complainant/injured as well as other injured PWs was conducted under the supervision of police on the following day of the alleged occurrence i.e. 15.10.2018, yet the FIR had been lodged with an inordinate and unexplained delay of 25 days. While giving the history of patient, as per MLC, the initial medico-legal officer has recorded the complain of pain on the right leg of the examinee/injured, but he found no corresponding injury on her body. The injury No.1 has been declared as "Jurh Ghayr Jaifah Mutalahimah". It has been noticed that the Medical Officer has expressed his opinion in the column of Medico Legal Certificate which is specified for his remarks regarding the possibility of fabrication of injury, if any, in-affirmative i.e. yes. The Medical Officer, however has failed to assign any reason for giving his above noted opinion about the injury. Therefore, to better comprehend the procedural aspects with regard to issuance of the medico-legal Certificate by the Medical Officers, a review of the relevant law, rules and instructions is deemed necessary which is undertaken hereunder.

5. In any case involving physical violence, amounting to commission of some cognizable offence, necessitating medical opinion, the required mechanism, which has to be followed by the police and the medical officers, for conduction and issuance of Medico Legal Certificates, post-mortem reports etc. according to Police Rules, 1934 is, to the following effect. According to Rule 25.19(1) of the Police Rules, 1934:

> Medico-legal opinion.---(1) When a medical opinion is required in police cases, the persons to be examined shall be produced before the highest medical authority available on the medical staff of the district. Persons requiring examination at the headquarters of a district shall be taken to the Civil Hospital and not to a branch dispensary; similarly in rural areas, where a hospital is accessible, medico-legal cases shall be sent there and not to a rural dispensary.
>
> (2) Medical Officers of the Irrigation Department are prohibited from undertaking medico-legal work and officers in charge of district board dispensaries may only be called upon to do such work, for which they must be qualified in other respects, in cases of emergency. Medical Officers may not be called upon to proceed to the scene of an occurrence to examine injured persons except in cases of real urgency and when it is impossible to convey the injured person to the nearest dispensary or hospital.
>
> (3) Police Officers cannot legally compel injured persons to submit for medical examination, and such persons have a right to be examined privately at their own expense by medical practitioners. "Injury Statements" [25.39(1) are intended solely for the use of the Civil surgeon of the district or any medical officer subordinate to him, on whom the police may call for a report. Such forms must not be given to injured persons for the purposes of examination at their private choice, nor must they be sent with injured persons to Government medical officers of another district.

All medical officers in charge of hospital and dispensaries are required to report to the nearest police station within 24 hours all cases of serious injury of poisoning admitted by them for treatment, whether such cases have been brought in by the police or not.

(4) Medical officers of Government, or those employed by local bodies, are entitled to charge fees for medico-legal work performed in their private capacities for parties to cases, but no fees whatsoever are leviable by Government medical officers for work in cases in which the [State] is the complaint, including all post mortem examination, such work being part of their regular duties. The rules under which medical officers, other than those subordinate to the District Health Officer, may charge fees for medical-legal work on behalf of Government are given in the Punjab Medical Manual; in certain cases fees may also be charged by medical officers employed by district board. In no case, however, are such fees debitable to the police department; any claims submitted to Superintendents should be passed on, with the necessary information, to the District Magistrate.

(5) Police officers should refrain from sending persons whose injuries are obviously slight for medico-legal examination, and should exercise their discretion in obtaining a medical opinion as to whether injuries received by complainants constitute a cognizable offence.

(6) Medico-legal cases not requiring urgent attention should be sent for examination during hospital hours only.

(7) The unnecessary summoning as witnesses of medical subordinates, to the detriment of their proper activities, shall be avoided as far as possible, and, when the attendance of such an officer is necessary , as much notice as possible shall be given him. When the necessary evidence can be given by the investigating officer or by another medical witness stationed at the place where the case is being

prosecuted a medical subordinate should not be summoned from a distance merely to give corroborative evidence.

Furthermore, according to Rule 25.22 for Medical examination of women-

No examination by a medical officer of a living women's person shall be made without her consent and without a written order from a magistrate, addressed to the medical officer, directing him to make such examination.

In all cases in which the police consider such an examination to be necessary, the woman shall be taken before a magistrate for order. This rule shall also apply to similar examinations by dhais or any other person.

The word "person" applies only to those parts of the body, to expose which would violate a woman's modesty. Female Assistant or Sub-Assistant Surgeon in Government service shall only be required to do medico-legal work on behalf of Government when the woman or girl concerned refuses to be examined by a male doctor. When a female doctor is summoned by a Court she must attend (Punjab Government endorsement No. 558-M-36/9932, dated the 25th March, 1936).

Importantly as per Rule 25.33. Investigation officers - action at scene of death:

On arrival at the place where the body of a deceased person is lying, the police officer making the investigation shall act as follows:---

(1) He shall prevent the destruction of evidence as to the cause of death.

(2) He shall prevent crowding round the body and the obliteration of footsteps.

(3) He shall prevent unnecessary access to the body until the investigation is concluded.

(4) He shall cover up footprints with suitable vessels so long as may be necessary.

(5) He shall draw a correct plan of the scene of death including all features necessary to a right understanding of the case.

(6) If no surgeon or other officer arrives, he shall, together with the other persons conducting the investigation, carefully examine the body and note all abnormal appearance.

(7) He shall remove, mark with a seal, and seal up all clothing not adhering to, or required as a covering for, the body, all ornaments anything which may have caused or been concerned in the death of the deceased and shall make an inventory thereof describing the position in which each thing was found and any blood-stain, mark, rent, injury or other noticeable fact in connection with such thing. The number and dimension of such stains, marks, rents, injuries, etc., shall also be given in the inventory.

A counterpart of the mark and seal attached to such thing or to the parcel in which it has been enclosed shall be entered in, or attached to the inventory.

(8) He shall take the finger prints of the deceased person if the body is unidentified.

(9) The photographing of the body in situ and of the scene of the occurrence may prove of great evidential value.

[25.36 deals with Post-mortem examination---As to when and by whom it is to be held, 25.37 explains the action to be taken by police]. Rule 25.39 deals with the Form which has to accompany the body or injured person], is reproduced as under:-

FORM TO ACCOMPANY BODY OF INJURED PERSON

SENT FOR MEDICAL EXAMINATION

1.	Name of injured or deceased person, parentage, caste,	

	residence and condition of life.	
2.	Sex and supposed age.	
3.	Report of Police Officer:-	
	(a) Description of any injuries or marks of violence received, wounds and bruises, position, length and breadth.	
	(b) Brief report by dispatching police officer stating the manner in which the injuries or death is supposed to have been caused. If by poison, the poison suspected to have been used.	
	(c) Date and hour it was administered, the date and hour of commencement of symptoms, the date and hour of death, and the nature and duration of treatment adopted by the police or friends of the deceased	
4.	Brief report and opinion in simple language dictated by the medical officer and followed by his initials:-	
	(a) as to the means by which the injuries were caused.	
	(b) In the case of injuries, poisoning not causing death, the extent of the injuries or sickness, and, in the latter case, the nature of the poison ascertained or suspected.	
	(c) In the case of death (1) Whether death by violence is ascertained and cause of death, and (2) Whether death is suspected from poisoning, the poison ascertained or suspected.	

[Rule 25.40 deals with the sending of Articles for medical examination, 25.41 Chemical Examiner-relates to channel of

communication and 25.47 deals with report of medical officer, respectively].

6. Despite the above rules being in vogue, unfortunately there remained prevailing a persistent confusion in the mind of the public-at-large as to whether a person injured during some occurrence in a police case, could be given first aid or medical treatment without interference or request of the police or not. In order to remove such misconceptions, as a result of which, the provision of first aid and the treatment of the injured person used to be delayed resulting into further medical complications and loss of life as well, the legislature rose to the occasion. By legislating, "The Injured Persons (Medical Aid) Act, 2004", containing provisions for protecting health and save lives of the injured persons, in order to provide medical aid and treatment during some emergency. It may be pointed out that under section 2 of the ibid Act, certain terms i.e. Doctor, Government, Hospital and the injured person have been defined. Under section 3 of the ibid Act, injured persons has been directed to be treated on priority basis, Section 4 deals with non-interference by the police. Under section 5, consent of relatives has been dispensed with in certain cases, section 6 directs the hospital not to shift an injured person until stabilized, As per section 7 it is mandatory that the hospital be notified, section 8 provides that the injured persons not be taken to a police station, section 9 prohibits that the person bringing the injured person to hospital should not be harassed, section 10 deals with launching of awareness campaign in this regard, section 11 prescribes certain penalties, section 12 points out about cognizance of cases, section 13 deals with instruction and section 14 pinpoints the power of the rule-making authority by the Federal or Provincial Government, as the case may be. [which have not been framed till today].

7. The Government of the Punjab Health Department Lahore has issued the instructions regarding the conduct of Medico Legal/Post-Mortem Examinations bearing No.SO (H&D) 5-5/2002, dated 1st December, 2004

and in the year 2015. The instructions regarding the conduct of Medico Legal/Post-Mortem Examinations bearing No.SO(H&D) 5-5/2002, Government of the Punjab Health Department dated Lahore, the 1st December, 2004, comprising over various parts, which are as follows"-

PART-I, General Instructions for conducting Medico Legal Examination.

PART-II, Specific instructions for various Medico Legal Examination in the living cases.

(i) Physical Assault/trauma

(ii) Female victim of sexual assault

(iii) Male victim of sexual assault

(iv) Examination of alleged suspect/assailant of sexual assault for potency

(v) Estimation of age

(vi) Alleged intoxication/suspected poisoning

(vii) Alleged pregnancy/criminal abortion

PART-III, Instructions regarding post-mortem examination.

PART-IV, Exhumation.

PART-V, Collection, preservation and Dispatch of material to chemical examiner Laboratory.

PART-VI, Medico Legal Re-Examination

PART-VII, Attendance of the Medical Examiner in the Court of Law

PART-VIII, Laws related to medical examinations

The law to protect rights of injured persons the Injured Persons (Medical Aid) Act, 2004

As per Part-I(3) of the instructions regarding the conduct of Medico Legal and postmortem examination, issued in 2015, the Medico Legal/Postmortem Register/Medicolegal certificate/post-mortem report

should be, issued only on the notified proformas, which has been prescribed by the Government of the Punjab and is maintained in the form of a proper register, duly page marked and certified by the controlling authority in a proper binding using tough card board. Only one Medico Legal and one Post mortem register should be used by all the Doctors of the same Health Facility. All the Doctors should place their signatures on their name stamp and must draw the findings on Pictorial Diagram also. All the columns should be filled in clearly and must be easily legible to everyone. The entries should not be made hurriedly. No column should be left blank. Any particular column, if in-applicable, should be crossed. According to Part-I(12) of ibid instructions, Medico Legal examination should be detailed, Searching and thorough. All the Positive as well as important negative findings/ observations should be recorded at the time of examination and report should be issued as soon as possible, though, in certain cases the injuries might be kept under observation for a certain period of time for investigations/specialist's opinion/treatment notes etc., whereas as per Part-I (13), the injuries kept under observation should be declared within three Weeks. It is the duty of the initial Medico legal examiner to collect the relevant reports, which are required to declare the KUO injuries within time-frame notified by the Government i.e. within three weeks. According to Part-II(5) if nature of injury is not clear and requires further investigations/ expert opinion of specialist/re-examination of the injured person, the injury may be kept under observation for some time to obtain such reports. Any way the Medicolegal Report should be finalized as early as possible. According to the Government Notification No.SO(H&D)5-5/2002, dated 28.10.2004, no case should be left pending without valid reason for more than 21 days. Any investigations advised/expert's opinions requested should be clearly mentioned in the report. As per Part-II(6), the Medico Legal certificate should be issued by the First Examining Doctor who has seen and treated the injured in the first place and must not declare any KUO injuries which have been interfered with surgically unless treatment notes are received from

concerned Hospital. Part-II(9) of ibid instructions depicts that manner of causation of injuries should be given as homicidal, accidental, self-inflicted or manipulated.

As per Part VI(2), re-examinations are carried out on judicial orders from the court. According to Part-VI(6), appeal against the decision of the District Standing Medical Boards lies with Provincial Standing Medical Board, Punjab headed by the Surgeon Medico Legal, Punjab. For this purpose, the Courts has to write to the Health Department, Government of the Punjab directing Surgeon Medico Legal, Punjab for doing the needful. In addition, Honorable Lahore High Court, Lahore can also pass an order for re-examination by the Special/Standing Medical Board, Punjab, Lahore. Part VI (10) deals with the cases where the Standing Medical Boards differ from the initial medico legal report should be highlighted and should be reported to Surgeon Medico Legal Punjab/EDO Health for consideration/initiation of disciplinary action wherever there is fabrication/foul play. According to Part VI(12) if the examinee does not offer before the DSMB/PSMB in spite of calling for three times consecutively, it indicates mala fides intention of the examinee. No further chance may be given to the examinee for appearance/re-examination and case may be decided on the basis of document/evidence/witness.

8. It will be important to point out that as per 1st Notification No.SO (H&D) 6-1/90 dated 12.02.1990 issued by the Government of the Punjab Health Department regarding constitution of Special Medical Board for re-examination/re-postmortem, it has been directed that "whenever required, the Judicial officers may be advised to approach the relevant Boards. However, such orders may be passed within three weeks of the first examination. The opinion of the respective Boards shall be final. The Board shall only examine such cases on the judicial orders of the District Magistrate". Furthermore, in case of a complaint by an aggrieved person and in order to eliminate/weed out the possibility of false implication of

the adversaries in criminal cases got registered on the basis of self-inflicted injuries by applying different manipulative modes after procuring the MLC with the connivance of the police and the Medical Officer with mala fide intentions by the unscrupulous/inimical elements in the society, the Government of the Punjab has established through a Notification No.SO(H&D)5-5/2002 dated 05.02.2003, a "Three Tier structure" for conducting medico-legal work, which are reproduced as under:-

(a) FIRST TIER

The Initial Medico legal examination shall be carried out by the Medical Officers/Women Medical Officers at the Rural Health Centers, Tehsil Headquarters Hospitals, District Headquarters Hospitals and at Teaching Hospitals.

(b) SECOND TIER

The District Standing Medical Boards, comprising the following, shall act as First Appellate Authority in all the 34 Districts of Punjab:

Medical Superintendent, DHQ Hospital Chairman

District Officer Health Member

Surgeon Member

These Boards will conduct re-examination if the decision of the first medico legal examiner is challenged and also for examination of alleged cases of police torture. For District Lahore District Standing Medical Board will be established at Government Mian Muhammad Munshi, DHQ, Hospital.

(C) THIRD TIER

The role of Surgeon medico legal, the Punjab shall only be Appellate and Supervisory. He shall be the Chairman of Provincial Standing Medical Board, which shall be the final Appellate Authority against the decisions of District Standing Medical Boards. Other

members of the Provincial Standing Medical Board (PSMB) will be the Associate/Assistant Professor Forensic Medicine of the Regional Medical College and the Medical Superintendent of one of the attached Teaching Hospital. The Board can co-opt any other member when required.

Furthermore, in case law reported as "Muhammad Rizwan v. The State and others" (2017 MLD 1828), an elaborate discussion over the procedure to be adopted under three tiers structure has been made.

9. Although the above instructions permit the DSMB/ PSMB that in case an examinee does not offer himself before it in-spite of calling for three times consecutively, the Board may conclude that the non-appearance is an outcome of mala-fide intention of the examinee. This inference, however, should preferably be drawn when there is some evidence with the Board that despite he/she had duly been served upon or had been intimated about the date fixed for his/her re-medical examination, the examinee has avoided to appear before it. Since the Board is constituted on the order of a Court, therefore, the police is under obligation to effect service upon the examinee in the same manner as if the police is making the compliance of order of the Court. If the board is of the opinion that there is a deliberate non-compliance of its order by the employee/officer, deputed for effecting service upon the examinee, such employee can be proceeded against as if he has defied the order issued by a lawful authority. In order to weed out the possibility of fabrication or procurement of MLC based on the self-suffered injuries, while undertaking a meaningful exercise with an objective approach, the police officer deputed to effect service upon the examinee is bound to submit his report about the compliance or otherwise of the order regarding effecting of requisite service within the stipulated period of time. The Board shall make such report an integral part of its record.

10. It may be pertinent to mention here that during pendency of this bail petition, keeping in view the above inquisitive observations made in

paragraph No.4, comments/reports from the District Police Officer, Rajanpur, Chief Executive Officer (Health), Rajanpur, Secretary (Health) Govt. of the Punjab, Lahore and Surgeon Medico Legal Punjab, Lahore were requisitioned, which have been made part of the record. Furthermore, in pursuance of order of this court dated 08.10.2019, on the aforesaid point, a joint meeting was convened under the supervision of District and Sessions Judge, Rajanpur and a report submitted in this regard has also been made part of the record.

11. After, above elaborate discussion, it is observed that admittedly, the co-accused namely Shahid Hussain and Asad are real sons of the petitioner. Their pre-arrest bail was confirmed by learned Addl. Sessions Judge, Jampur vide its order dated 21.12.2018. Moreover, the complainant/injured despite his service, deliberately did not appear before the District Standing Medical Board, which is indicated through a letter issued by the Medical Superintendent, Chairman DSMB, DHQ Hospital Rajanpur, bearing No.6793/DHQ(H) Rajanpur dated 6.11.2019, therefore, her re-examination could not be done. The deliberate and evasive attitude of the examinee amounts to cover up the alleged fabrication of injury. In view of above factors, when the realities of prosecution's case are not clear and transparent, the possibility of the petitioner's false implication by way of fabrication of injuries and by levelling exaggerated allegations with mala fide intention and ulterior motive of the complainant while throwing a widened net to his extent cannot be ruled out, which render the case of the petitioner to be one of further inquiry. Resultantly, the instant bail petition is allowed and ad-interim pre-arrest bail already granted to the petitioner, vide order dated 06.08.2019, is hereby confirmed, subject to his furnishing fresh bail bonds in the sum of Rs.1,00,000/- (Rupees one hundred thousand only), with one surety, in the like amount to the satisfaction of learned trial Court.

12. Before parting with this order, I feel it appropriate to issue following directions:-

(a) The Medical Officer/Woman Medical Officer, after physical examination of an injured person, while issuing the Medico Legal Certificate, holding the possibility of fabrication of any injury as "Yes", he/she must record reasons in unambiguous terms on the basis of principles of Medical Jurisprudence. In case of more than one injury, the Medical Officer/Women Medical Officer shall mention regarding which injury, there exists possibility of fabrication.

(b) In case the supervisory Medical Authority finds that Medical Officer/Women Medical Officer motivated by ill-will, based on extraneous consideration, had recorded a wrong opinion, the relevant Board shall recommend the initiation of departmental proceedings against him/her regarding his/her misconduct.

(c) Since it is the duty of the Investigating Officer to find out the truth of the matter under investigation, his object is to discover actual facts of the case and to arrest the real offender or offenders and not to commit himself prematurely to any view of the facts far and against any person, therefore, in appropriate cases where he suspects that the injuries are self-suffered, in order to further strengthen his opinion, besides an aggrieved party, I.O can invoke the jurisdiction of a Magistrate to exercise his power for reconstitution of the District Standing Medical Board or the Provincial Standing Medical Board as the case may be.

13. Copy of the judgment be sent to the Secretary Health, Government of the Punjab, Lahore, Medico Legal Surgeon, Punjab, Lahore, I.G Police (Punjab) and Prosecutor General Punjab to bring the existing S.O.Ps, if any, given in case law reported as "Muhammad Khalid and others v. State and others (2018 YLR 2433), in conformity with the observation made herein the judgment.

MH/M-95/L **Bail allowed.**

P L D 2020 Lahore 97

Before Anwaarul Haq Pannun, J

SALMAN KHALID---Petitioner

Versus

The STATE and others---Respondents

Criminal Miscellaneous No.1277-B of 2019, decided on 4th July, 2019.

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

----S. 497---Penal Code (XLV of 1860), S. 489-F---Dishonouring of cheque---Compoundable offence---Bail, grant of---Cheque issued by accused to complainant was dishonoured due to insufficient funds---Accused submitted affidavit stating that he was ready to pay the amount of cheque by certain date and in case of his failure in dishonouring his commitment, he would not be entitled to enjoy the right of bail---Offence under S.489-F, P.P.C., being cognizable and compoundable, considering the compounding character of offence, court seized with bail application, may extend concession of bail---If the accused did not honour his commitment in terms of compromise accused would lose his right to enjoy concession of bail---Bail was granted accordingly.

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

----Ss. 497 & 345---Penal Code (XLV of 1860), S.489-F---Dishonring of cheque---Grant of pre or post arrest bail---High Court provided guidelines for proceeding with cases under S.489-F, P.P.C., involving compromise at pre-arrest or post arrest bail stage stated.

Following are the guidelines as provided by the High Court:--

(i) A compromise deed shall be in writing and duly signed or thumb marked by the accused as well as the person in whose favour, the dishonoured cheque was issued by the accused or any other person duly authorized by the payee .

(ii) In case of post arrest bail, the Court seized with the bail application due to the accused being in jail, shall also record the statement of the

counsel, representing accused or any other person duly authorized by the accused for this purpose.

(iii) The Court, while giving effect to the compounding character of the offence, at bail stage shall reflect the terms and conditions of the compromise in its bail granting order besides clearly stating that the accused shall only be entitled to enjoy the liberty, he has earned by way of concession of bail, provided he honours the terms of compromise deed.

(iv) The accused shall make payment of amount of cheuqe or settled between the parties, to the payee on the date fixed in compromise deed or in case of any exigency within next three days. In case of any default, even in making payment of any installment, the accused shall lose his right to enjoy the concession of bail. The complainant, however may show grace and accept any request on part of the accused for extension of time.

(v) In case of default, in absence of a consent of the complainant, for extension of time, in making the payment of amount settled between the parties through compromise, the bail granting order shall be deemed to have been vacated automatically on the expiry of date fixed.

(vi) After seeking relief of bail on the basis of compromise, the non-compliance of its terms and conditions will amount to breach of commitment and misuse of concession of bail by the accused for the period he enjoy the said concession in the form of liberty instead of facing the rigors of jail.

(vii) The complainant shall not be obliged to file a formal application for cancellation of bail under Section 497(5) Cr.P.C either before the trial Court or before any higher Court which had passed the bail granting order. However, the complainant, in case of default in making payment by the accused, may file only a miscellaneous application before the trial Court inviting its attention towards the default made by the accused, thereupon, learned trial Court shall pass an order for committing the accused to custody.

(viii) All the trial Courts seized with the trial/ proceedings for the offence under Section 489-F, P.P.C., shall prepare a separate category of compromise cases with some special identity so that the case may be dealt with, in terms of bail granting order.

(ix) In case, the trial Court, is satisfied that the terms of the compromise have been fulfilled and acted upon, the Court, on its own motion or on the application of either party shall give effect to the compromise, by way of termination of proceedings in the case. [p.103] E

Ghazanfar Ali Khan with the Petitioner.

Najeeb Ullah Khan Jatoi, Deputy Prosecutor General for the State.

Rao Nasir Mehmood Khan with the Complainant.

ORDER

ANWAARUL HAQ PANNUN, J.---The petitioner seeks confirmation of already extended concession by way of his admission to ad-interim pre-arrest bail vide order dated 08.05.2019 in case FIR No.184 dated 02.04.2019, offence under Section 489-F, P.P.C., registered at Police Station Kot Samaba, District Rahimyar Khan. The learned Addl. Sessions Judge, Rahimyar Khan, dismissed his application, while recalling his ad-interim bail, vide order dated 04.05.2019.

2. Precisely the allegation against the petitioner is that he dishonestly issued a cheque No.7675385, A/C No. 06444573861002907 of MCB Main Branch Sadiqabad, amounting to Rs.3,25,000/- to the complainant for fulfillment of his obligation, when presented before the concerned bank, stood dishonoured.

3. Learned counsel for the petitioner while submitting an affidavit duly sworn in, by the petitioner, Mark "A", states that the petitioner is ready to pay the amount of cheque till 30.09.2019 and in case of his failure in honouring his commitment, he will not be entitled to enjoy the fruit of bail. The factum of compromise reflecting through the affidavit Mark "A" has been conceded by the complainant.

4. Learned Deputy Prosecutor General assisted by learned counsel for the complainant does not oppose the above arrangement inter-se the parties.

5. At the very outset, it is observed that a civil remedy for recovery of amount of cheque, a negotiable instrument, by way of a summary suit under Order XXXVII C.P.C. is available to the payee against the person issuing cheque with mala fide, without making arrangement for its encashment, on its presentation before the financial institution.

6. There is hardly any cavil in saying that every religion, society and civilization throughout the world including past and present, despite varying social taboos, irrespective of differences in, set of the believes of their followers, have some common traits furnishing basis for creating a common connection amongst humanity. I cater no doubt in my mind that in every nook and corner of the world, the followers of every set of belief do not appreciate the breach of commitment and disapprove dishonesty. Regarding promise/commitment, in Verse No.34 of Surah Banni Israel, Chapter No.15 of the Holy Quran, Almighty Allah has commanded that: -

The Holy Prophet Hazrat Muhammad (Peace Be Upon Him) said that:-

I observe with pleasure that while legislating Section 489-F P.P.C., the above commands stand encapsulated into Section 489-F P.P.C., conveyed through the above quoted verse and Hadith.

7. Owing to variety of scientific inventions, especially in the field of information technology, without compromising their sovereignty, the nation states have become global villages. It has given phenomenonal rise to even inter-continental trade and fiduciary relation. The ongoing trade and commerce activities amongst various nations necessitated the adoption of swift mode of payment for materializing the transactions. The on-line banking is one of the mode for transfer and payment of money currently in vogue, for running the business all over the world. Pakistan

unfortunately being one of the under developed countries amongst the comity of nations has yet not been able to adopt computerized culture and other modes relating to advance technology. However, with the increase in the financial transactions within the country, being safe enormously the transactions are now being made through financial institutions. In absence of any efficacious and swift remedy for bringing the person to book, issuing cheque with dishonest intention, the legislature while enacting the provision of Section 489-F, P.P.C., rose to the occasion, made person liable to penalty.

8. The offence has been made compoundable under the law. For ready reference, the provision of section 345 Cr.P.C is reproduced as under:-

345. Compounding offences. (1) The offences punishable under the sections of the Pakistan Penal Code specified in the first two columns of the table next following may be compounded by the persons mentioned in the third column of that table:

Offence	Sections of Penal Code applicable	Persons by whom offence may be compounded
Dishonestly issuing a cheque for repayment of loan of fulfillment of an obligation	489F	The person in whose favour cheque issued

The offence under Section 489-F, P.P.C. is cognizable by the police, therefore, person accused of committing such offence, is either arrested by police or apprehending his arrest, he seeks pre-arrest bail. The Court seized with the bail application of accused may extend concession of bail considering the compounding character of offence. It is observed that voluntary issuance of a cheque in-fact amounts to give an undertaking by the accused that on its presentation, it shall be honoured/encashed. The dishonest intention of the person, issuing a cheque, becomes evident, the

moment, the bank, through its endorsement in writing, refuses to honour the cheque. Needless to say that at same time, the offence under Section 489-F, P.P.C. also stands committed. Therefore, it may be said that the dishonouring of the cheque amounts to breach of commitment/ undertaking by the accused he made with the payee. The accused, after registration of a criminal case against him, if enters into a compromise with the person in whose favour the cheque he issued, concession of bail, can be granted to him on the affirmative nod of the complainant.

9. It may be reiterated that since on dishonouring of dishonestly issued cheque, the offence under Section 489-F, P.P.C. stands constituted. It also amounts to breach of commitment. It can safely be concluded that after entering into a compromise with the complainant for making payment of the amount either mentioned in the cheque or settled between the parties at the time of their entering into compromise, the accused once again makes a commitment and as such in case he again dishonors his commitment, which will be deemed to be a repetition and in continuation of his earlier breach of commitment, thus rendering him disentitled to further enjoy and reap the fruit of his misdeed, he earned, by way of compromise.

10. The provision of Section 345, Cr.P.C bifurcates vis-a-vis the compounding of offences, with or without the permission of court, into two categories. The august Supreme Court of Pakistan had expounded this legal proposition in the case titled "Tariq Mehmood v. Naseer Ahmed and others "(PLD 2016 SC 347) as under:-

> "Section 345(1), Cr.P.C. enlisted the offences which may be compounded by the specified persons without intervention of any court--- Compounding in such cases took effect from the moment the compromise was completely entered into by the parties, the relevant court which was to try the offence in issue was left with no jurisdiction to refuse to give effect to such a compromise and a party to such a compromise could not resile from the compromise

at any subsequent stage of the case---On the other hand Section 345(2), Cr.P.C. dealt with cases in which the offences specified therein could be compounded only with the permission of the court and in all such cases any compromise arrived at between the parties on their own at any stage was not to take effect at all unless the court permitted such compromise to be given effect to and the relevant court for the purpose was the court before which prosecution for the relevant offence was pending."

The offence under Section 489-F, P.P.C., is compoundable inter-se the parties, without intervention of the Court. The role of the Court thus remains to finally give effect to such compromise in pending proceedings against the accused by way of its termination. It has been observed that while entering into a compromise, generally the accused gives an undertaking, which is normally in writing and the same is tendered in the court in any of the form i.e. affidavit, compromise deed or any other form that in case, he is granted bail, he shall make the payment of the amount, either mentioned in the cheque or agreed upon inter-se the parties, at the time of compromise. The accused, in this way, earns his liberty and saves himself from facing the rigors of jail. This liberty is outcome of a bargain with the complainant in lieu of his commitment for making payment. The compromise, after registration of case against accused amounts to an admission of his liability, once again. On forwarding a report under Section 173 Cr.P.C, by the Station House Officer, in case of trial, it may terminate, either in acquittal or conviction of the person accused of commission of the offence, by a Court of competent. The offence under Section 489-F, P.P.C. as per Schedule-II of the Code of Criminal Procedure Code, 1898, is triable by the Magistrate of the first class. In either of the situation i.e. grant of pre-arrest or post arrest bail to an accused on the basis of compromise, the effect of compromise is clearly reflected in bail granting order by the Court.

11. It may be said with great concern that because of dwindling value system, gradual decay in moral fabric of the society has occurred. Sometimes, an accused in order to achieve his nefarious, devilish desires and designs eventually effects compromise. Later-on while adopting various strategies, the accused try to hoodwink the process of law, defeating the spirit of the noble deed of compromise which amounts to breach of commitment. This situation generates further litigation. Being on rise the litigation, had caused an alarming situation in the Courts. Needless to say that unscrupulous elements while dishonouring their commitment, in-fact, try to lower down the esteem of the Court in the eyes of the public. In case, non-fulfillment of commitment made before the Court is allowed to go with immunity and it is not checked, it will shake the confidence of the public, they repose in Courts and shall create uncertainty and a sense of despair and despondency amongst the masses, eventuating into a chaotic situation in the society. Therefore, necessity is being felt that such non-fulfillment of the commitment before the Court may be dealt with stringently, instead of allowing the persons to draw a premium from their own bad deeds. It has further been observed that some opportunists and clever litigants in order to buy time from the simpleton and gentle people, keeping in their mind the involvement of procedural technicalities, causing relatively slowness, in deciding cases before Courts of law, try to cheat and defraud them with mala fide intention and to achieve their nefarious ends under the garb of compromise.

12. I hold that since the compromise can be given effect finally by a Court, competent to try the case, therefore, a duty is cast upon the petitioner to submit before the trial Court on 30.09.2019 or before, that he had honoured his commitment in terms of the compromise arrived inter-se the parties, by way of making payment of the amount, failing which, the accused/ petitioner shall lose his right to enjoy the concession of bail. The petitioner while entering into the compromise has submitted an affidavit Mark "A", which spells out that the petitioner has given undertaking to

make payment of Rs.3,25,000/- till 30.09.2019, therefore, this petition is allowed in the light of terms and conditions arrived at between the parties by way of affidavit Mark "A". The petitioner after making payment of total amount, may move to the Court for his final relief in the shape of his acquittal before the trial Judge. In case of default or breach of commitment of terms of compromise, his bail granting order shall be deemed to have been withdrawn and he will be committed to custody.

13. Before parting with this order, I feel it appropriate to issue for future, certain guidelines for the trial Courts proceeding with the cases under Section 489-F, P.P.C. involving compromise between the parties arrived at pre-arrest or post arrest bail stage:-

(i) A compromise deed shall be in writing and duly signed or thumb marked by the accused as well as the person in whose favour, the dishonoured cheque was issued by the accused or any other person duly authorized by the payee .

(ii) In case of post arrest bail, the Court seized with the bail application due to the accused being in jail, shall also record the statement of the counsel, representing accused or any other person duly authorized by the accused for this purpose.

(iii) The Court, while giving effect to the compounding character of the offence, at bail stage shall reflect the terms and conditions of the compromise in its bail granting order besides clearly stating that the accused shall only be entitled to enjoy the liberty, he has earned by way of concession of bail, provided he honours the terms of compromise deed.

(iv) The accused shall make payment of amount of cheuqe or settled between the parties, to the payee on the date fixed in compromise deed or in case of any exigency within next three days. In case of any default, even in making payment of any installment, the accused shall lose his right to enjoy the concession of bail. The

complainant, however may show grace and accept any request on part of the accused for extension of time.

(v) In case of default, in absence of a consent of the complainant, for extension of time, in making the payment of amount settled between the parties through compromise, the bail granting order shall be deemed to have been vacated automatically on the expiry of date fixed.

(vi) After seeking relief of bail on the basis of compromise, the non-compliance of its terms and conditions will amount to breach of commitment and misuse of concession of bail by the accused for the period he enjoy the said concession in the form of liberty instead of facing the rigors of jail.

(vii) The complainant shall not be obliged to file a formal application for cancellation of bail under Section 497(5) Cr.P.C either before the trial Court or before any higher Court which had passed the bail granting order. However, the complainant, in case of default in making payment by the accused, may file only a miscellaneous application before the trial Court inviting its attention towards the default made by the accused, thereupon, learned trial Court shall pass an order for committing the accused to custody.

(viii) All the trial Courts seized with the trial/ proceedings for the offence under Section 489-F, P.P.C., shall prepare a separate category of compromise cases with some special identity so that the case may be dealt with, in terms of bail granting order.

(ix) In case, the trial Court, is satisfied that the terms of the compromise have been fulfilled and acted upon, the Court, on its own motion or on the application of either party shall give effect to the compromise, by way of termination of proceedings in the case.

(x) Office is directed to transmit copy of this order to the Registrar of this Court, who shall circulate the same to all the Sessions

Division Punjab for onward transmission to the courts concerned for their guidance pointed out supra.

MFB/S-65/L **Bail granted.**

P L D 2020 Lahore 183

Before Anwaarul Haq Pannun, J

MUHAMMAD IQBAL and others---Petitioner

Versus

The STATE and others---Respondents.

Diary No.40709 of 2019, decided on 8th October, 2019.

(a) Court Fees Act (VII of 1870)---

----S. 19(xvii)---Constitution of Pakistan, Arts. 9 & 4---Petition by a prisoner---Fixation of court fee---Scope---Office raised objection to maintainability of petition for suspension of sentence on grounds of insufficient court fee---Validity---Held, provisions of S.19(xvii) of Court Fees Act, 1870 granted exemption from affixing court fee on petitions by prisoners or other persons in duress or under restraint of any court or its officers---High Court observed that office should have avoided from raising illegal and unnecessary objection on petitions when there were specific, clear provisions and rules granting exemption particularly when question of liberty of a person was involved---Such like objection could curtail his/her days of liberty if they were otherwise entitled to apply to High Court to be set at liberty in accordance with law---Such office objections could amount to infringement of fundamental right of liberty enshrined in Arts. 9 & 4 of the Constitution if otherwise they were entitled to apply for any relief of liberty on merits---Unnecessary objections caused delay in disposal of cases and wasted precious time of court---High Court declared that accused persons were not liable to affix court fee/stamp on the petition as they were confined to jail to serve out sentences awarded to them in criminal case---Office objection was overruled in circumstances.

Abid Hussain Shah and 28 others v. Government of the Punjab through Secretary S&GAD and others PLJ 2012 Lah. 334; Zahoor Ahmad and 309 others v. Member (Consolidation) Board of Revenue, Punjab and 23 others PLD 2007 Lah. 461; Mst. Walayat Katoon's case PLD 1979 SC 821; Pakistan Defence Officers Housing Authority and others v. Lt.-Col. Syed Jawad Ahmed 2013 SCMR 1707 and AIR 1978 AP 297 ref.

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

----Ss.371(1) & 420---Copy of judgment to be given to accused---Procedure.

Rao Jamshed Ali Khan for Petitioners.

ORDER

ANWAARUL HAQ PANNUN, J.---The petitioners, through this petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, seek suspension of their sentence awarded to them vide judgment dated 27.09.2019 passed by the learned Judge Anti-Terrorism Court-II, Multan in case FIR No. 44 dated 02.09.2018 registered at Police Station CTD, District Multan for offences under Sections 4 and 5 of Explosive Substances Act, 1908, 13(2)(c) of Arms Ordinance, 1965 and 7 of Anti-Terrorism Act, 1997, whereby they have been convicted and sentenced as under:-

Under Section 5 of Explosive Substances Act, 1908

Rigorous imprisonment for 02 years each and forfeiture of whole property belonging to them.

Under Section 13 of Arms Ordinance, 1965

Muhammad Iqbal

Rigorous imprisonment for 02-years and fine of Rs.5,000/- and in case of non-payment of the same, to further undergo two months' S.I.

Benefit of Section 382-B Cr.P.C was extended to the accused - petitioners and both the sentences awarded to petitioner Muhammad Iqbal were directed to run concurrently.

2. Against their afore-quoted conviction and sentences, all three petitioners (Muhammad Iqbal, Muhammad Usman and Hasnain Moavia) preferred Criminal Appeal No.891 of 2019 before this Court during pendency whereof, the instant constitution petition has been filed by them for suspension of their sentences. The petitioners have only affixed court fee/stamp paper of Rs.500/- on this petition.

3. Although the petition has been diarized by the office but it is fixed as an objection case. As per objection performa, the following objection has been raised:-

"The Court fee is insufficient to the extent of Rs.1000/-."

4. Learned counsel for the petitioners, while relying upon the cases reported as Abid Hussain Shah and 28 others v. Government of the Punjab through Secretary S&GAD and others (PLJ 2012 Lahore 334) and Zahoor Ahmad and 309 others v. Member (Consolidation) Board of Revenue, Punjab and 23-others (PLD 2007 Lahore 461), contends that where the impugned acts arise out of one action or one order, one set of court fee is payable by several petitioners; that since the petitioners having joint interest have challenged one and the same order/judgment, therefore, court fee of Rs.500/- on behalf of all the three petitioners is sufficient and the office objection is not sustainable.

5. Heard.

6. Before dilating upon the merits of the case, I deem it necessary to firstly take bird's eye view over the concept and history of levying the court fee/stamp paper with the petition filed by the prisoner(s) before the court of law. The court-fee was ordered to be levied in the Sub-continent,

for the first time, in the year 1780 by Viceroy Warren Hastings during East India Company's rule over India. After his impeachment by the British Parliament, his successor Lord Carnwallis took over as the Viceroy of India. He abolished the condition of court-fee as, according to him, a tax on justice was a disgrace to a civilized power. However, after his retirement in the year 1795, the levy of court-fee was again imposed. In 1870, present Court Fees Act, 1870 (Act VII of 1870) was enacted and enforced by the British rulers throughout the British India. However, the British rulers exempted the Chartered High Courts/Supreme Court, established in the three Presidency Towns of India, namely, Calcutta, Madras and Bombay, where their British subjects could file suits without paying any court-fee.

After the establishment of Pakistan on 14th August, 1947 the laws then in force in British India were adopted in Pakistan. The Court Fees Act, 1870 is one of such laws, which has remained in force in Pakistan under Article 268 of the Constitution as the "existing Law". Browsing of the Court Fees Act, 1870 reveals that it is a Central statute relating to the levy of the court-fees. Chapter-I of the Act is preliminary, Chapter II deals with levy of court-fees in High Courts on original side, to be collected in the manner provided in the Act, Chapter III, deals with fees in other Courts, Chapter III-A, deals with fee leviable on probates, letters of administration and certificates of administration, Chapter-IV deals with process fees. Chapter-V deals with mode of levying fees and Chapter-VI deals with miscellaneous matters. There are three Schedules appended with the said Act. Schedule-I prescribes fees on ad-valorem basis whereas Schedule-II prescribes fixed rates and fees. Schedule-III prescribes forms of valuation. The main purpose of the Court Fee Act is to levy fee for the services to be rendered by the court. The Act not only prescribes fee but also provide how they are to be ascertained. In Mst. Walayat Khatoon 's case (PLD 1979 SC 821), the apex court has held as under:-

"Court Fees Act is a fiscal enactment entitled only to secure revenue, it is a form of taxation."

Needless to mention here that judicature is creation of the constitution. Article 175 of The Constitution of Islamic Republic of Pakistan, 1973 reads as under:

175. Establishment and Jurisdiction of Courts. (1) There shall be a Supreme Court of Pakistan, a High Court for each Province and a High Court for the Islamabad Capital Territory, and such other courts as may be established by law.

(2) No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.

(3) The Judiciary shall be separated progressively from the Executive within fourteen years from the commencing day.

This Article also makes clear that the courts shall exercise the jurisdiction authorized by the constitution and law.

Article 192 of the Constitution states about formation of High Courts of the provinces which reads as under:

192. Constitution of High Court. (1) A High Court shall consist of a Chief Justice and so many other Judges as may be determined by law or, until so determined, as may be fixed by the President.

(2) The Sindh and Baluchistan High Court shall cease to function as a common High Court for the Provinces of Baluchistan and Sindh.

(3) The President shall, by Order, establish a High Court for each of the Provinces of Balochistan and Sindh and may make such provision in the Order for the principal seats of the two High Courts, transfer of the Judges of the common High Court, transfer of cases pending in the common High Court immediately before the establishment of two High Courts and, generally, for matters

consequential or ancillary to the common High Court ceasing to function and the establishment of the two High Courts as he may deem fit.

(4) The jurisdiction of a High Court may, by Act of Majlis-e- Shoora (Parliament), be extended to any area in Pakistan not forming part of a Province.

Article 202 of the Constitution empowers the High Courts to make rules for regulating the practice and procedure of the Court or of any court subordinate to it subject to the Constitution and law which, for convenience of reference, is reproduced as follows:-

202. Rules of Procedure. Subject to the Constitution and law, a High Court may make rules regulating the practice and procedure of the Court or of any court subordinate to it.

In pursuance of the above constitutional provision, Lahore High Court, Lahore framed certain Rules and time to time issued Orders for regulating its judicial proceedings and that of District courts of the province. In order to determine the livability of the court fee on petitions, Rules and Orders of the Lahore High Court, Lahore, Volume-V (Relating to Proceedings in the High Court) Chapter 1 (Judicial Business) Part-A Rule 11 states as follow:

"No petition, memorandum of appeal or other document, which ought to bear a stamp under the Court Fees Act, 1870, shall be received in the Court until it is properly stamped."

Moreover, Rule 10(i), Chap.4-F, Part-III of Part. J, Volume-V of High Court Rules and Orders, reads as under:

"A court-fee of Rs. 500/- shall be payable on each petition but no court-fee shall be required in case a writ is required in respect of

the detention of any person by or under orders of any public authority."

In Pakistan Defence Officers Housing Authority and others v. Lt. Col. Syed Jawad Ahmed (2013 SCMR 1707), the august Supreme Court of Pakistan has defined public authority as:

"A public authority is a body which has public or statutory duties to perform and which performs those duties and carries out its transactions for the benefit of the public and not for private gain or profit."

7. It will be relevant to quote here Section 19(xvii) of The Court Fee Act, 1870 in verbatim which provides as under:-

"19. Exemption of certain documents. Nothing contained in this Act shall render the following documents chargable with any fee:-

i. ----------

ii. ----------

iii ----------

xvii. Petition by prisoners, or other persons in duress or under restraint of any court or its offiers:

While expounding the principle, in Abid Hussain Shah's case (supra), following dictum has been laid down:-

"In view of the foregoing, since all the petitioners complain of a single action and are employees of the same department, the office objection is overruled for the time being. Let the main case be listed for hearing on the judicial side."

Similarly, in Zahoor Ahmad's case (supra), following has been observed:-

"10. From the survey of above case law, it can safely be concluded that each petitioner, in a joint petition has his/its own cause of action and relief claimed by such petitioner is to his extent and grievance of each petitioner is individual. The petition by each one of the petitioners in a joint petition, shall be deemed independent and each of such person, shall be liable to pay court-fee separately. The object, of allowing joint petitions, is to avoid conflicting judgments or to allow litigants to conveniently and properly file one petition without going into a hassle of filing and documenting the petition separately. This however; does not absolve the petitioners from payment of court-fee, separately. Single set of court-fee in such petition is not legal.

11. One set of court-fee is payable by several petitioners only when inter se the petitioners a jural relationship subsists i.e. association of persons registered as a firm or incorporated company etc. or in the case of public injury leading to public interest litigation, or in case where series of complained/impugned acts arise out of one action or order.

8. On the following grounds, Zahoor Ahmad 's case is distinguishable from the present case:-

(a) In present case, the office has raised objection regarding the non-affixation of court fee on this constitutional petition while the petitioners are in detention whereas the referred case pertains to civil matter. (b) In the referred case, the constitutional petition did not fall within the exemptions mentioned in provision of section 19 of The Court Fees Act, 1870, therefore, the above provisions could not have been considered. (c) In referred case, interest of community and common grievance of the petitioners qua civil matter was involved whereas the present petition involves the

personal liberty of the petitioners. It is well settled principle of law that in criminal cases, an individual is responsible of his own act.

I may refer a judgment from the other side of the international border. In AIR 1978 AP 297, the Indian High Court has observed as under:-

"5. This provision makes it abundantly clear that it exempts the application to be filed by a prisoner of other person in duress or under restraint of any Court or its Officers from payment of court-fee. As the petitioners are in prison, the application filed by them in the Court need not be affixed with any court-fee stamp. Whether the petition is presented to Court through jail or it is presented through an advocate is not material for the reason that exemption is given from the payment of court-fee for filing a petition by the prisoner. Therefore, in out view, the accused who are in jail need not pay any court- fees."

(underlined for emphasis)

I may supplement the above proposition by referring Section 371(1) of The Code of Criminal Procedure,1898 which provides as under:-

"In every case where the accused is convicted of an offence, a copy of the judgment shall be given to him at the time of pronouncing the judgment, or when the accused so desires, a translation of the judgment in his own language, if practicable, or in the language of the Court, shall be given to him without delay. Such copy or translation shall be given free of cost."

It is clear from the afore-quoted section of Cr.P.C that copy of judgment or translation shall be given free of cost to the convicted person. The provision leads to the conclusion that at the moment when judgment of conviction with imprisonment is pronounced, convict person is ordered to be taken under custody unless granted bail under Section 381-A of

Cr.P.C and copy of the same is given to him free of cost because he is under detention. Likewise, if he approaches the upper forum regarding his conviction and detention while he is in prison or under custody, law exempts his petitions from levy of court fee. Intention and purpose of the legislature was that there should be no financial burden on the person under custody or detention who wants to approach the courts for redressal of any of his grievance in the case in which he is in prison or custody etc. I may refer to Section 420 of the Criminal Procedure Code which provides that:-

> "If the appellant is in jail, he may present his petition of appeal and the copies accompanying the same to the Officer in charge of the jail, who shall thereupon forward such petition and copies to the proper Appellate Court."

In order to advance the above object, Rule 94 (Chapter 5) of Pakistan Prisons Rules, 1978 is referred which provides as under:-

(i) If a convicted prisoner without a friend, relative or counsel to act for him, elects to appeal, the Superintendent shall apply to the Court concerned for a copy of the judgment or order against which the appeal is to be filed. If several persons are sentenced in the same case, only one copy of judgment shall suffice for all the prisoners electing to appeal from the same prison.

(ii) On receipt of the copy of the judgment or order, a prisoner if literate shall be allowed to write his own appeal. If the prisoner is not able to write, the Superintendent shall cause his appeal to be written for him by another prisoner or a prison official strictly in accordance with the dictation of the appellant.

(iii) An appeal preferred by a prisoner from the prison should, before despatch, be read over to him in the presence of the Superintendent. If the prisoner approves of the appeal, he shall

affix his signature or thumb-impression on it. The Superintendent shall sign the document and cause the official seal of the prison to be stamped on it.

(iv) The Superintendent shall forward the appeal, with a copy of the judgment or order appealed against, direct to the appellate court as required by section 420 of the Code of Criminal Procedure.

Article 9 of the Constitution of Islamic Republic of Pakistan guarantees the right to life and liberty of citizens of Islamic Republic of Pakistan in the following words:-

"No person shall be deprived of life or liberty save in accordance with law."

The above-quoted provision i.e. Section 19(xvii) of the Court Fees Act, 1870 clearly grants exemption from affixing court fee on the petitions by prisoners or other persons in duress or under restraint of any court or its officer(s). The office should avoid from raising illegal and unnecessary objection on the petitions when there are specific, clear provisions and rules granting exemption particularly when question of liberty of a person is involved because such like objection may curtail his/her days of liberty if they are otherwise entitled to apply to the High Court to be set at liberty in accordance with law. Such office objections may amount to infringement of their fundamental right of liberty as envisaged in Article 9 of the Constitution if otherwise they are entitled to apply for any relief of liberty on merits. Unnecessary objections cause delay in disposal of cases and waste the precious time of the court. Article 4 of the Constitution covenants that every citizen has protection of law and to be treated in accordance with law particularly (i) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law; (ii) no person shall be prevented from or

be hindered in doing that which is not prohibited by law (iii) no person shall be compelled to do that which the law does not require him to do.

9. For what has been discussed above, I am of the view that since the petitioners are confined in jail to serve out sentences awarded to them in the aforementioned criminal case, thus, in the presence of afore-quoted provisions of law, they are not liable to affix court fee/stamp paper on this petition. The office objection, in view of above, is over-ruled.

10. Before parting with this order, I duly appreciate the assistance rendered by Mr. Fakhar Bashir Sial and Mr. Muhammad Shafiq, Civil Judges/Research Officers Lahore High Court, Multan Bench, Multan to deal with the issue discussed and dealt with hereinabove.

MH/M-182/L **Objection overruled.**

P L D 2020 Lahore 434

Before Anwaarul Haq Pannun, J

ASWAD IQBAL---Petitioner

Versus

R.P.O. and others---Respondents

Writ Petition No.4994 of 2019, decided on 23rd April, 2019.

Criminal Procedure Code (V of 1898)---

----S. 173---Police Order (22 of 2002), Art.18-A (as amended by Punjab Police Order (Amendment) Act (XXI of 2013)---Change of investigation after commencement of trial---Scope---Petitioner assailed the order for change of investigation---Plea of petitioner was that after submission of interim report under S. 173, Cr.P.C. by the SHO, taking cognizance of the offence and framing of charge by the Trial Court, the order for the change of investigation could not be passed---Validity---Section 173, Cr.P.C., contained a command that every investigation under Chapter XIV, Cr.P.C. would be completed without any unnecessary delay and as soon as it was completed, the SHO, through the Public Prosecutor, would forward a report to the court empowered to take cognizance of the offence on a police report---In case, where investigation was not completed within a period of 14 days from the date of recording of FIR under S.154, Cr.P.C., the SHO, within three days of the expiration of said period, would forward interim report to the Magistrate through the Public Prosecutor and the court would commence the trial on the basis of such interim report, unless for the reasons to be recorded, the court decided that the trial would not so commence---Provision containing word 'interim report' allowed, while placing no bar on the police officer, to hold further investigation in the criminal case---Said provision permitted submission of a report before the court on the basis of a subsequent investigation---Said provisions in verbatim left no doubt to point out that after

submission of report under S.173, Cr.P.C., it was the sole and exclusive domain and discretion of the court for commencement of trial or its postponement---Article 18-A, Police Order, 2002, explicitly set out no period of limitation for filing of applications seeking any change of investigations after its commencement from the stage of registration of a criminal case under S.154 Cr.P.C.---Only the statutory period of seven days had been provided in the said Article in order to pass an order by the relevant authority for the change of first and second investigation---Said period, however, in case of third change of investigation had been fixed as thirty days---Even after passing of the order for change of investigation, no outer time line had been prescribed for completion or conclusion of investigation---Said factor was perhaps to enable the Investigating Officer to find out the truth of the matter under , his investigation---Submission of report under S.173, Cr.P.C and commencement of trial thus created no bar to pass an order for the change of investigation in terms of Art. 18-A of the Police Order, 2002---Contrary view would tantamount to defeat the object of Art.18-A leading to its redundancy---Opinion of the Investigating Officer was neither admissible in evidence nor binding upon the courts---Proposed evidence, collected through investigation, on its transformation into real evidence in a court of law only mattered for deciding a case---No defect was found in the impugned order of first change of investigation---Constitutional petition being without merits was dismissed.

Qari Muhammad Rafique v. Additional Inspector General of Police (Inv.) Punjab and others 2014 SCMR 1499; Raja Khurshid Ahmad v. Muhammad Bilal and others 2014 SCMR 474; Abdul Qayyum v. Niaz Muhammad and another 1992 SCMR 613; Muhammad Ashfaq v. Additional Inspector General of Police (Investigation) Punjab, Lahore and 3 others 2013 PCr.LJ 920 and Abdul Qayyum v. D.P.O. and others 2016 PCr.LJ 618 ref.

Raja Khursheed Ahmad v. Muhammad Bilal and others 2014 SCMR 474 rel.

Mazhar Abbas Wasli for Petitioner.

Rana Mehboob Ali for Respondents.

Zulfiqar Ali Sidhu, Assistant Advocate General with Abdul Rehman ASI for the State.

Date of hearing: 23rd April, 2019.

JUDGMENT

ANWAARUL HAQ PANNUN, J.---The petitioner, through this constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, has challenged the vires of order dated 12.02.2019, passed by Respondent No.2/City Police Officer, Multan whereby, application filed by respondent No.7, for second change of investigation of case FIR No.547 dated 30.06.2018, registered in respect of an offence under Section 365-B, P.P.C., at Police Station Seetal Mari, District Multan, has been allowed.

2. Briefly, the facts of the case are that respondent No.7 lodged the aforesaid criminal case against the petitioner and others. The investigation of the case, since could not be completed within fourteen days of registration of case, thus, the Station House Officer forwarded an interim report under Section 173, Cr.P.C before the learned trial court. Respondent No.7, feeling himself aggrieved of the investigation, moved an application before respondent No.2 for transfer/change of the investigation and its entrustment to some other investigating officer, which was allowed vide impugned order and consequently, the same was entrusted to Yousaf Haroon DSP Headquarter, Multan, hence, this writ petition.

3. Learned counsel for the petitioner submits that after forwarding an interim report under Section 173, Cr.P.C by the Station House Officer,

taking cognizance of the offence and framing of charge on 22.01.2019 by the learned trial court, order for the change of investigation could not be passed, hence the impugned order of change of investigation, being illegal, may be struck down. In order to fortify his contention, he has relied upon the case reported as Qari Muhammad Rafique v. Additional Inspector General of Police (Inv.) Punjab and others (2014 SCMR 1499).

4. Conversely, learned Law Officer and learned counsel representing respondent No.7, have submitted that there is no legal bar on further investigation by way of its transfer. While relying on case reported as Raja Khurshid Ahmad v. Muhammad Bilal and others (2014 SCMR 474) they have opposed the above submissions made by learned counsel for the petitioner and have prayed for dismissal of the instant writ petition.

5. The arguments advanced by the learned counsel for the parties have been heard and record perused.

6. It is felt that the subject under consideration requires reproduction of text of some relevant legal terms and provisions of Statutes to highlight their bearing on the instant case, hence the same are reproduced hereinafter in a chronology.

7. According to Ordinary Dictionary, word "investigation" means official examination of the facts about a situation, crime etc. However, in the legal parlance, the term investigation has been defined under section 4(l) of the Code of Criminal Procedure, 1898 (hereinafter called as "Code"), is reproduced as under:-

> "Investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police-officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf.

According to Law Dictionary by Dr. A R Biswas, Investigation generally consists of the following steps:

(1) Proceedings to the spot; (2) ascertainment of the facts and circumstances of the case; (3) discovery and arrest of the suspected offender, (4) collection of evidence relating to the commission of the offence which may consist of (a) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (b) the search of places or seizure of things considered necessary for the investigation and to be produced at the time of trial, and (5) formation of the opinion as to whether on the materials collected there is a case to place the accused before a Magistrate for trial and, if so, taking the necessary steps for the same by the filing of a charge-sheet under Section 173.

In Sections 4(p) and 4(s) of Criminal Procedure Code, 1898, the terms "Police Station" and "Station House Officer" have been defined as under:

"4(s) "Police station" "police station" means any post or place declared, generally or specially, by the [Provincial Government] to be a police station, and includes any local area specified by the [Provincial Government] in this behalf."

"4(p) "Officer incharge of a police station" "Officer incharge of a police station" includes, when the officer incharge of the police station is absent from the station house or unable from illness or other cause to perform his duties, the police officer present at the station house who is next in rank to such officer and is above the rank of constable or, when the [Provincial Government] so directs, any other police officer so present."

Perusal of relevant provisions of the Code of Criminal Procedure, 1898 and the Police Rules, 1934, as given below, reveal that there are three classes of officers, who can generally investigate an offence.

1. Officer Incharge of Police Station (Sec.156 Cr.P.C.)

2. Assistant Sub-Inspector. (Rule 25(2) of Police Rules, 1934).

3. Officer superior to officer incharge of Police Station. (Section 551 Cr.P.C.)

Certain other Provisions of Cr.P.C specify officers of particular rank which are competent to investigate:-

1. Officer not below the rank of Superintendent of Police to investigate offence under section 295-C of P.P.C. (156-A Cr.P.C.)

2. Officer not below the rank of Superintendent of Police to investigate where a person is accused of an offence of Zina (Enforcement of Hadood) Ordinance, 1979. (156-B Cr.P.C)

3. An officer not below the rank of sub-inspector of police. (Section 21/22 of CNSA. 1997)

4. An officer not below the rank of Inspector. (Section 19 of the Anti-Terrorism Act, 1997)

Under Section 156 of Code of Criminal Procedure, 1898, any officer incharge of police station may, without the order of Magistrate, investigate any cognizable case occurring in his police station.

Term "officer incharge of police station" has been defined in section 2(p) of Cr.P.C. as under:-

"Officer incharge of a police-station". 'Officer incharge of a police-station' includes, when the officer incharge of the police-station is absent from the station house or unable from illness or other cause to perform his duties, the police-officer present at the station house who is next in rank to such officer and is above the rank of constable or, when the Provincial Government so directs, any other police-officer so present.

According to 25(2) of Chapter 25 of Police Rules, 1934

(1) An officer incharge of police station is empowered under section 157(1) of Cr.P.C. to depute a subordinate to proceed to the spot to investigate the facts and circumstances of the case and if necessary to take measures for the discovery and arrest of the offenders. Any police officer may be so deputed under this section but where a police officer under the rank of assistant sub-inspector is deputed the investigation shall invariably be taken up and completed by the officer incharge of police station or an assistant sub-inspector at the first opportunity.

551. Powers of superior officers of police: Police officers superior in rank to an officer incharge of a police station may exercise the same powers, throughout the local area to which they are appointed, as-may-be exercised by such officer within the limits of his station.

156A. Investigation of offence under Section 295C, Pakistan Penal Code. Notwithstanding anything contained in this Code, no police officer below the rank of a Superintendent of Police shall investigate the offence against any person alleged to have been committed by him under Section 295C of the Pakistan Penal Code, 1860 (Act XLV of 1860).

156B. Investigation against a woman accused of the offence of zina.--- Notwithstanding anything contained in this Code, where a person is accused of offence of zina under the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (VII of 1979), no police officer below the rank of a Superintendent of Police shall investigate such offence nor shall such accused be arrested without permission of the court.

Since the prosecutor has been assigned a proactive role in submission of report under Section 173 Cr.P.C, therefore, it will be appropriate to reproduce some relevant text from the statue etc.

Term "Public Prosecutor." has been defined in Section 4(t) of the Code in the following words

> "Public Prosecutor" means any person appointed under section 492, and includes any person acting under the directions of a Public Prosecutor and any person conducting a prosecution on behalf of the State in any High Court in the exercise of its original criminal jurisdiction."

It may also be mentioned here that the term 'Prosecution' and 'Prosecutor' both have been defined in the Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act, 2006 (III of 2006) (hereinafter to be called as, Prosecution Act) promulgated on 3rd April, 2006.

According to Section 2(k) of the said Act,

"Prosecution" means the prosecution of a criminal case;

The word "prosecution" in its widest sense means:

> "The continuous following up through instrumentalities created by law, of a person accused of a public offence with a steady and fixed purpose of reaching a judicial determination of the guilt or innocence of the accused .it consists of all the successive steps having relation to each other taken against the accused by the officers charges with the enforcement of criminal law, it contemplates proceedings judicially."

As per Section 2(l), Prosecutor" means the Prosecutor General, Additional Prosecutor General, Deputy Prosecutor General, District Public Prosecutor, Deputy District Public Prosecutor, Assistant District Public Prosecutor and a Public Prosecutor appointed under this Act and shall be deemed to be the public prosecutor under the Code;

8. The moot question, requiring its determination through the instant proceedings, is, 'whether the relevant designated authority under Police Order, 2002 can pass an order for change of investigation of a criminal case upon submission of interim report of investigation under Section 173, Cr.P.C by the S.H.O through the Public Prosecutor, when the Court, while taking cognizance, had already framed the charge against the accused'. The said question can be answered through a combined reading of various provisions of Code of Criminal Procedure 1898, Prosecution Act, promulgated on 3rd April 2006, Police Rules, 1934 and Police Order, 2002. For ready reference, Section 173 Cr.P.C. is reproduced hereunder:-

> Report of police-officer (1) Every investigation under this Chapter shall be completed, without unnecessary delay, and, as soon as it is completed, the officer incharge of the police-station shall, [through the public prosecutor].-
>
> (a) forward to a Magistrate empowered to take cognizance of the offence on a police-report a report, in the form prescribed by the Provincial Government, setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case and stating whether the accused (if arrested) has been forwarded in custody or has been released on his bond, and, if so, whether with or without sureties, and
>
> (b) communicate, in such manner as may be prescribed by the Provincial Government, the action taken by him to the person, if any, by whom the information relating to the commission of the offence was first given.
>
> [Provided that, where investigation is not completed within a period of fourteen days from the date of recording of the first information report under section 154, the officer incharge of the police station shall, within three days of the expiration of such period, forward to

the Magistrate through the Public prosecutor, an interim report in the form prescribed by the Provincial Government stating therein the result of the investigation made until then and the court shall commence the trial on the basis of such interim report, unless, for reasons to be recorded, the court decides that the trial should not so commence. (emphasis provided)

(2) Where a superior officer of police has been appointed under section 158, the report shall, in any case in which the Provincial Government by general or special order so directs, be submitted through that officer, and he may pending the orders of the Magistrate, direct the officer incharge of the police-station to make further investigation.

9. The provision of Section 173 Cr.P.C, catering no ambiguity, contains a command in clear terms, that every investigation under this Chapter {Chapter XIV of Criminal Procedure Code, 1898 titled "Information to the Police and their Powers to Investigate"} shall be completed without unnecessary delay and as soon as it is completed, the officer incharge of the police station, through the Public Prosecutor shall forward a report to the Magistrate empowered to take cognizance of the offence on a police report. This report, shall be compiled, in the form prescribed by the Provincial Government, setting forth the names of the parties in it, the nature of the information and the names of the persons who appeared to be acquainted with the circumstances of the case. Under section 161, Cr.,P.C., the police officer making an investigation under this Chapter, has been vested with the power so as to examine orally any person supposed to be acquainted with the facts and circumstances of the case and the report shall also disclose the names of the accused arrested and forwarded in custody or released on bail on his bond and that whether the accused so released had submitted any surety or had been released without surety. The said provision further provides that in case the investigation is not completed within a period of 14 days from the date of

recording of First Information Report under section 154 Cr.P.C., it casts a duty on the Station House Officer of the police station that he shall, within a period of three days of the expiration of such period {a period of 14 days} forward an interim report in the form prescribed by the Provincial Government in this behalf of the investigation through a Public Prosecutor, to the Magistrate, stating therein, the result of investigation made until then and the court shall commence the trial on the basis of such interim report unless for reasons to be recorded the court decides that the trial should not so commence. The scrutiny of the above provision, with a view to reply the question under consideration, makes it abundantly clear that it is the intention of the law that after its commencement, no unnecessary delay should occasion in completing the investigation. However, in case the investigation is not completed within a period of 14 days, the Station House Officer is under a legal obligation to forward an interim report {According to Word and Phrases, word 'interim' means 'meanwhile'; time intervening; interval between; belonging to an interim; done; made occurring for an interim or meantime; temporary. In a case reported as Abdul Qayyum v. Niaz Muhammad and another (1992 SCMR 613), the word `interim' inter alia means one for the time being; one made in the meantime and until something is done; an interval of time between one event, process or period and another; belonging to or taking place during an interim; temporary; something done in the interim; a provincial arrangement adopted in the meanwhile; done, made, occurring etc. in or in the meantime; provisional} of investigation conducted till then, through Public Prosecutor to the Magistrate within next three days. Thus, the provision containing words 'interim report' itself allows, enabling and authorizing the police officer to hold further investigation in a criminal case and places no bar in submission a report on the basis of subsequent investigation before the Court. The power of police has been expounded through a plethora of case law pronounced by the superior courts holding

that there exists no bar for further investigation and on submission of report based on subsequently collected incriminating material.

10. Let us now examine the relevant provision of The Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act, 2006 which are also relevant to the question under discussion and is reproduced below:-

Section 9. Conduct of prosecution.- (1) The Prosecutors shall be responsible for the conduct of prosecution on behalf of the Government.

(2) .....

(3)

(4) A police report under section 173 of the Code including a report of cancellation of the first information report or a request for discharge of a suspect or an accused shall be submitted to a Court through the Prosecutor appointed under this Act.

(5) The Prosecutor shall scrutinize the report or the request and may-

(a) return the same within three days to the officer incharge of police station or investigation officer, as the case may be, if he finds the same to be defective, for removal of such defects as may be identified by him; or

(b) if it is fit for submission, file it before the Court of competent jurisdiction.

(6) On receipt of an interim police report under section 173 of the Code, the Prosecutor shall-

(a) examine the reasons assigned for the delay in the completion of investigation and if he considers the reasons compelling, request the Court for the postponement of trial and in case investigation is

not completed within reasonable time, request the Court for commencement of trial; and

(b) in cases where reasons assigned for delay in the completion of investigation are not compelling, request the Court for commencement of trial on the basis of the evidence available on record.

(7) The Prosecutor shall submit, in writing, to the Magistrate or the Court, the result of his assessment as to the available evidence and applicability of offences against all or any of the accused as per facts and circumstances of the case and the Magistrate or the Court shall give due consideration to such submission.

11. Bare perusal of subsection (4) of Section 9 of the Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act, 2006, envisages that a report "under section 173 Cr.P.C." including "a report of cancellation of First Information Report" or a "request" for discharge of suspect or accused, be submitted to a court through a Prosecutor. Subsection (5) of the Act ibid further reveals that it authorizes the Prosecutor to scrutinize the above mentioned "report" or the "request" and permit him, who may, within three days, return the same, if he finds the same to be defective {report or request} to the officer incharge of the police station or investigation officer, as the case may be, for removal of defects, he had identified. It goes to disclose further that in case the Prosecutor finds no defect or fault in the report rather finds it fit for submission, he shall, as required under sub-section (5), place it before the court of competent jurisdiction. Subsection (6) of Section 9 of the Act ibid provides that on receipt of interim police report under section 173 Cr.P.C., (i) the Prosecutor shall "examine the reasons assigned" for "the delay in completion of investigation" obviously given by SHO and if he considers the "reasons to be compelling", he "shall request" the court for the postponement of trial. (ii) In case, the Prosecutor, after examining the

reasons, considers that despite reasons, still the investigation cannot be completed within a reasonable time, he shall request the court for commencement of trial and in case, (iii) reasons assigned for delay in completion of investigation are not compelling, he shall request the court for commencement of trial on the basis of evidence available on record.

12. The role of Investigating Officer is very pivotal in the hierarchy of the system for dispensation of criminal Justice. Rules 25.2, Chapter 25 of the Police Rules, 1934, for ready reference, is reproduced as under:-

25.2 Power of investigating officers.-

(1)

(2) ..

(3) It is the duty of an investigating officer to find out the truth of the matter under investigation. His object shall be to discover the actual facts of the case and to arrest the real offender or offenders. He shall not commit himself prematurely to any view of the facts for or against any person.

13. The above-quoted rule of Police Rules, 1934 casts a duty upon investigating officer to find out the truth of the matter under investigation. It also makes clear that arrest of an accused is not a pre-condition for holding an investigation. The investigating officer shall not pre-maturely commit himself to any view of facts for or against any person allegedly connected with the crime under investigation. The police officer or any other person, especially empowered by a Magistrate, has been vested with the power while discharging his official obligations, to have his visual touch with the crime scene. He may examine orally any person supposed to be acquainted with the facts and circumstances of the case under investigation and may also record his statement while complying with the requirements of law in discharge of his official duty. The person under examination of the police officer conducting investigation is bound by

law to answer the questions so put to him except those questions which would have a tendency to expose him to a criminal charge or forfeiture. There is a judicial consensus that investigation is the name of proceedings and process to be conducted and undertaken respectively by the investigating officer to collect evidence in respect of a crime or the offence alleged. The investigation consists of certain steps to be taken gradually facilitating the collection of evidence. The steps to be taken in a chronology have been enumerated in Chapter 25 of Police Rules, 1934 which are statutory rules having force of law. The investigation being foundational proceedings for raising a super structure for the prosecution of a person accused of the commission of an offence for its placement before the Court of law for deciding the case. These steps must be taken fairly without fear, favour or bias against any party. Investigation must be conducted while keeping in view the object for achieving the philosophical idea behind formation of a criminal justice system consisting of various rungs in a ladder leading to its eternal destination known as dispensation of justice. It may be relevant that while conducting investigating, the investigating officer must collect the evidence at its earliest available opportunity without wasting any time. The delay in collection of evidence, unless explained satisfactorily, sheds its negative repercussion upon the cases in the courts. Needless to observe that it is not the domain of an investigating officer to pronounce guilt or innocence of an accused as it is the exclusive domain of the courts being final arbiter in this regard.

Neglect, lethargy, lure, greed, persuasions, venom and mala fide, despite their disapproval by the society, are the inherent human weaknesses and the enactment of various penal laws is the proof of realization of this eternal human trait.

14. Before the promulgation of Police Order 2002 (Chief Executive's Order No. 22 of 2002) under the law in force, neither any specific provision, empowering a particular authority nor any statutory

mechanism, providing procedure for change of investigation of a criminal case from one police officer to another was available. The superior officers of the Police Department, in view of their positions in the official hierarchy, while exercising their general administrative powers, used to pass orders for change of investigations of criminal cases. Mostly, the persons wielding influence including the political personalities, while exploiting their positions used to get passed the orders for change of investigations of criminal cases from the superior officers for entrustment of the same with the investigating officer of their choice to get favourable results/opinions. This unhealthy trend and tendency caused disappointment and dissatisfaction amongst the criminal litigants with increasing possibilities, defeating the object of fair and impartial investigation into crimes. Ultimately, this practice caused a sense of injustice at the very stage of investigation amongst the people concerned. Needless to say that in view of sharp parochial political polarization being in vogue in the country, this vicious trend gained currency generating a sense of despondency amongst the litigants. This practice also politicized the police, adversely affecting their overall efficiency and performance in the field of investigation. Realizing the adverse repercussions of whimsical exercise of discretion for change of investigation by some of the superior police officers on the eye blink of powerful quarters, The Police Order 2002 (Chief Executive's Order No.22 of 2002) (hereinafter to be referred as "the Order") was promulgated with the aim to reconstruct and regulate the police. The order provides certain measures introducing structural reforms in the hierarchy of the police service, besides a formal mechanism, streamlining the process for the change of investigation. According to Article 18-A of the Order, contrary to the previous practice, by way of change of investigation, inter alia the numbers of investigations have been fixed. For ready, reference, the relevant provision of Article 18-A of the Police Order, (Amendment) Act 2013 (XXI of 2013), is reproduced hereunder:-

18-A. Transfer of investigation.- (1) Within seven working days of the filing of an application, the Head of District Police may, after obtaining opinion of the District Standing Board and for reasons to be recorded in writing, transfer investigation of a case from the investigation officer to any other investigation officer or a team of investigation officers of a rank equal to or higher than the rank of the previous investigation officer.

(2) If the Head of District Police has decided an application for transfer of investigation, the Regional Police Officer may, within seven working days of the filing of an application, after obtaining opinion of the Regional Standing Board and for reasons to be recorded in writing, transfer investigation of a case from the investigation officer or a team of investigation officers to any other investigation officer or a team of investigation officers of a rank equal to or higher than the rank of the previous investigation officer or officers.

(3) If a Regional Police Officer has decided an application for transfer of an investigation, the Provincial Police Officer may, within thirty days of filing of an application, after obtaining opinion of a Standing Review Board, transfer investigation of a case to an investigation officer or a team of investigation officers of a rank equal to or higher than the rank of the previous investigation officer or officers.

(4) A case under investigation with a District Investigation Branch may only be transferred to another officer or a team of officers of the District Investigation Branch, Regional Investigation Branch or Provincial Investigation Branch.

(5) For the purpose of this Article-

(a) 'District Standing Board' means the District Standing Board constituted by the Head of District Police consisting of a

Superintendent of Police as chairperson and two officers not below the rank of Deputy Superintendent of Police as members; (Inserted by the Punjab Police Order (Amendment) Act 2013 (XXI of 2013).

(b) 'Regional Standing Board' means the Regional Standing Board constituted by the Regional Police Officer consisting of a Superintendent of Police as chairperson and two Superintendents of Police as members;

(c) 'Standing Review Board' means the Standing Review Board constituted by the Provincial Police Officer consisting of a Deputy Inspector General of Police as chairperson and two officers not below the rank of Superintendent of Police as members; and

(d) reference to Head of District Police and Regional Police Officer in the case of Capital City District shall be construed to mean the Head of District Investigation Branch of the Capital City and the Capital City Police Officer, respectively.

15. The procedure, unambiguously, for transfer of Investigation, in case a party is not satisfied with the quality of an investigation, or the conduct of any investigating officer has exhaustively been explained in Article 18-A of the Police Order, 2002.

For the 1st change of investigation, an application preferably in writing by an aggrieved party, is to be submitted to the Head of District Police. Within seven working days of filing of such application, the Head of District Police has to place it before the District Standing Board, to be constituted by him consisting of a Superintendent of Police as Chairperson and two officers not below the rank of Deputy Superintendent of Police as its members. The said Board will then give its opinion, in writing, consisting of its recommendations. The Head of the District Police, while examining the opinion so formed by the Board, after recording reasons, in writing, may transfer investigation of a case from one investigating officer to some other investigating officer or a team of

investigating officers equal or higher than the rank of previous investigating officer.

For 2nd change of investigation, if the head of District Police, has decided an application for transfer of application, an aggrieved party, has to submit an application to the Regional Police Officer seeking change of investigation. Within seven working days of filing of such application, the Regional Police Officer has to place it before the Regional Standing Board, to be constituted by him consisting of a Superintendent of Police as Chairperson and two officers not below the rank of Superintendent of Police as its members. The said Board will then give its opinion, in writing, consisting of its recommendations. The Head of the Regional Police, after examining the opinion so formed by the Board, after recording reasons, in writing, may transfer investigating of a case from one investigating officer to some other investigating officer or a team of investigating officers equal or higher than the rank of previous investigating officer(s).

For the 3rd change of investigation, if the Regional Police Officer, has decided an application for transfer of investigation, an aggrieved party, has to submit an application to the Provincial Police Officer {to be appointed under Article 11 of Police Order 2002}. Within thirty days of filing of such application, the Provincial Police Officer has to place it before the Standing Review Board, to be constituted by him, consisting of a Deputy Inspector General of Police as Chairperson and two officers not below the rank of Superintendent of Police as its members. The said Board will then give its opinion, in writing, consisting of its recommendations. The Head of the Standing Review Board, after examining the opinion so formed by the Board, in writing, may transfer the investigating of a case from one investigating officer to some other investigating officer or a team of investigation equal or higher than the rank of previous investigating officer. The perusal of Article 18-A(3) of Police Order, 2002 makes it clear that conspicuously the requirement for

passing an order in writing for third change of investigation is missing. Moreover, unlike the constitution of District Standing Board and the Regional Standing Board by the requisite authorities within a stipulated statutory period of seven working days of filing of application for 1st and 2nd change of investigation, has also been omitted in proviso 3 of the said Article. However, it may be stated that no order can be passed in the air by any of the functionary of the State. Even in absence of such requirement of passing an order in writing, it is expected that while passing an order on the application for 3rd change of investigation, the Provincial Police Officer, shall keep under consideration the spirit of section 24-A of General Clauses Act, 1897. It may be pointed out that in case of Capital City District, a reference to Head of District Police and Regional Police Officer shall be construed to be the Head of District Investigation Branch of the Capital City and Capital City Police Officer respectively.

The standing boards have a mandate to look into the faults of the investigation conducted by previous Investigating Officers. The board should give its opinion based on some reasons. The boards can also examine the justification and bona fides of the applicant seeking change of investigation. In the cases reported as Muhammad Ashfaq v. Additional Inspector General of Police (Investigation Punjab, Lahore and 3 others (2013 PCr.LJ 920), Abdul Qayyum v. D.P.O. and others (2016 PCr.LJ 618) some guidelines have been pronounced which are required to be fulfilled for making an application for change of investigation.

No crime should remain undetected nor any guilty person should go scot free nor any innocent person should face the rigor of prosecution.

16. Article 18-A of Police Order, 2002 when examined closely, it explicitly set out no period of limitation after registration of a criminal case for filing an application seeking transfer/change of investigation. It further reveals that even if the investigation is changed, no outer time

limit of period has been fixed for its conclusion. It only provides that in case of filing of applications seeking transfer of investigation by either of the parties to the case, the respective authorities i.e. the Head of the District Police, the Regional Police Officer and the Provincial Police Officer, shall within stipulated statutory periods, on filing of such applications, constitute the respective Standing Boards and after obtaining their opinions, have to pass order, assigning reasons, in writing, for transfer of investigation. It may be relevant to mention, as discussed above, that in case of third change of investigation, the requisite time period within which, an opinion of the relevant Review Board has to be obtained by the Provincial Police Officer for passing the order for change of investigation, has been extended up to thirty days. It may be important to mention that Article 18-A of Police Order, 2002 more expressly allows holding of more than one investigations and subsequent investigations through its formal change to be conducted by an officer of equal or higher in rank than the previous investigating officer. It also introduces the concept of investigation by Joint Investigation Team. It may be observed that this concept of Joint Investigation will ensure transparency in the investigation to be conducted by the experts having field experience. It will improve the worth and level of investigation.

17. Diversification remained a constant feature of the universe. Allah Almighty has created the man while bestowing upon him with a variety of faculties. The human traits may be good or bad in their nature. The virtues and vices go side by side. The criminals, with the rare exceptions, try to escape from the punishment for the crime they have committed. In order to achieve their object, they try to screen themselves off by adopting various strategies. Needless to observe that a police investigation officer has been placed under an obligation to find out the truth of the matter under his investigation. He has been cautioned not to commit himself to any view about the involvement or otherwise of a person accused of an offence pre-maturely. The wicked criminals, at sometimes, camouflage

their identity in order to save themselves from their criminal liability by adopting innovating mechanism. The arrest of the accused is not a pre-condition for holding investigation. Realizing diversity in criminal cases, a principle for criminal dispensation of justice has been established by the superior Courts of the country that each and every criminal case is to be decided on its own peculiar facts and circumstances. Due to complications involved in detecting the real culprits, the delay may contribute towards the completion of investigation within the initial stipulated period of 14 days. The variety in modes of crime and unforeseen complications might have been weighed with the legislature for not placing any bar on further investigation. The Prosecution Act also does not provide any specific time period in clear cut terms for conclusion of the investigation. It only mention that if the Prosecutor is of the opinion that the investigation cannot be completed within a reasonable time, he shall request the Court for commencement of trial. It can safely be concluded that nowhere in the laws, relating to subject of investigation/ reinvestigation, any limitation for conclusion of the investigation has been provided.

18. The specific issue under discussion can also be viewed from another angle. Section 173 Cr.P.C. contains a command that every investigation under this Chapter shall be completed without any unnecessary delay, and as soon as it is completed the officer incharge of the police station, through the Public Prosecutor, forward a report to the court empowered to take cognizance of the offence of a police report. In case, where investigation is not completed within a period of 14 days from the date of recording of First Information Report under section 154 Cr.P.C., the officer incharge of the police station, within three days of the expiration of said period, forward to the Magistrate through the Public Prosecutor, and the court shall commence the trial on the basis of such interim report unless for the reasons to be recorded, the court decides that the trial should not so commence. The provision containing word "interim report" allows, while placing no bar on the police officer, to hold further

investigation in the criminal case. It permits submission of a report before the Court on the basis of a subsequent investigation. The above said provisions, in verbatim leave no doubt to point out that after submission of report under Section 173 Cr.P.C., it is the sole and exclusive domain and discretion of the court for commencement of trial or its postponement. Section 9(6)(a) and (b) of the Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act, 2006 explains powers and function of the Public Prosecutor. Subsection (6) of Section 9 of the Act ibid provides that on receipt of interim police report under section 173, Cr.P.C., (i) the Prosecutor shall "examine the reasons assigned" for "the delay in completion of investigation" and if he considers the "reasons to be compelling", he "shall request" the court for the postponement of trial. (ii) In case, the Prosecutor, after examining the reasons, considers that despite reasons, yet the investigation cannot be completed within a reasonable time, he shall request the court for commencement of trial and in case, (iii) reasons assigned for delay in completion of investigation are not compelling, he shall request the court for commencement of trial on the basis of evidence available on record. It may be observed that under Section 173, Cr.P.C., before promulgation of Prosecution Act 2006, the role of the prosecutor was no more than a postman. However, on the promulgation of Act ibid, the prosecutor apart from his powers mentioned in section 9 of the Act, has to perform his statutory functions after examining the report under Section 173, Cr.P.C by way of making a request before the Court either for the commencement or postponement of the trial. It may be observed here that on making of such request by the prosecutor, the Court has to consider it while applying its judicial mind, in the peculiar facts and circumstances of the case. It may not be out of place to mention here that the Court or the magistrate, without losing sight of the interest of justice, shall be the final arbiter to examine the reasonability of request so made by the prosecutor. It is also observed that even in presence of compelling reasons for non-conclusion of

investigation, the Court while rejecting the request of the prosecutor for the postponement of the trial, for the reasons to be recorded, may commence the trial. The close scrutiny of provision of subsection (6) of section 9 of the Prosecution Act, 2006 clearly points out the above mentioned three eventualities. It is thus observed that the forming of opinion by the prosecutor and making of his request before the trial Court, is quite in line with the command for filing of an interim report under Section 173, Cr.P.C, due to its non-completion within a statutory period of 14 days.

19. Article 18-A of Police Order, 2002 when examined, it explicitly set out no period of limitation for filing of applications seeking any change of investigations after its commencement from the stage of registration of a criminal case under Section 154, Cr.P.C., only the statutory period of seven days has been provided in the said Article in order to pass an order by the relevant authority for the change of first and second change of investigation. This period however, in case of third change of investigation has been fixed as thirty days. It may be held that even after passing of the order for change of investigation no outer time line has been prescribed for completion or conclusion of investigation. This is perhaps to enable the investigating officer to find out the truth of the matter under his investigation. The submission of report under section 173, Cr.P.C. and commencement of trial thus creates no bar to pass an order for the change of investigation in terms of Article 18-A of the Police Order, 2002. In case a contrary view is taken, it would tantamount to defeat the object of Article ibid leading to its redundancy. Needless to say that the opinion of the investigating officer is neither admissible in evidence nor binding upon the courts. The proposed evidence, collected through investigation, on is transformation into real evidence in a Court of law only matters for deciding a case.

20. Before the promulgation of the Prosecution Act, as observed hereinabove, forwarding of an interim report under Section 173, Cr.P.C.,

the court itself has to decide either to commence the trial or to postpone it. On promulgation of the Act ibid, the proactive role for prosecutor has been envisaged. He after examining the compelling reasons (compiled by the Station House Officer or the Investigating Officer) for delay in completion of investigation, shall make his own opinion about the reasonability of the compelling reasons for non-completion of the investigation. If he is of the view that the reasons for non-completion of the investigation, prima facie are virtually compelling, he shall make request to the Court for postponement of the trial. However, in case, he forms his opinion that despite availability of the reasons, the investigation cannot be completed within a reasonable time or there appears to be no reason for non-completion of investigation, the Prosecutor shall make a request to the Court or the Magistrate for commencement of the trial. Needless to observe that a court shall have to make its own decision, after applying its judicial mind while considering the request of the Prosecutor and facts and circumstances of the case. If the argument of learned counsel for the petitioner that after framing of the charge, no order for change of investigation can be passed by the relevant authorities designated under the Order, is accepted, it would tantamount to rendering the Article 18-A of the Police Order, 2002 to be redundant. Redundancy of one piece of legislation by way of its interpretation with the other is neither desired nor approved. It is always desired that efforts must be made to create harmony even amongst the conflicting laws while interpreting them and a harmony beween the laws must be created. The above object duly advanced through the legal provisions has well been explained in the case reported as Raja Khursheed Ahmad v. Muhammad Bilal and others (2014 SCMR 474) wherein it has been held as under:-

> "It would be seen that as per settled law, there is no bar to the reinvestigation of a criminal case and the police authorities are at liberty to file a supplementary challan even after submission of the final report under section 173, Cr.P.C. However this cannot be

done after the case has been disposed of by the learned trial Court (see Bahadur Khan (Supra) Similarly there is no cavil to the proposition that a Court of law is not bound by the Ipse Dixit of the police authorities and rather should formulate its own independent views irrespective of the investigation whether or not to charge the accused with a particular crime. Seen in this view of the matter, perhaps no exception can be taken to the Judgment of the learned High Court which has held as such i.e. that a charge under section 380, P.P.C. can also be framed against the accused if sufficient material is placed on the record which would convince the learned trial Court to do so. However this aspect does not debar the police authorities from carrying out further investigation in the case. In this regard reference can be made to Article 18(6) of the Police Order, 2002 (Supra). The correspondence placed on record tends to show that firstly the Additional Inspector General, Investigation Branch, Punjab had not agreed with the findings of the Board for re-investigation vide letter dated 23.12.2011. Thereafter the Capital City Police Officer, Rawalpindi vide his letter dated 10-2-2012 addressed to the Additional Inspector-General insisted for the first change of investigation which was again resisted by the latter Vide his reply dated 20-2-2012. Yet again vide letter dated 15-3-2012 the Capital City Police Officer insisted on his earlier views and finally vide letter dated 24-3-2012, the Additional Inspector-General relented and agreed to the change of investigation. Consequently we are of the view that the matter has not been thoroughly examined at the level of the police officials concerned and perhaps due to pulls and pressures the first change of investigation has been ordered."

21. The learned counsel for the petitioner has failed to point out any defect in exercise of powers by respondent No.2 for passing the impugned order of first change of investigation on the request of respondent No.7.

Therefore, for what has been discussed hereinabove, the instant writ petition being without merits, stands dismissed.

JK/A-72/L **Petition dismissed.**

P L D 2020 Lahore 759

Before Anwaarul Haq Pannun, J

MUKHTIAR AHMAD and 3 others--- Appellants

Versus

The STATE and others---Respondents

Criminal Appeal No. 171-J and Criminal Revision No. 94 of 2019, heard on 25th September, 2019.

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

----Ss. 148 & 149---Criminal Procedure Code (V of 1898), S. 367---Rioting, armed with deadly weapon, common object---Scope---Contents of judgment---Appellants were distinctly and separately charged under Ss.148 & 149, P.P.C. but contrary to the express and mandatory provisions of S.367, Cr.P.C., Trial Court had failed to even advert to such charge while passing the judgment, thus creating scope for remanding the case for decision afresh---Appeal was accepted, impugned judgment was set aside as well as conviction and sentences awarded to the appellants and the case was remanded to the trial court for decision afresh regarding guilt or innocence of the appellants under Ss. 148 & 149, P.P.C.

(b) Words and phrases---

----"Judgment"---Scope---Judgment means judicial determination/ decision of a court seized of the matter.

Black's Law Dictionary; Cambridge English Dictionary and Law Dictionary rel.

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

----S. 367---Contents of judgment---Scope---Section 367, Cr.P.C. envisages that the court while delivering its verdict shall specifically express the offence and the section of the Penal Law, under which the

accused is convicted and sentenced---Even in case of acquittal, the judgment shall state the offence of which the accused is acquitted of and a direction shall be issued that the accused be set at liberty if under custody and not required in any other case and in case of being on bail, his bail bonds shall be ordered to be discharged forthwith.

Messrs Union Bank Limited v. Messrs Silver Oil Mills Limited and others 2003 CLD 239; Mohib Ali v. The State 2004 YLR 1106 and Muhammad alias Jhari v. The State 1986 PCr.LJ 2535 rel.

(d) Appeal---

----Right of appeal cannot be exercised unless granted under a statute---Such is a statutory right which is conferred upon a person through legislation.

Syed Masroor Shah and others v. The State PLD 2005 SC 173 rel.

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

----Ss. 367, 537 & 561-A---Contents of judgment---Finding or sentence when reversible by reason of error or omission in charge or other proceedings---Inherent powers of High Court---Scope---Provisions of S.367, Cr.P.C., are mandatory, non-compliance whereof is an illegality, neither curable under S.537, Cr.P.C. nor rectifiable under S.561-A, Cr.P.C.

Farrukh Sayyar and 2 others v. Chairman, NAB, Islamabad and others 2004 SCMR 1; Shoukat Bus Service, Shahkot v. The State and another 1969 SCMR 325; Bashir Ahmad v. Zafar-ul-Islam and others PLD 2004 SC 298 and Muhammad Ijaz and others v. Muhammad Shafi through LRs. 2016 SCMR 834 rel.

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

----S. 367---Contents of judgment---Scope---Accused, in case of acquittal, earns double presumption of innocence---Judgment of acquittal of an accused, previously accused of commission of some offence, passed while complying with the mandatory provisions of S.367, Cr.P.C, should be deemed as a proof of a clean chit of innocence of that person---Each person has a right to enjoy the life in a dignified manner and free of any stigma---Judgment of acquittal passed in violation of mandatory provisions of S.367, Cr.P.C. may cause prejudice to the exercise of statutory right of acquitted accused, in case of his malicious prosecution, to claim damages.

Sh. Muhammad Raheem and Ch. Saeed Ahmad Farrukh for Appellants.

Muhammad Abdul Wadood, Deputy Prosecutor General for the State.

Ch. Faqir Muhammad for the Complainant.

Date of hearing: 25th September, 2019.

JUDGMENT

ANWAARUL HAQ PANNUN, J.---Through this single judgment, I propose to decide titled Criminal Appeal filed by appellants, namely, Nawab Ali, Shah Muhammad, Mukhtiar Ahmad and Bashir Ahmad as well as Criminal Revision filed by Muhammad Mohsin son of Munir Ahmad, the complainant, seeking enhancement of sentence of the appellants, against judgment dated 12.02.2019, passed, on the conclusion of trial, in case FIR No.311/2017, dated 19.08.2017 for offences under Sections 302, 148 and 149, P.P.C., registered at Police Station Chab Kalan Mian Channun by the learned Additional Sessions Judge, Mian Channun, whereby they have been convicted and sentenced as under:-

1. Nawab Ali

Under Section 302(b), P.P.C.

Imprisonment for life as Ta'zir and compensation of Rs.5,00,000/- payable to the legal heirs of deceased under Section 544-A, Cr.P.C and in case of its non-payment, to further undergo six months' S.I.

2. Shah Muhammad

Under Section 337-A(iii), P.P.C.

Rigorous imprisonment for ten years as Ta'zir and payment of Arsh equal to 10% of Diyat i.e. Rs.1,93,559/- and till its payment, to remain in jail and be dealt with as if sentenced to S.I.

3. Mukhtiar Ahmad

Under Section 337-A(iii), P.P.C.

Rigorous imprisonment for ten years as Ta'zir and payment of Arsh equal to 10% of Diyat i.e. Rs.1,93,559/- and till its payment, to remain in jail and be dealt with as if sentenced to S.I.

4. Bashir Ahmad

Under Section 337-F(ii), P.P.C.

Rigorous imprisonment for three years as Ta'zir and payment of Daman amounting to Rs.50,000/- payable to the legal heirs of deceased and till its payment, to remain in jail and be dealt with as if sentenced to S.I.

The appellants were held entitled to the benefit of Section 382-B, Cr.P.C.

2. The prosecution's story, as unfolded through FIR (Exh.PA/2), registered on the basis of complaint (Exh.PA) lodged by Muhammad Mohsin complainant (PW-1) is to the effect that on 19.08.2017 at about 04:30 p.m., the complainant along with his brother Munawar (deceased) and witnesses were present at their agricultural land to irrigate it, when Nawab Ali, Mukhtar Ahmad, Shah Muhammad, Bashir Ahmad

(appellants) and Khalid (since P.O.), while armed with hatchets, after forming an unlawful assembly, in furtherance of their common object, came there and raised Lalkara for teaching a lesson to Munawar for demanding the water charges, within their view, Mukhtar inflicted hatchet blow, which landed at the nose of Munawar, hatchet blow of Shah Muhammad landed at his left cheek, Bashir Ahmad also inflicted hatchet blow which hit on the inner side of his right arm, hatchet blows of Muhammad Khalid hit his calf and knee; the complainant and the witnesses tried to interfere and rescue Munawar but they could not succeed due to extending life threats of the accused; the complainant attended his brother but he succumbed to the injuries on the way to the hospital.

The motive behind the occurrence is stated to be that one day prior to the occurrence, on demanding tube-well water charges by the deceased, some altercation took place between the deceased and the accused persons.

3. Registration of the case, after its usual investigation, encapsulated into a report under Section 173, Cr.P.C. (hereinafter to be referred as 'the Code'), which was duly submitted before the learned trial court, the appellants, after supplying them with the copies of incriminating material under Section 265(c), Cr.P.C, were charged sheeted to which they denied and pleaded not guilty, while professing their innocence and claiming trial, the prosecution was directed to produce evidence.

4. The prosecution has produced as many as eleven witnesses besides tendering, in evidence, reports of Punjab Forensic Science Agency as Exh.PR and Exh.PS. Medical evidence has been furnished by Dr. Muhammad Usama (PW-8), Medical Officer THQ Hospital, Mian Channun, who observed as many as five injuries on the person of the deceased.

5. Learned trial court, on conclusion of the trial, proceeded to convict the appellants as aforesaid. Hence, the titled appeal as well as the criminal revision.

6. At the very outset, learned Deputy Prosecutor General has pointed out that the learned trial court charge sheeted the accused on 18.01.2018 for offences under Sections 302, 148 and 149, P.P.C. but while passing the impugned judgment, had not expressly recorded any findings in respect of charges under Sections 148 and 149, P.P.C., which is a legal infirmity making the impugned judgment liable to be set aside, therefore, the case may be remanded to the learned trial court for decision afresh.

7. Although, initially the learned counsel for the appellants, controverted the above stance on the ground that the appellants have already endured the agony of protracted trial, therefore, remanding the case to the trial court, for decision afresh, would serve no other purpose but add to their predicament, being behind the bars since long. It was also urged that the legal defect in the impugned judgment can be cured by this Court while exercising its power under Section 537 or 561-A of the Code., however, later on, they have conceded that the impugned judgment does not fulfill the mandatory requirements of provision of Section 367 of the Code owing to omission on the part of the learned trial court to record findings on the charges under Sections 148 and 149, P.P.C.

8. Arguments heard. Record perused.

9. Before undertaking judicial scrutiny of the matter and analyzing the rival contentions in the light of law, I feel it appropriate, at the inception, to refer to certain relevant provisions of law in verbatim.

"Charge". "Charge includes any head of charge when the charge contains more heads than one."

10. Section 221 of Chapter XIX of the Code deals with the framing of charge against the accused who had committed an offence which reads as follows:-

221. Charge to state offence.---(1) Every charge under this Code shall state the offence with which the accused is charged.

(2) Specific name of offence; sufficient description. If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only.

(3) How stated where offence has no specific name. If the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.

(4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.

(5) What implied In charge. The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.

(6) Language of charge. The charge shall be written either in English or in the language of the Court.

(7) Previous conviction when to be set out. If the accused having been previously convicted of any offence, is liable by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence, the fact, date and place of the previous

conviction shall be stated in the charge. If such statement has been omitted, the Court may add it any time before sentence is passed.

11. The Hon'ble Supreme Court of Pakistan in Criminal Original Petition No.06 of 2012 in Suo-Motu Case No.04 of 2010, decided on 26th April, 2012 reported as PLD 2012 Supreme Court 553, has held as under:-

"It is pertinent to mention here that Section 221, Cr.P.C. dealing with Charge and its forms clarifies that a Charge is to state the offence and if the offence with which an accused is charged is given a specific name by the relevant law then the offence may be described in the Charge "by that name only". According to Section 221, Cr.P.C. "If the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged". It is further provided in Section 221, Cr.P.C. that "The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge". In the case in hand not only the name of the offence, i.e. contempt of court had been specified in the Charge framed against the accused but even the relevant Constitutional and legal provisions defining contempt of court had been mentioned in the Charge framed. According to Section 221(5), Cr.P.C. the fact that the Charge is made in the terms noted above "is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case".

12. Chapter XXVI of the Code provides certain parameters for delivering a judgment either by the lower or by the superior Courts. The word 'judgment' has not been defined in the Code or in Pakistan Penal Code, 1860. However, in legal parlance, it means judicial determination/ decision of a Court seized of the matter.

According to Black's Law Dictionary:--

"the mental faculty that causes one to do or say certain things at certain time, such as exercising one's own discretion or advising other; the mental facility of decision- making."

"a Court's final determination of rights and obligations of the parties in a case."

According to Cambridge English Dictionary:-

"a decision or opinion about someone or something that you form after thinking carefully; an official legal decision; a decision that you make, or an opinion that you have, after considering all the facts in a situation:

According to the Law Dictionary:-

"The official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination.

The sentence of the law pronounced by the court upon the matter appearing from the previous proceedings in the suit. It is the conclusion that naturally follows from the premises of law and fact.

The determination or sentence of the law, pronounced by a competent judge or court, as the result of an action or proceeding instituted in such court, affirming that, upon the matters submitted for its decision, a legal duty or liability does or does not exist."

13. Section 367 of the Code enumerates the detail of requisite contents, which are considered mandatory for delivering a speaking judgment. For convenience of reference, the said section is reproduced hereunder:-

"367. Language of judgment Contents of judgment.---(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the Court or from the dictation of such presiding officer in the language of the Court, or in English; and shall contain the point or points, for determination, the decision, thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open Court at the time of pronouncing it and where it is not written by the presiding officer with his own hand, every page of such judgment shall be signed by him.

(2) It shall specify the offence (if any) of which, and the section of the Pakistan Penal Code (XLV of 1860) or other law under which, the accused is convicted, and the punishment to which he is sentenced.

(3) Judgment in alternative. When the conviction is under the Pakistan Penal Code (XLV of 1860) and it is doubtful under which of two sections, or under which of two parts of the same section, of that Code the offence falls, the Court shall distinctly express the same, and pass judgment in the alternative.

(4) If it be a judgment of acquittal, it shall state the offence of which the accused is acquitted and direct that he be set at liberty.

(5) If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed.

(6) For the purposes of this section, an order under section 118 or section 123, subsection (3), shall be deemed to be a judgment."

14. The above-quoted provisions of law clearly envisage that the Court while delivering its verdict, commonly known in the legal parlance as

'judgment', shall specifically express the offence and the section of the Penal law, under which the accused is convicted and sentenced. Even in case of acquittal, the judgment shall state the offence of which the accused is acquitted of and a direction should be issued that the accused be set at liberty if under custody and not required in any other case and in case of being on bail, his bail bonds shall be ordered to be discharged forthwith.

In "Messrs Union Bank Limited v. Messrs Silver Oil Mills Limited and others" (2003 CLD 239), Supreme Court of Pakistan has observed as under:

"A judgment must fulfil the following three conditions:-

(a) It should terminate proceedings in the High Court.

(b) It should determine the rights and liabilities of the parties.

(c) The determination of the rights and liabilities as envisaged in (b) above should be on merits and should further be final and conclusive so as to cover the entire range of substantive rights and liabilities which formed the subject-matter of real controversy in the suit proceedings which initially gave rise to the dispute.

In "Mohib Ali v. The State" (2004 YLR 1106), it has been held as under:-

The word "judgment" has also come into consideration before the different Courts and it has been held that the word "Judgment" means a decision in a trial which decides a case finally, so far as the Courts trying the case is concerned and terminating in either conviction or acquittal of the accused."

The Hon'ble Supreme Court of Pakistan in case reported as Muhammad alias Jhari v. The State (1986 PCr.LJ 2535), while dealing with the issue under discussion, has observed as under:-

"----This subsection requires, on a plain reading thereof, that the judgment must contain the points for the decision. The object of this provision is that the trial Court should consider the case before it in all its bearings and after such consideration arrive at a clear-cut conclusion on the basis of the evidence produced by the prosecution. The perusal of the impugned judgment would show that the learned Assistant Sessions Judge, Gambat has ignored the mandatory provisions of section 367(1), Cr.P.C. The judgment did not show as to what were the points for determination nor that any decision was given by the learned trial Court on the said points. After giving the prosecution story and the defence version the learned Assistant Sessions Judge has gone on reproducing the evidence of all the witnesses in an unnecessary details and at certain places in the first form. The judgment is no doubt very lengthy and runs in as many as 35 typed pages and learned Assistant Sessions Judge must have worked hard on writing the same, but from its perusal it is quite clear that he has neither brought out the points for determination which were the necessary ingredients which the prosecution ought to have proved nor expressed his clear-cut decisions on those points."

15. After above discussion, now the stage has been set to examine the contentions of learned counsel for the parties already recorded in preceding paragraphs. It will be appropriate to examine the relevant provisions of law and the case-law wherein those provisions have been expounded and interpreted. Section 537 of the Code deals with the irregularities, omissions and errors which are curable by this Court, which is reproduced as under:-

"537. Finding or sentence when reversible by reason of error or omission in charge or other proceedings. Subject to the provisions

hereinbefore contained, no finding, sentence order passed by a court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account--

(a) of any error, omission or irregularity in the complaint, report by police-officer under section 173, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or

(b) of any error, omission or irregularity in the mode of trial, including any misjoinder of charges unless such error omission or irregularity has in fact occasioned a failure of justice."

In Farrukh Sayyar and 2 others v. Chairman, NAB, Islamabad and others (2004 SCMR 1), the august Supreme Court of Pakistan, while expounding the provisions of Sections 367 and 537 of the Code, has held as under

" ..It is a mandatory requirement of section 367, Cr.P.C. that a Court while writing a judgment shall refer to the point or points for determination, record decision thereon and also give reasons for the decision. The Court shall also specify the offence of which, and the section of the Pakistan Penal Code or other law under which, the accused is convicted and the punishment to which he is sentenced. In the present case the learned trial Court overlooked the mandatory provisions of section 367, Cr.P.C. and rendered a judgment which falls short of the requisite standard. Failure to specify the points for determination as required under section 367, Cr.P.C. is an omission which is not curable under section 537, Cr.P.C. and absence of decision on the points for determination and" reasons in the judgment amounts to an illegality which prejudices the case of the accused .."

16. The High Court has inherent powers Under section 561-A of the Code, which is reproduced as under:-

"561-A. Saving of inherent power of High Court. Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code; or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

The Hon'ble Supreme Court of Pakistan in case reported as Shoukat Bus Service, Shahkot v. The State and another (1969 SCMR 325), has laid the principle as under:-

"----It is no doubt, true that where express provision is made in the Code itself for a particular purpose, recourse cannot be had to the inherent jurisdiction to achieve the same purpose, but at the same time, it has to be pointed out that the inherent power of the High Court is of a very wide and indefinable nature and in exercise of this power the High Court can make all such orders which may be necessary to do real and substantial justice and prevent abuse of the process of the Court, subject only to the limitation that it cannot override an express provision of code."

Moreover, in case reported as Bashir Ahmad v. Zafar-ul-Islam and others (PLD 2004 SC 298), it has been held as under:-

22. Using the powers under section 561-A, Cr.P.C. to determine the fate of a criminal case is thus a serious departure from the normal course and needless to say that any deviation from the normal path is always pregnant with risk of being led astray. Such a deviation can, therefore, never be ordinarily advisable. Extraordinary circumstances must always be shown to exist before a choice could be made to abandon the regular course and instead to follow an

exceptional route. Mere claim of innocence by an accused person could never be considered sufficient to justify such a departure because if this was so permitted then every accused person would opt to stifle the prosecution and to have his guilt or innocence determined under section 561-A of the Cr.P.C. The result would be decision of criminal trials in a summary and a cursory manner rendering the trials as a superfluous activity and the trial Courts as a surplusage. This never was and could never have been the intention of the law maker in adding section 561-A to the Code. Reference may be made to Sheikh Mahmood Saeed and others v. Amir Nawaz Khan and another (1996 SCMR 839), Malik Salman Khalid v. Shabbir Ahmad, D&SJ, Karachi and another (1993 SCMR 1973) and Mst. Sarwar Jan v. Ayub and Gulab (1995 SCMR 1679).

23. The correct import of the provisions of section 561-A, Cr.P.C, may be summarized as under:

(i) The said provision should never be understood to provide an additional or an alternate remedy nor could the same be used to override the express provisions of law;

(ii) the said powers can ordinarily be exercised only where no provision exists in the Code to cater for a situation or where the Code offers no remedy for the redress of a grievance;

(iii) Inherent powers can be invoked to make a departure from the normal course prescribed by law only and only in exceptional cases of extraordinary nature and reasons must be offered to justify such a deviation; and

(iv) In the matter of quashing criminal proceedings, the trial must ordinarily be permitted to take its regular course envisaged by law

and the provisions of section 561-A, Cr.P.C. should be invoked only in exceptional cases for reasons to be recorded."

17. It is well established principle of law that right of appeal cannot be exercised unless granted under a Statute. It is, as such, a statutory right which is conferred upon a person through legislation. Reliance in this regard can be placed to the case reported as Syed Masroor Shah and others v. The State (PLD 2005 SC 173) wherein it has been held as under:-

"----It is well-entrenched legal proposition "that right of appeal is a creature of statute. An appeal is competent only if the relevant statute so provides and not otherwise."

Chapter XXXI of the Code deals with appeal, reference and revision. Section 404 of the Code provides as under:-

"No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or any other law for the time being in force."

In case an accused is acquitted of all charges or partially of any of the offences, a statutory right accrues in favour of a person aggrieved of such order to challenge the same before the forum prescribed, by way of filing an appeal against acquittal under the provisions of Section 417 of the Code or the relevant provision of any Special Law. For convenience of reference, the said Section is reproduced below:--

"417. Appeal in case of acquittal. (1) Subject to the provision of subsection (4), the Provincial Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court.

(2) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf grants special leave to appeal from the order of acquittal the complainant may present such an appeal to the High Court.

(2-A) A person aggrieved by the order of acquittal passed by any Court other than a High Court, may, within thirty days, file an appeal against such order.

(3) No application under subsection (2) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of sixty days from the date of that order.

(4) If in any case, the application under subsection (2) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under subsection (1)."

Perusal of afore-quoted provisions of law show that under Section 417(2) of the Code, in case of order/judgment of acquittal passed by any court other than the High Court, an appeal lies before the High Court within 30-days. However, if the order of acquittal is passed, in any case, instituted upon a complaint and the High Court, on an application made to it by the complainant, grants Special Leave to Appeal against the order/judgment of acquittal, only then the complainant may file such appeal in the High Court. Under subsection (3) to Section 417, Cr.P.C., limitation period for moving an application for grant of Special Leave to Appeal is 60-days from the date of order of acquittal. As reproduced above, the right of appeal against acquittal is subject to limitation contained in subsection 417(2-A) i.e. thirty days and is not governed by the provision of Limitation Act, 1908 like appeal against conviction Section 155 whereof provides 30-days' time in filing the appeal against conviction before the higher forum as the provision of Section 5 of the

Limitation Act, 1908, in view of section 29 of the Act ibid has not been made applicable.

As a sequel of above discussion, it may be inferred with certainty that the judgment must terminate the proceedings, determine the rights and liabilities of the parties, with clarity finally. There exists a legislative wisdom behind declaring the provision of Section 367 of the Code as mandatory non-compliance whereof is an illegality, neither curable under Section 537 of the Code nor rectifiable under Section 561-A of the Code. Its non-compliance can ensue into number of consequences causing prejudice to the rights of the parties directly involved in the criminal case as well as those indirectly linked with it. While interpreting an ancient adage, encapsulated into a legal maxim 'Actus Curiare Neminem Gravabit' the Hon'ble Supreme Court, in the case reported as Muhammad Ijaz and others v. Muhammad Shafi through LRs. (2016 SCMR 834), has held as under:-

> "There is a well-known maxim "Actus Curiae Neminem Gravabit" (an act of the court shall prejudice no man), thus, where any court is found to have not complied with the mandatory provision of law or omitted to pass an order, required by law in the prescribed manner, then, the litigants/parties cannot be taxed, much less penalized for the act or omission of the court. The fault in such cases does lie with the court and not with the litigants and no litigant should suffer on that account unless he/they are contumaciously negligent and have deliberately not complied with a mandatory provision of law."

Mere conceiving the acquittal on the basis of implications, can give rise to cause prejudice to an aggrieved person, in the light of as discussed above, in filing the appeal against judgment of acquittal. It may further be observed that the rights of a public or civil servant accused can be

prejudiced by way of non-compliance of the mandatory provision of Section 367 of the Code. It may not be out of context to hold that in case an accused is acquitted of the charge being on bail, bail bonds executed by his surety cannot be deemed of having been discharged from his liability in absence of acquittal in express and clear terms and that too, in the light of Section 367 of the Code. The accused, in case of acquittal of a charge, earns a double presumption of innocence. The judgment of acquittal of an accused, previously accused of commission of some offence, passed while complying with the mandatory provision of Section 367 of the Code, should be deemed as a proof of a clean chit of innocence of that person. There is also hardly any cavil with the proposition that each person has right to enjoy the life in a dignified manner and free of any stigma. It is further observed that a judgment of acquittal passed in violation of mandatory provision of Section 367 of the Code may cause prejudice to the exercise of statutory right of acquitted accused, in case of his malicious prosecution to claim damages.

18. Now coming to the merits of the instant case. Needless to say that the appellants were distinctly and separately charged under Sections 148 and 149, P.P.C. for 'rioting', carrying the penalty of imprisonment up to three years or with fine or with both but, contrary to the express mandatory provision of Section 367 of the Code, the learned trial court failed to even advert to this charge, what to speak of recording either acquittal or conviction of the appellants under Sections 148 and 149, P.P.C., thus creating scope for remanding the case for decision afresh after hearing learned counsel for the parties.

19. Consequently, the instant appeal is accepted, the impugned judgment dated 12.02.2019, as well as conviction and sentences awarded to the appellants are set aside and the case is remanded to the learned Sessions Judge, Khanewal, for the reasons recorded above, with consent

of learned counsel for the parties for decision afresh regarding guilt or innocence of the appellants regarding Sections 148 and 149, P.P.C., after providing opportunity of hearing to both the parties. It is, however, made clear that till the decision of the matter, the trial of the case in hand shall be deemed pending before the learned trial court and during this period, the appellants will be treated as under trial prisoners. Office is directed to send record of the case along with a copy of this judgment, forthwith, to the learned Sessions Judge, Khanewal, for the needful within a period of one month after first hearing and if need be, to conduct proceedings day-to-day basis.

20. Criminal Revision No.94 of 2019 filed by complainant Muhammad Mohsin seeking enhancement of conviction and sentence of the appellants, has become infructuous, therefore, the same stands dismissed.

21. Before parting with the judgment, I am constrained to observe that parties, in this case, have endured the rigors of trial. The learned trial court also consumed time while conducting trial and recording the detailed judgment. Having been passed, in violation of a mandatory provision of law, the impugned judgment has failed to withstand the test of legality necessitating setting aside it and remanding the same, as observed hereinabove only because of an act of court. The public time has been consumed in hearing and deciding the matter, which was at the cost of other litigants, therefore, I deem it appropriate to direct the learned trial courts to exercise extra care, caution and take cognizance of all relevant facts and legal provisions applicable to the case while deciding a case, especially involving conviction or acquittal of the accused persons.

SA/M-22/L **Case remanded.**

P L D 2020 Lahore 788

Before Anwaarul Haq Pannun, J

GHULAM MURTAZA---Petitioner

Versus

The STATE and others---Respondents

Criminal Miscellaneous No. 6039-B and C.M. No. 1305 of 2019, decided on 5th November, 2019.

Criminal Procedure Code (V of 1898)---

----Ss. 496, 497 & 344---Penal Code (XLV of 1860), Ss. 337-A(i) & 337-F(i)---Prison Rules, 1978, R.1242, Register No.1---Shajjah-i-Khaffifa and Ghayr-Jaifah Damiyah---Bail, grant of---Bailable offence---Earlier bail order---Jail record---Omission of offences---Accused was earlier granted bail in main offence of Qatl-i-Amd etc. but due to offences under Ss. 337-A(i) & 337-F(i), P.P.C. mentioned in jail record, accused was not released---Validity---Serial number of the FIR along with other particulars of the accused and the "offence or offences" all are equally relevant---In order to enjoy concession of bail by way of his release in a particular case, accused had to seek his bail in 'each and every offence' for which he was charged with, either at the inception of registration of FIR or as a result of any subsequent addition thereof during the course of investigation or by way of framing of charge by Court---High Court directed all subordinate Courts to send copy of remand paper, its order thereon along with judicial warrant to concerned jail for admission of accused to prison.

Following directions were issued by High Court:-

1. That all the Subordinate Courts while granting judicial remand under section 344, Cr.P.C. shall also send a copy of remand paper, its order thereon along with the judicial warrant to the concerned jail for admission of the accused to prison.

2. That the jail authorities at the time of admission of the accused to prison, shall enter accurately while tallying the particulars of the accused with those mentioned in the remand paper and judicial warrant, in the relevant register maintained by it under the Jail Manual/Rules.

3. The jail authorities before attestation of thumb impressions or the signatures of the accused/prisoners, shall ensure that the particulars of prisoner given in the power of attorney/wakalatnama are in conformity with the particulars mentioned in the jail record and if any deficiency is found, the same shall be rectified accordingly.

4. The Prosecutors under the provisions of Code of Criminal Procedure, 1898 and the Punjab Criminal Prosecution Service Act, 2006, are responsible for conducting prosecution of the accused and during discharge of this duty, they are privileged with the authority to examine the record of the case, therefore, all the learned Prosecutors are bound to bring any deficiency/ omission regarding addition or deletion of offence etc., if any, in notice of the Court, so that such deficiency/omission in particulars of the accused may be made up at that stage.

5. The Court of first instance at the time of decision of bail application shall objectively peruse the record of the case and if any deficiency/omission in the particulars of the accused on the memo of bail petition is found while taking judicial notice or on its pointing out by the Prosecutor, the requisite observation shall be made in writing in its order by the Court specifically, so that the release robkar may be issued with exact particulars of the accused.

6. The bail petitions, in case of post arrest bail application, shall preferably be drafted by the Advocates with the particulars of the accused given in the remand order instead of the FIR.

7. All the police officials before issuing a certified copy of FIR shall ensure that the exact particulars of the accused including addition or omission, if any of the offence made so far has been reflected in it.

8. Office of High Court was directed to transmit copy of this order to the Registrar of this Court, who shall circulate the same to all the Sessions Divisions for its onward transmission to the courts concerned, I.G. Punjab (Police), I.G. Prisons/jail authorities and Prosecutor General (Punjab) for their guidance and issuance of instructions for compliance. Ch. Muhammad Imran and Khawaja Qaiser Butt for Petitioner.

M. Abdul Wadood, D.P.G. with Mohsin Rafique Ch., Deputy Inspector General (Prison), Multan, Arshad Ali Superintendent, District Jail, Multan.

ORDER

C.M. No.1305 of 2019.

ANWAARUL HAQ PANNUN, J.---By means of instant criminal miscellaneous application, the applicant has sought the relief of grant of bail, in offences under sections 337-A(i) and 337-F(i), P.P.C., besides addition thereof in earlier post arrest bail granting order dated 24.10.2019, passed in Crl. Misc. No.6039-B of 2019 (Ghulam Murtaza v. State etc.) in case FIR No. 323, dated 10.7.2019, offence under sections 302, 324, 109, 34, P.P.C., at Police Station Saddar Chichawatni, District Sahiwal. The instant application has been allowed through the short order dated 05.11.2019 with the observations that

"Since the petitioner has already been granted bail in the principal offence i.e. 302, 324, 109 and 34, P.P.C. and the aforesaid offences are bailable in nature, therefore, the application is allowed through this short order and offences 337-A(i) and 337-F(i), P.P.C. stand added in the bail granting order dated 24.10.2019. This order shall be read as part and parcel of the bail granting order.

It has been noticed that on account of identical omissions, which are ministerial in nature, the accused have to face many hardships,

therefore, in order to devise remedial measures in such like matters, detailed reasons with appropriate directions to the concerned quarters shall follow, later on."

2. Precisely the factual background of instant Criminal Miscellaneous Application is that as a result of registration of afore referred criminal case with the allegations that while armed with fire-arm weapons in furtherance of their common intention, the applicant along with his co-accused had committed murder of one Muhammad Hasnain, i.e. the son of the complainant besides causing injuries to Niaz Ahmad and Fakhar Iqbal PWs.

3. Perusal of record reveals that both the above named injured persons were medically examined under the supervision of police. The copies of MLCs appended with this petition show that at the time of their issuance by the initial Medical Officer, the injuries, which he observed on the bodies of examinees, were kept under observation and the nature thereof was declared later-on as "Shajjah-i-Khafifah" and "Ghayr-Jaifah Damiyah" falling within the mischief of Sections 337-A(i) and 337-F(i), P.P.C. respectively. On account of this reason, it appears that these offences/sections could not have been inserted in the FIR at the time of its chalking out. These offences/sections have not even been added/ reflected in the certified copy of FIR annexed with the petition. It may also be relevant to observe that the learned defence counsel even did not mention these sections/offences on the memo of bail petition moved either to the learned trial Court or before this Court. The lower Court, while deciding the bail application has also failed to mention about the addition of these offences in its bail dismissing order. The jail authorities also did not bother to rectify the omission of non-mentioning of these sections in the Wakalatnama, while comparing the particulars of the accused, with their own record, when it was presented for attestation. At the time of hearing of bail application before this Court, even none of the sides pointed out the above noted deficiency/omission. However, this Court after perusing

the record, while passing the bail granting order, observed that "no injury towards the deceased is attributed to the petitioner during the course of commission of crime, however, only injury attributed to him is on the person of injured PW Niaz Ahmad, comes within the mischief of section 337F(i), P.P.C., which is bailable." Despite submission of bail bonds in terms of the bail granting order dated 24.10.2019 and issuance of release robkar, the jail authorities had refused to release the accused/petitioner from jail only on the ground that since the offences under Sections 337-A(i) and 337-F(i), P.P.C. have not been mentioned in the relevant papers/release robkar and available record with the jail authorities. Hence, this petition.

4. While relying upon case law titled "Mst. Shahida Parveen v. The State and another"(1995 MLD 1082)" and "Abdul Shakoor v. The State" (2004 PCr.LJ 399), the learned counsel for the petitioner submits that the bail is always granted to an accused, after considering the facts of a particular case/FIR in its totality, therefore, after acceptance of bail bonds in terms of bail granting order, which is followed by the issuance of release robkar of the accused, the jail authorities cannot refuse to release the accused from the jail either on the ground that some particular sections or the offences have not been mentioned in the release robkar or they do not tally with the record of the accused maintained by the jail authorities.

5. On the other hand, learned Deputy Prosecutor General relying upon case law titled "Waqar Ahmad and another v. Chairman, National Accountability Bureau, Islamabad and another" (P L D 2015 Sindh 295) and an unreported judgment dated 15.07.2019 passed by the Islamabad High Court, Islamabad in Crl. Misc. No.461-M/2019 (Talat Hussain v. Aqib Mehmood and another) while opposing the above noted contentions of the petitioner's counsel has submitted that the bail is always granted in the offence either mentioned in the FIR or the offences which are added during the investigation showing the charge against the accused,

therefore, the mentioning of offences besides the number of FIR is important in bail granting order. He, however, offered his no objection to the acceptance of instant application.

6. After hearing all concerned and perusing the record, it is felt appropriate to refer the relevant provisions of law hereunder for the decision of the issue seeking its resolution:-

According to Section 4 (b) of the Code of Criminal Procedure Code, 1898 "Bailable Offence" means an offence shown as bailable in the second schedule, or which is made bailable by any other law for the time being in force; and "non-bailable offence" means any other offence;

Section 4 (o) of the Code of Criminal Procedure Code, 1898 "Offence". "Offence" means any act or omission made punishable by any law for the time being in force, it also includes any act in respect of which a complaint may be made under section 20 of the Cattle Trespass Act, 1871.

Section 28 of the Code of Criminal Procedure Code, 1898

Offence under Penal Code. Subject to the other provisions of this Code any offence under the Pakistan Penal Code may be tried:

(a) by the High Court; or

(b) by the Courts of Sessions; or

(c) by any other Court by which such offence is shown in the eighth column of the second schedule to be triable.

This schedule besides above also depicts in its column No.1, "the Section", No.2, "the offences", No.3 "Whether the police may arrest without warrant or not", No.4 "Whether a warrant or a summons shall be issued", No.5 "Whether a particular offence is bailable or not", No.6 "Whether compoundable or not", No.7 "Punishment under the Pakistan Penal Code". For further clarification, the synopsis of the Schedule-II is reproduced hereunder:-

1	2	3	4	5	6	7	8
Section	Offence	Whether the police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not	Whether compoundable or not	Punishment under the Pakistan Penal Code	By what Court triable

7. It is also felt necessitated, to have a glance over the provisions contained in Chapter XXXIX from Sections 496 to 502, Cr.P.C. with title of BAIL. There can be no denial to the legal proposition that every section has got its own importance. In order to seek clarity about the meaning and object of a certain provisions, it is always necessary to read such Section with reference to its subsequent Section(s) because the latter Sections always explain the limitation of the former. Sections 496, 497 and 498-A, Cr.P.C in verbatim are reproduced hereunder:--

Section 496, Cr.P.C, in what cases bail to be taken.

When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer incharge of a police-station or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any

stage of the proceedings before such Court to give bail, such person shall be released on bail: Provided that such officer of Court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provide:

Section 497 Cr.P.C, When bail may be taken in cases of non-bailable offence."

(1) When any person accused of non-bailable offence is arrested or detained without warrant by an officer-in-charge of a police station, or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or [imprisonment for life or imprisonment for ten years].

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are no reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, pending such inquiry, be released on bail, or, at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) An officer or a Court releasing any person on bail under sub-section (1) or subsection (2) shall record in writing his or its reasons for so doing.

(4) If, at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release

the accused, if he is in custody on the execution by him of a bond without sureties for his appearance to hear judgment delivered.

(5) A High Court or Court of Session and, in the case of a person released by itself, any other Court may cause any person who has been released under this section to be arrested and may commit him to custody.

[498-A Cr.P.C (No bail to be granted to a person not in custody, in Court or against whom no case is registered etc.) Nothing in section 497 or section 498 shall be deemed to require or authorize a Court to release on bail, or to direct to be admitted to bail any person who is not in custody or is not present in Court or against whom no case stands registered for the time being and an order for the release of a person on bail, or direction that a person be admitted to bail shall be effective only in respect of the case that so stands registered against him and is specified in the order or direction.]

8. The integrated reading of the above provisions leaves no room in drawing a conclusion that apart-from other particulars of the case relating to the FIR and the accused, the offence with which he is charged, is more significant and vital for the release of an accused on bail. According to Section 496, Cr.P.C, any person other than a person accused of non-bailable offence, if arrested or detained without warrant by an officer incharge of the police station or appears or is brought before the Court and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such Court to give bail, such person shall be released on bail. In addition to above, such officer or Court, if he or it thinks fit instead of taking bail from such person, may discharge him on his executing a bond without sureties for his appearance. However, in case of showing of his willingness by the accused for submission of bail bonds, to the satisfaction of the officer incharge of the Police Station or

the Court before which he has been produced, there remains no option with such officer or the Court, as the case may be, except to release him while accepting his bail bonds. On the other hand, if a person accused of a non-bailable offence is arrested or detained, he can only seek relief of his release on bail, on the grounds which have duly been mentioned in Section 497 Cr.P.C. The court, subject to procedure prescribed, can exercise its power for the release of the accused, who has been arrested or detained for committing a non-bailable offence on any of the grounds mentioned in the provision itself. The superior Courts from time to time through their authoritative pronouncement keep on laying down principles for regulating the exercise of discretion and power by the subordinate courts for the grant of bail to an accused. Through the above provisions, the legislature quite distinctly and wisely has demarcated the difference between the procedure and power of the Courts which they exercise for the release of the accused involved in bailable or non-bailable offences. As a result of above discussion, it is concluded that the serial number of the FIR alongwith other particulars of the accused and "the offence or offences", all are equally relevant. In order to enjoy the concession of bail by way of his release in a particular "case", the accused has to seek his bail in "each and every offence" for which he has been charged with, either at the inception of the registration of the FIR or as a result of any subsequent addition thereof during the course of investigation or by way of framing of charge by a Court. The argument of learned counsel for the petitioner in the light of above discussion is, therefore, repelled whereas the argument of learned Prosecutor shall hold the field similarly the law laid down in the judgment cited by him and referred above is correct exposition of law.

9. The relief prayed for through this miscellaneous petition although has already been granted to the petitioner through a short order, however, considering the consequential effects and hardships of such minor omissions of identical nature, in response to the notice issued by this

Court, D.I.G Prisons, Multan Region, Multan and District and Sessions Judge/Senior Additional Registrar of this Court submitted their respective reports, which have been made part of the record. Let me say without qualm of any reservation that having been more than a quarter of century at the Bar, and now at the Bench, it has been observed that due to non-addressing of such minor issues of identical nature/ highlighted above entail into hardships, unnecessary monetary loss of litigants besides being a continuous source of increase in the quantum of litigation consuming the court's precious time at the cost of public expense, which can objectively be utilized for the decision of other substantive public litigation, requiring urgent disposal. According to the proforma attached with the report of D.I.G Prisons, Multan Region Multan, bearing Memo No.Legal/2019/20504 dated 05.11.2019, 316 cases causing delay in release of an accused from jail have occurred only within the Multan Region w.e.f. 01.01.2019 to 02.11.2019 i.e. within 10 months. This situation is sufficient for eye opening and requiring immediate resolution of the issue. Earlier a Standard Operating Procedure vide letter No.21/LHC dated 25.04.2012 for communication of release orders/robkars to prisons, hereinafter to be referred as Standard Operating Procedure under the above subject was issued and had duly been communicated by the Registrar of this Court to all the District and Sessions Judges, all the District and Sessions Judges on ex-cadre, Inspector General Police (Punjab) and the Home Secretary Government of the (Punjab) Lahore. Being relevant it is reproduced as under:-

1. Every Judge of District Judiciary dealing with criminal work shall prepare a "Register of Release Robkars" in addition to register of bail applications and register of bail bonds. Such register will remain in personal custody of respective Judicial Officer and will contain following particulars, date wise:

a. Serial number.

b. Name and parentage of accused to be released.

c. FIR number

d. Offences

e. Date of order/judgment (bail, acquittal etc.).

2. Every robkar shall contain serial number of bail application register, bail bond register and release robkar register, as well. A standard stamp shall be prepared on the next date of hearing used for endorsing all the three members at one place.

3. After issuing last robkar in a day, Judicial Officer will close entries for the day with his signatures, like bank books. Such register should be inspected by Sessions Judge making periodical surprise inspections, and should be consigned to record on relinquishment of charge by the Judge on his transfer, and a new register to be opened up by his successor.

4. Superintendent Sessions Court will prepare a register of robkars for Courts at headquarters, and a similar register will be prepared by Stenographer/ Reader of ASJ-I or if no ASJ there, by Stenographer/Reader of Senior most Civil Judge of Sub-Division, to enter all robkars received from respective Courts.

5. At District Headquarters, all release robkars will be forwarded by Presiding Officers, in a sealed envelope, to Superintendent of Sessions Court, duly acknowledged by him in the Court register. The Superintendent will examine the contents and signatures of Presiding Officers, put his signatures on Robkar, after verification, enter in his register of Robkar as well record his register number below the serial numbers recorded by the Presiding Officer.

6. At Sub-Divisions, all release robkars will be forwarded in sealed envelops by Judicial Officers to the Court of Additional Sessions Judge-I and in case there is no Additional Sessions Judge at the

sub-division, to the Court of Senior most Judicial Officers Stenographer/Reader of the Court receiving such Robkars would acknowledge receipt in Robkar Register of the forwarding Court, as well as enter all Robkars in the register of such Court and following the exercise prescribed for the Headquarters, would record serial number of his register on the Robkar as well, and shall forward in sealed cover expeditiously to the Prison directly through duly designated official.

7. Every Sessions Judge would prepare a list of one or more Court officials from Headquarter as well from each sub-division of the District separately, designated to receive sealed packets of release issued special identity cards carrying their photographs attested by Sessions Judge. List of such officials would be provided to the Superintendent of respective prison along with specimen signatures, NIC number and cell number of those officials which will be kept in safe record at the prison. Any change in the list would be duly notified to the prison. Only such notified officials would receive sealed packets of robkars from the Headquarter as well from sub-division and they will deliver to the prison expeditiously. Time of delivery of packets would be recorded at both ends to ascertain any undue delay in transmission of robkars.

8. Whenever an under-custody accused is acquitted by a trial Court in the District Judiciary, in addition to endorsement on the remand orders, a separate short order of acquittal would also be prepared and signed by the Presiding Officer, and forwarded to the Prison in sealed cover through usual mode, prescribed for release robkars.

9. On receipt of the sealed robkars and memorandum, the Superintendent of prisons would act in accordance with relevant laws and the Prisons Rules for verification and compliance.

10. Whenever an order/judgment of release/acquittal is received in the office of District and Sessions Judge from the High Court, the Superintendent of Sessions Court, or any other official of his establishment duly designated by the Sessions Judge, would get it confirmed telephonically from the Formal Order Writer (FOW) of Lahore High Court who would confirm the same with help of the register of issuance of dockets.

11. The Deputy Registrars (Judicial) at Lahore High Court as well as at all the Benches would be responsible for integrity, and correctness of all entries in the registers of issuance of dockets and the Additional Registrar (Judicial) would be competent to make standing instructions for the process of movement of judicial files, preparation and communication of certified copies of executable orders/judgments, with approval of the Registrar.

(JAVAID RASHID MAHBOOBI)

DISTRICT AND SESSIONS JUDGE/

(INQ.,RESEARCH AND DEVELOPMENT)

10. The prison department in pursuance of aforesaid SOPs has also framed its own SOPs in Urdu language, which at present are being followed. Whenever, according to the report, any under-trial accused is remanded to jail in pursuance of an order passed under Section 344 Cr.P.C by learned Courts, the accused is only accompanied by a judicial warrant/robkar for his admission to prison. The copy of request of police for extension of physical remand or judicial remand/remand paper along with order of the court remanding the accused to judicial custody is not sent to the prison, which for all practical purposes contain the details of the offences, the accused is charged with at the time of his admission to jail. Although the instruction mentioned at serial No. 8 of the aforesaid SOPs reproduced hereinabove, sufficiently and effectively caters for the purpose for release of an accused on his acquittal from the prison but it

does not serve the purpose for release of the accused on bail, pending trial.

11. It will be important to point out that on admission to jail, the particulars of under-trial prisoner/accused comprising of his name, complete address, FIR number and the offences etc. in which the accused is required to be detained in jail are recorded in Register No.1, which is maintained in terms of Rule 1242 of Prisons Rules, 1978. For ready reference, the synopsis of Register No.1 showing various columns for making relevant entries of particulars of the under-trial prisoner is reproduced as under:-

REGISTER NO.1

Date of Admission	Admission No.	Name and Parents	Residence Village, Police Station, District	Sex Religion Caste Occupation

Thumb impression	Name of committing court	Date of commitment warrant and section	Date of production in court	Prisoners property	
				With prisoner	In store

OF UNDER TRIAL PRISONERS

Personal description and	Inquiries if any on	INITIALS	Disposal	Initial	Remarks

identification mark	admission								
		Asst. Supdt.	Dy. Supdt.	Supdt.	Authority if convicted admission No. in register No. 2	Asst. Supdt.	Dy. Supdt.	Supdt.	

Hence, if, the copy of remand paper and order of Court committing the accused to jail along with the robkar are accompanied by the accused, the jail authorities while comparing both the documents with each-other, may be in a better position to make correct entries regarding the particulars of the accused and in this way, the chances of such omissions shall be minimized.

12. The above discussion leads to conclusion that after grant of post arrest bail to an accused, submission of requisite bail bonds and issuance of release robkar by Courts, the delay in release of under-trial prisoner from the jail, sometimes, is mainly caused because of mistake/omission of ministerial nature, non-provision of correct particulars of the accused i.e. FIR number and the offences being inconformity with the relevant record maintained by the jail authority because the said entries in jail record are based on the particulars of the accused, given in the judicial warrant/ robkar accompanied by the accused at the time of his/their admission to prison/jail, therefore, to avoid the pointed out ensuing hardships, it may be appropriate that the Courts while remanding the accused to prison

should also send a copy of remand paper along with judicial warrant/robkar to the concerned jail. The jail authority at the time of admission of accused/under-trial prisoner should make a comparison of the particulars mentioned in the remand paper with the judicial warrant, so that the chances of any discrepancy in recording the particulars of the accused in the relevant record may be reduced/minimized. Moreover, if a power of attorney for its presentation to any Court of law for bail or trial is received in the jail, for its constitution, the jail authority should attest the thumb impression or signatures of the accused after comparing it with the particulars of the accused mentioned in the "wakalatnama" with those mentioned in Register No.1 and in case of any discrepancy, the same should be rectified/added.

13. For what has been discussed above, the instant C.M. is allowed and offences under Sections 337-A(i) and 337-F(i), P.P.C. stand added in the bail granting order dated 24.10.2019.

14. Before parting with this order, the following directions are issued:-

1. That all the learned Subordinate Courts while granting judicial remand under Section 344, Cr.P.C shall also send a copy of remand paper, its order thereon along with the judicial warrant to the concerned jail for admission of the accused to prison.
2. That the jail authorities at the time of admission of the accused to prison, shall enter accurately while tallying the particulars of the accused with those mentioned in the remand paper and judicial warrant, in the relevant register maintained by it under the Jail Manual/Rules.
3. The jail authorities before attestation of thumb impressions or the signatures of the accused/prisoners, shall ensure that the particulars of prisoner given in the power of attorney/ wakalatnama are in conformity with the particulars mentioned in

the jail record and if any deficiency is found, the same shall be rectified accordingly.

4. The Prosecutors under the provisions of Code of Criminal Procedure, 1898 and the Punjab Criminal Prosecution Service Act, 2006, are responsible for conducting prosecution of the accused and during discharge of this duty, they are privileged with the authority to examine the record of the case, therefore, all the learned Prosecutors are bound to bring any deficiency/ omission regarding addition or deletion of offence etc., if any, in notice of the Court, so that such deficiency/omission in particulars of the accused may be made up at that stage.

5. The Court of first instance at the time of decision of bail application shall objectively peruse the record of the case and if any deficiency/omission in the particulars of the accused on the memo of bail petition is found while taking judicial notice or on its pointing out by the Prosecutor, the requisite observation shall be made in writing in its order by the Court specifically, so that the release robkar may be issued with exact particulars of the accused.

6. The bail petitions, in case of post arrest bail application, shall preferably be drafted by the Advocates with the particulars of the accused given in the remand order instead of the FIR.

7. All the police officials before issuing a certified copy of FIR shall ensure that the exact particulars of the accused including addition or omission, if any of the offence made so far has been reflected in it.

8. Office is directed to transmit copy of this order to the Registrar of this Court, who shall circulate the same to all the Sessions Divisions for its onward transmission to the courts concerned, I.G. Punjab (Police), I.G. Prisons/jail authorities and Prosecutor General (Punjab) for their guidance and issuance of instructions for compliance.

MH/G-11/L **Application allowed.**

P L D 2020 Lahore 811

Before Anwaarul Haq Pannun, J

TAHIRA BIBI---Petitioner

Versus

STATION HOUSE OFFICER and others---Respondents

Writ Petition No. 15567 of 2019, decided on 29th October, 2019.

(a) Islamic-law---

----Marriage---Marriage contracted for a minor by any guardian other than the father or father's father---Option to repudiate marriage by minor on attaining the puberty---Scope---Right to repudiation of marriage is lost, in case of a female, if after attaining puberty and after having been informed of the marriage and of her right to repudiate it, she does not repudiate without reasonable delay.

'Fatawa Alamgiri', Page-93 of Vol-V and Paragraph-274 of Mahomedan Law rel.

(b) Dissolution of Muslim Marriages Act (VIII of 1939)---

----S. 2 (vii)---Term 'repudiation of marriage'---Option of puberty (Khyar-ul-Bulugh), principle of---Scope---Female has been given a right under Dissolution of Muslim Marriages Act, 1939, to repudiate marriage before attaining age of eighteen years provided that marriage has not been consummated---In case of a male the right continues until he has ratified marriage either expressly or impliedly as by payment of dower or by cohabitation.

(c) Words and phrases---

----Misconduct---Defined---Even if expression 'misconduct' is not defined in statute or rules, yet it was to be interpreted by courts narrowly in the sense of an infringement of binding rule of conduct applicable.

The Province of East Pakistan v. Muhammad Sajjad Ali Mazumdar PLD 1962 SC 71 rel.

(d) Family Courts Act (XXXV of 1964)---

----S. 20---Child Marriage Restraint Act (XIX of 1929), S. 2 (a)---Constitution of Pakistan, Arts. 9 & 25-A---Child marriage---Trial, forum of---Right to life and education---Scope---Trial of offence under provisions of Child Marriage Restraint Act, 1929, is to be held by Family Court exercising powers of Judicial Magistrate of First Class in accordance with the provisions of Family Courts Act, 1964---Due to child marriage, possibility/chances/likelihood of infringement of fundamental rights of a child which have duly been guaranteed by the Constitution are enhanced---Right of life is not a mere right to exist or live, it also encompasses the idea of leading a meaningful and dignified life---Offering of an opportunity to get education by State is also a fundamental right of a minor, denial whereof may amount to denial to excel and progress in life.

(e) Constitution of Pakistan---

----Arts. 9, 14 & 35---Family matter---Jurisdiction of High Court---Scope---Petitioner, a minor, entered into marriage of her choice without consent of her parents---Grievance of petitioner was that police authorities were harassing her on the behest of her parents and other family members---Validity---Paramount consideration before Court had always been welfare and betterment of a minor---Courts always acted in loco parentis position while keeping in view a variety of considerations---Technicalities of law were not supposed to circumvent exercise of jurisdiction and powers by Courts in dealing with matters pertaining to minor/child---Courts were supposed to exercise their jurisdiction proactively to forestall any endeavor to cause a breach of fundamental rights of children, protection/provision of which essentially was also in welfare of minor/child---In view of Arts. 9, 14 & 35 of the Constitution, the State was to protect marriage, the family, the mother and the child, as the same

was granted---High Court directed the authorities to remain within the four corners of law and restrained them from causing any harassment to petitioner in any manner---Constitutional petition was allowed accordingly.

Ismaeel v. The State 2010 SCMR 27; Ms. Shehla Zia and others v. WAPDA PLD 1994 SC 693; Bushra Jabeen and 367 others v. Province of Sindh through Chief Secretary and others 2018 MLD 2007; Liaqat Hussain and others v. Federation of Pakistan through Secretary, Planning and Development Division, Islamabad and others PLD 2012 SC 224 and 2019 SCMR 247 ref.

(f) Muslim Family Laws Ordinance (VIII of 1961)---

----S.5 (2A)---Registration of Nikah---Contents---Duty of Nikah Registrar---Scope---All Nikah Registrars or other persons who solemnize marriages are under legal obligation to scrutinize credentials at the time of Nikah as to whether marriage is solemnized with free will of parties and no child is exposed to marriage---Mere submission of oral entries for the purpose of age should not be accepted unless any proof of age from parties to marriage preferable which should be in shape of some authentic document either issued by National Database and Registration Authority in the form of National Identity Card, B-Form or School Leaving Certificate, Medical certificate based on ossification test issued by competent authority and Birth Certificate validly issued by Union Council etc. is produced.

Sh. Aamer Habib Siddiqui for Petitioner.

Zulfiqar Ali Sidhu, A.A.G. with M. Arshad Gopang, Director, Local Government, Multan for Respondents.

ORDER

ANWAARUL HAQ PANNUN, J.---The petitioner, by means of instant Constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 has made the following prayer:-

"In the light of above submissions, it is, respectfully prayed that the instant writ petition may very kindly be accepted by way of directing the respondents Nos.1 to 3 not to harass the petitioner, their family members and also not to interfere within the matrimonial lives of the petitioner at the instance of respondents Nos.4 to 11.

It is further humbly prayed that any other equitable relief, to which the humble petitioner may be found entitled to, be also granted".

2. As per averments of the petition, the petitioner being major and sui-juris, while exercising her free-will entered into a matrimonial bond with one Muhammad Bashir on 07.08.2019 against the wishes and without the blessing of her parents. After the solemnization of marriage, respondents Nos.1 to 3/SHOs at the behest of private respondents started harassing, intimidating and compelling the petitioner to get divorce from her husband and in the wake of this drive, on 15.08.2019, respondents Nos.1 to 3 illegally conducted a raid at her house. Upon raising hue and cry, the people of the locality attracted to the spot and rescued her from the clutches of said respondents. The petitioner has invoked the jurisdiction of this Court being aggrieved of the behaviour and conduct of the official respondents who in the aforementioned circumstances are illegally creating harassment to her.

3. Heard.

4. At the very outset, it is observed that during the judicial dispensation, it has oftenly been noticed that as a result of registration of criminal cases in respect of offences under Chapter XVI-A, P.P.C. while waging a plea of valid marriage having duly been registered under the Muslim Family Laws Ordinance, 1961 (hereinafter to be referred as 'the MFLO') by one of the parties to the lis, generally contested by the other side or even in absence of registration of criminal cases, the grievance of illegal and undue harassment to the breach of fundamental rights of the aggrieved persons claiming valid marriage, at the hands of police at the

behest of the parents, guardians or other relatives of the bride, is found to be voiced and by filing such petitions either the relief of quashing of FIR or issuance of a writ in the nature of prohibition is usually prayed for. Even, in certain cases upon a cursory inquiry it divulges that despite clear legal provisions specifying the eligibility with regard to age limit of the parties to the marriage, the acclaimed marriage is found as having been contracted by violating the provisions of the Child Marriage Restraint Act, 1929 (hereinafter to be referred as "the Act 1929").

It has further been noticed that some of the Nikah Khawans/Nikah Registrars instead of requiring any proof of age from the parties to the marriage which should be in the shape of some authentic document either issued by the NADRA in the form of National Identity Card, B-Form or School leaving Certificate, medical certificate based on ossification test issued by the competent authority and the Birth Certificate validly issued by the Union Council etc, out of their petty temptations knowingly that one of the parties to the marriage is minor, proceed to rely upon a self-declaration of the concerned party in respect of his/their age at the time of registration of their marriage.

Similarly, it has also come on surface at a number of occasions that despite a clear legal requirement of filling in each column of the Nikahnama individually, with specific answer of the parties to the marriage, the Nikah Registrar proceeds to place a single long vertical line against all or some of the columns which amounts to an offence liable to be punished under the law. Such criminal lapse/acts of the Nikah Registrar or the parties, as the case may be, despite being a source of breach of rights of the parties to the marriage are randomly ignored. The unscrupulous elements while taking advantage of such omissions or lapses try to exploit the situation and create serious future complications for the others.

It has also been observed with concern that the relevant Authorities i.e. Director General Local Government and Community Development,

Lahore or any other person authorized in this behalf have not bothered to issue specific S.O.Ps. containing mechanism or guidelines to avoid such violations to the provisions of the Act 1929 and the MFLO.

5. During the hearing of even instant case, while perusing the documents appended with this petition, it has been noticed that the Nikah Registrar has either left some of the columns of the Nikahnama blank or has not accurately filed in the same with requisite/specific reply of bride or the bridegroom, thus, in view of this criminal negligence, a notice was issued to Director, Local Government, Multan vide order dated 15.10.2019, who when confronted with the above noted criminal negligence and failure on the part of Nikah Registrar, sought time for obtaining instructions from the Director General, LG and CD, Punjab, Lahore. Learned Law Officer was also directed to establish contact with the Secretary, LG and CD, Punjab Lahore and submit his report before this Court in this regard on 29.10.2019. The Director, LG and CD Department, Multan Division, Multan in view of his correspondence with the D.G. LG and CD, Punjab Lahore, under the subject of "Issuance of Standard Operating Procedure (SOP) for taking punitive action against Nikah Registrars violating the basic law" who, vide his letter No.LG and CD/AD(CD)13/19 (CRMS Complaints)/P-II dated Lahore, 23.10.2019 clarifying the legal position and providing guidelines approved by the competent authority on the subject matter to all the Directors in the Punjab, the same has been made part of the record and shall be discussed and commented upon in the later part of the judgment.

6. Under the Muslim Law the competence of a girl to enter into a contract of marriage is dependent on the attainment of puberty. Puberty is presumed at the age of fifteen years. According to 'Fatawa Alamgiri', Page-93 of Vol-V, the lowest age of puberty according to its natural signs, is 12 years in males and 9 years in females and if signs do not appear, both sexes are held to be adult on the completion of their age of 15 years. The principle which after copying out from Fatawa Alamgiri and Hedaya

can be deduced is that a girl even having not attained puberty but possessing discretion and sufficient understanding can enter into a contract of marriage however for its operation it will be dependent on the consent of the guardian, if there is one, but in the absence of any guardian it will take effect on her attaining of majority and ratifying the contract. According to Paragraph-274 of Mahomedan Law, "when a marriage is contracted for a minor by any guardian other than the father or father's father, the minor has the option to repudiate the marriage on attaining the puberty. This is technically called the "option of puberty" (Khyar-ul-bulugh). The right of repudiation of the marriage is lost, in the case of a female, if after attaining puberty and after having been informed of the marriage and of her right to repudiate it, she does not repudiate without reasonable delay. The Dissolution of Muslim Marriages Act, 1939, however, gives her the right to repudiate the marriage before attaining the age of eighteen years, provided that the marriage has not been consummated. But in the case of a male the right continues until he has ratified the marriage either expressly or impliedly as by payment of dower or by cohabitation."

7. I feel it expedient to observe that unfortunately due to fissiparous and rival political, social and religious forces, the resultant anarchy besides other factors also paved the way for the colonization of Sub-Continent. Despite scathing criticism, for many valid reasons for the systemic loot and plunder, of the resources of Indian Sub-continent, which at the relevant time were comprised over 1/3rd wealth of the world, initially by the barrens running the Company Bahadar and thereafter by the British Government itself. The society at the relevant time was also flowing many sordid traditions including child marriage because of certain socio-economic reasons and their education backwardness. It cannot be denied that the Indians of all colour and creed, had however benefited from the modern education system, innovative scientific research based technical knowledge which was introduced by their

Colonial Masters. The modern education system brought a positive change in every sphere of life of the natives.

8. It may be necessary to express that the legislature despite being nicest one was comprised over forward looking men of wisdom. While adopting a progressive approach for relieving the society from the harmful effects of prevalent child marriage, it indeed undertook a commendable legislative business in the form of the Child Marriage Restraint Act, 1929 (Act XIX of 1929). It appears that without directly meddling with above described position discussed in para No.6 of this judgment regarding which age limit of marriage under the Muslim Personal Law, the provisions of Act 1929 have expediently and objectively been framed to hold male adult i.e. marriage contracting party about 18-years of age liable for punishment along with the other persons including the parents and guardians, who perform, arranged, conduct or direct any child marriage. A deterrence of punishment for violation of the provisions has been created. It is quite vivid that the act does not hold the minor responsible for violation of the provision of the Act 1929. It also does not invalidate the marriage itself. It only, as discussed above, holds certain categories of persons liable for the violations of the provisions of the Act 1929. Under Section 2(a) of Act 1929, child has been defined 'a person, if male, under 18 years of age and if female, under 16 years of age. In sum and substance, except the minor, the Act 1929, holds three persons accountable for violating its provisions i.e:-

(i). Contracting party;

(ii). Promoter of the marriage;

(iii). Guardians

It is a matter of great concern that despite ninety years of the promulgation of the Act, 1929, its objectives could not have been achieved satisfactorily due to certain lapses or loopholes in the mechanism for its enforcement. The children are still being lured by unscrupulous elements through deceitful means to abuse their innocent

souls. It is also relevant to point out that although under The Majority Act, 1875 (Act XX of 1875) (hereinafter known as 'Majority Act') a person is said to attain majority at the age of eighteen years. However, in case of appointment of his guardian by the Court, the age of majority of such a Ward is twenty-one years. The application of the above provisions has however been excluded insofar as the operation of personal law in respect of marriage, divorce and dower is concerned. Every other person, subject to as aforesaid, domiciled in Pakistan shall be deemed to have attained his majority on completion of his age of eighteen years, and not before. A Muslim though under 18 years on attaining puberty, can bring a suit relating to marriage, dower and divorce without next friend.

Nothing is more precious in the world than human beings. Human resource is most important and valuable as compared to other sources in the universe. Child is the future asset of a family, a nation and the world at large, respectively.

9. Normally, the marriages in early age are likely to be higher in rural areas due to less development as compared to more developed urban areas. Lesser or fewer educational and economic opportunities reduce the female access to education and restrict their involvement in sales and services as compared to their urban counterparts. Poverty and cultural barriers put constraints on women from having their say regarding their marriage decisions specifically in the traditional and parochial societies. Early age marriages can have severe consequences to the life of a female and pose serious personal and social problems ranging from health issues to social mobility. Women who marry earlier in age are more likely to bear child at younger age and are more exposed to prolong domestic violence. Similarly, women marrying at younger ages tend to have less education, less economic opportunities, lower level of social mobility and poor access to health services. The denial of opportunity for an adequate education would amount to denial of opportunity to succeed in life. Early marriage does not only restrict women from socio-economic

opportunities, but also affects their reproductive health status such as forced sexual relations, early and complicated pregnancies, higher fertility rate and large family size formation.

There is almost a consensus that fertility and age at the time of marriage have an inverse relationship, lower the age at marriage, higher will be the fertility rate as lower age at marriage lengthens the reproductive span of a girl. In general, early age marriage of females not only exacerbates the poor socio-economic development by depriving them of education, social freedom, good health, but also their personal development and well-being. While talking about the consequences of early age marriage at broader sense, it not only brings socio-economic underdevelopment at individual level but also hampers the development process of a region or a country. Therefore substantial part of human population, the women, remain uneducated or less educated, unemployed and underprivileged with poor health measures and no decision making power. It also increases the gender inequality and putting higher value on the boys than girls in the society.

Early marriage ensues into numerous adverse health consequences. Physically, child bride has small pelvis and are not prepared for childbearing. It results in deliveries that are too early or late. This exposes them to different complications. High mortality rates are due to postpartum hemorrhage, sepsis, obstructed labor and HIV transmission. Besides that, they are also at risk of acquiring Sexually Transmitted Infection and Cervical Cancer. To prove their fertility, they go for high frequency and unsafe intercourse with their old age polygamous spouse. Conjointly, the adolescent mother produces less breast milk or colostrum, which makes their child susceptible to infection. After marriage, girls are brought to their husband's place, where they have to play the role of wife, domestic worker, and ultimately a mother. Their husband may also be polygamous due to which they end up in burdensome situation and feel isolated, rejected, and depressed. Literature suggests that age differences

and the poor communication may lead to divorce or separation. Also, their children are more likely to report a stressful life and notably more psychiatric disorders. Socially child brides are unable to look after their families because they have less authority and control over their kids, and have less capability to become decisive about their housing management, nutrition and health care. With that most of wives have never gone to school or left school early, making them dependent on their spouses in practical life .

After the above discussion, it will be beneficial to examine certain provisions of the Constitution of Islamic Republic of Pakistan, 1973 (hereinafter to be referred as 'the Constitution'), which have a close nexus with the subject.

According to the preamble of the Constitution which inter alia says that "Wherein shall be guaranteed fundamental rights, including equality of status, of opportunity and before law, social, economic and political justice, and freedom of thought, expression, belief, faith, worship and association, subject to law and public morality so that the people of Pakistan may prosper and attain their rightful and honoured place amongst the nations of the World and make their full contribution towards international peace and progress and happiness of humanity".

Now, therefore, we, the people of Pakistan,

Do hereby, through our representative in the National Assembly, adopt, enact and give to ourselves, this Constitution.

In the case reported as "Ismaeel v. The State" (2010 SCMR 27), it has been observed as under:-

"It is settled law that preamble and object is always be kept in mind by interpreting the provisions of the Act on the well-known principle that preamble is key to understand the Act. According to the Chief Justice Dyer, preamble is the key to open the minds of the makers of the Act, and the mischief of which they intend to redress. See Stowel v. Lord Zouch (1965) I Plowd. ..It is settled principle of law that Act must be read as an organic whole while reading the Act in question as an organic whole then it casts heavy duty upon the Courts to examine the evidence on record and decide the cases keeping in view the object and mandate of the provision of the said Act. "

It may be proper to refer here Article 9 of the Constitution, which says that 'No person shall be deprived of life or liberty save in accordance with law' it has been interpreted by the Superior Courts in plethora of judgments while enlarging comprehensively the word 'life' with a variety of shades emphasized that the said Article does not merely protect the right to 'exist' or 'live' but it also encompasses the idea of leading of a meaningful and dignified life with a minimum standard of living. In Ms. Shehla Zia and others v. WAPDA (PLD 1994 SC 693) it has been held that:-

"The word 'life' has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country, is entitled to enjoy with dignity, legally and constitutionally. It is now well established that right to life as envisaged by Article 9 of the Constitution includes all those aspects of life which go to make a man's life meaningful, complete and worth living. In the case of Employees of Pakistan Law Commission v. Ministry of Works (1994 SCMR 1584), it has been laid down that Article 9 of the Constitution which guarantees life and liberty according to law, is not to be construed in a restrictive manner. Life has larger concept

which include the right of enjoyment of life, maintaining adequate level of living for full enjoyment of freedom and rights."

Article 25-A of the Constitution provides as under:-

Right to Education. The State shall provide free and compulsory education to all children of the age of five to sixteen years in such manner as may be determined by law'.

In case of "Bushra Jabeen and 367 others v. Province of Sindh through Chief Secretary and others" (2018 MLD 2007), the co-relation between Articles 9 and 25-A of the Constitution has beautifully been maintained in the following words:-

"-----It needs no reiteration that right to life includes right to education, therefore, it is one of the Fundamental Rights of every citizen of Pakistan, whereas, in terms of Article 25-A of the Constitution of Islamic Republic of Pakistan, 1973, it has now become the duty of the State, to be performed through Government(s), to provide free and compulsory education to all the children of the age of five to sixteen years in such a manner as may be determined by law."

It will be relevant to mention that in terms of above Article, Punjab Free and Compulsory Education Act, 2014 (Act XXVI of 2014) has been promulgated.

Islam is the most progressive religion. It has laid more emphasis on the importance of learning and research than every other religion. Besides individual efforts, the atmospheric support is sine-qua-non for acquiring scholarship. The education enhances the consciousness and sharpens the vision of the humans. Being a substantial portion of population, women cannot be kept out of the main stream of the national life for the progress of any society and development of a country.

In case reported as "Liaqat Hussain and others v. Federation of Pakistan through Secretary, Planning and Development Division,

Islamabad and others" (PLD 2012 Supreme Court 224) it has been held as under:-

----Art.25-A---Right to education---Education plays an important role in the successful life of an individual---Generally, education is considered to be the foundation of society which brings economic wealth, social prosperity, political stability and maintaining healthy population---Further progress of society is stopped in case of deficit of educated people---Educated people enjoy respect among their colleagues and can effectively contribute to the development of their country and society by inventing new devices and discoveries---Islam is a scientific religion emphasizing on the need of scientific inquiry---Need, purpose and kinds of education and as under the mandate of Quran and Ahadith, elucidated.

----Arts. 270AA(8), (9), 25-A, 29, 7, 37(a) & 184(3)---Constitutional petition---Right to education---Duty of State---"State"---Definition---By virtue of Art.270AA(8)(9) of the Constitution [as substituted by Constitutional (Eighteenth Amendment) Act, 2010] the Concurrent Legislative List was omitted in pursuance whereof projects being run by the Federal Government in the Provinces, including Basic Education Community Schools were decided to be wound up---While assailing the proposal of such winding up prayer of the petitioners (fathers of students and employees of the Projects) was that the proposed action on the part the authorities of closing down "Establishment and Operation of Basic Education Community Schools" be declared to be without lawful authority and of no legal effect and be also declared to be in violation of Art.25-A of the Constitution and the proposed act of winding up of the National Commission of Human Resources may be held to be entirely unconstitutional and of no legal effect so as to allow the Commission to continue to perform the positive duty of providing basic human rights to the citizens of Pakistan, under Art.7 of the

Constitution, and that the State including the Federal and the Provincial Governments, therefore, under Art.25-A of the Constitution, the Parliament, in view of the definition of the 'State' had not absolved the Federal Government from conferring the Fundamental Rights upon the children---State, in terms of Art.37(a) of the Constitution, shall form such policies on the basis of which State shall promote, with special care, the educational and economic interest of backward classes or areas---Held, under Art.29 read with Art.25-A of the Constitution the Fundamental Rights were required to be enforced by the State---Especially in view of Art.25-A of the Constitution, it had been made mandatory upon the State to provide the education to the children of the age of 5 to 16 years."

No country can make progress without maintaining a nice balance between its population and resources. The august Supreme Court, in a Human Rights Case No. 17599 of 2018, regarding alarming high population growth rate in the country, reported as 2019 SCMR 247, has held as under:-

"As of 2017, Pakistan is ranked as the fifth most populous nation in the world, with a population of over 200 million. While all nations and economies rely on population growth and a creation of future younger generations, such growth must be sustainable and proportionate to the resources available. Approximately 14,000 babies are born in Pakistan which is already struggling to feed, educate and provide employment for its existing population. Pakistan has experienced unchecked population growth since its creation in 1947. From 1998 (the previous comprehensive census) to 2017, Pakistan's population has increased by 57%, with the addition of approximately 76 million people to the population. Projected growth trends from the United Nations suggest that if this population growth rate does not slow considerably, Pakistan

can expect to have its population increase by 50% resulting in an estimated 306 million people, surpassing the United States, Indonesia, Brazil, and Russia to become the world's third largest country in terms of population trailing behind India and China. The steadily increasing population rate in Pakistan is a ticking bomb which will certainly not wait till it is convenient for us to take note of it. What will follow this population explosion is starvation, famine and poverty, the likes of which are already visible in areas like Thar. Other indicators of overstretched resources and infrastructure are apparent in Pakistan's unemployment rate, maternal and child mortality rate, literacy and educational enrolment figures, and access to clean water and adequate food. A brief overview of the above figures reveals the extent of the resource and infrastructure shortcomings for an already large populace. Pakistan currently has a very high mortality rate for children under the ages of five years (75 deaths per 1000 live births), an above average maternal mortality rate (178 deaths per 10,000 births), and approximately 44% of the population lacks access to clean drinking water. Furthermore, Pakistan's literacy rate is 58% while over 22 million children are out-of-school. Future projections indicate the number of educational institutions to reduce in number. The above figures make it clear that Pakistan is not equipped to handle the addition of another 100 million people to its ranks.

10. Through a Proclamation on the conclusion of International Conference on Human Rights at Tehran in 1968, 'family planning' was recognized by the international community as both a right and a means of enabling other human rights. In this regard, paragraphs 16 and 17 of the Proclamation are relevant which read as under:-

"16. The protection of the family and of the child remains the concern of the international community. Parents have a basic human right

to determine freely and responsibly the number and the spacing of their children;

17. The aspirations of the younger generation for a better world, in which human rights and fundamental freedoms are fully implemented, must be given the highest encouragement. It is imperative that youth participate in shaping the future of mankind;"

As obvious from the language of the above reproduced paragraphs, the right to freely and responsibly determine the number and spacing of children involves imparting sufficient information and means to the parents to control reproduction as well as providing them with adequate knowledge regarding the advantages and disadvantages of such determination. Also apparent from the above language is the interdependence of planned births with the right of the younger generation to be afforded all fundamental and human rights recognized by the international community. Thus, the right to well-informed and controlled pregnancies is a right that paves the path for enabling several other rights; for an overburdened economy cannot be expected to juggle with a growing population while struggling to provide better facilities and opportunities for its progeny. This right, which forms part of the international commitments of Pakistan, originates from the right to life under Article 9 of the Constitution of the Islamic Republic of Pakistan, 1973 (Constitution), and other fundamental rights such as the right to education, equality, speech, information and due process (Articles 4, 25, 25-A, 19, 19-A and 10-A of the Constitution respectively), which are in turn inevitably linked to the economic progress of the State expected to make such rights available to its people. Unfortunately, by failing to prioritize the provision of information and means of controlling unplanned and unwanted births, the country now faces a surplus of unskilled and unemployed manpower for whom basic human and

fundamental rights are luxuries they can at best only hope for, but never attain.

11. It is maintained that in order to give effect to certain recommendations of the Commission on Marriage and Family Laws and to achieve the other objects, it has been made mandatory for the Muslim citizens of Pakistan solemnizing and contracting marriage to get their marriages registered in accordance with the provision of Section 5 of the MFLO and the Rules made thereunder i.e. West Pakistan Rules under the Muslim Family Laws Ordinance, 1961.

12. For ease of reference and better comprehension of the issues highlighted, relevant provisions of law and rules made there-under, in their chronological order are reproduced:-

5. Registration of marriage;

(1) Every marriage solemnized under Muslim Law shall be registered in accordance with the provisions of this Ordinance.

(2) For the purpose of registration of marriage under this Ordinance, the Union Council shall grant licences to one or more persons, to be called Nikah Registrars, but in no case shall more than one Nikah Registrar be licensed for any one Ward.

Province of Punjab

For the purpose of registration of marriage under this Ordinance, the Union Council shall grant licences to one or more persons, to be called Nikah Registrars.

(2-A) The Nikah Registrar or the persons who solemnizes a Nikah shall accurately fill all the columns of the Nikahnama form with specific answers of the bride or the bridegroom.

(3). ...

(4). ..

Province of Punjab

(4) If a person contravenes the provision of:

(i) Subsection (2A), he shall be punished to simple imprisonment for a term which may extend to one Month and fine of twenty five thousand rupees; and

(ii) Subsection (3), he shall be punished to simple imprisonment for a term which may extend to three months and fine of one hundred thousand rupees.

(5) The form of Nikahnama, the registers to be maintained by Nikah Registrars, the records to be preserved by Union Councils, the manner in which marriage shall be registered and copies of Nikahnama shall be supplied to the parties, and the fees to-be charged thereof, shall be such as may be prescribed.

(6) ..,,

13. Rule 7 of the West Pakistan Rules under the Muslim Family Laws Ordinance, 1961, deals with the issuance of a licence to the person for registration of marriages, which reads as under:-

"7(1) Any person competent to solemnize a marriage under Muslim Law may apply to the Union Council for the grant of a licence to act as Nikah Registrar under section 5.

(2) If the Union Council, after making such enquiries as it may consider necessary, is satisfied that the applicant is a fit and proper person for the grant of a licence, it may, subject to the conditions specified therein, grant a licence to him in Form I.

(3) A licence granted under this rule shall be permanent and shall be revocable only for the contravention of any of the conditions of a licence granted under this rule.

(4) If any person to whom a licence has been granted under this rule contravenes any of the conditions of such licence, he shall be punishable with simple imprisonment for a term which may extend

to one month, or with fine which may extend to two hundred rupees, or with both.

The license is issued on a prescribed form i.e. Form-1 given in West Pakistan Rules.

"CONDITIONS"

1. The Licence is not transferable.
2. The licence is revocable for breach of any of the provision of MFLO, 1961, or the rules made thereunder or of any condition of this licence.
3. .....
4. .....
5. Such other conditions, if any, as may be specified by the Provincial Government.

On a combined reading of above provisions of MFLO and the Rules, the irresistible conclusion which can draw is that every marriage solemnized under Muslim Family Law is mandatorily registerable. The registration of the marriage shall be in accordance with the provisions of the Ordinance and the Rules. For registration of Nikah/marriage, the Union Council has been authorized to issue a license to one or more persons who are fit and proper to solemnize the Nikah, on his/their application who are called as Nikah Registrars. The Nikah Registrar is under obligation to fill in accurately every column of the Nikahnama individually with specific answers of the bride and the bridegroom. Any violation/contravention with the provisions of the Ordinance is punishable with simple imprisonment and fine. The record of the marriage in respect of marriage registration is to be maintained by the Union Council. The copy of Nikahnama shall be supplied to the parties. It may be relevant to observe that in view of section 21 of the Pakistan Penal Code, 1860, Nikah Registrar is deemed to be a 'Public Servant' for criminal prosecution. The status of Nikah Registrar is that of a licensee. He does not fall within the definition of an employee as

provided under Section 2(h) of the PEEDA (Punjab Employees, Efficiency and Discipline) Act 2006, therefore, in case of any contravention with any of the provisions of law or violation of any of conditions of the licence, subject to notice, his licence can be revoked/ cancelled by the Union Council.

14. Except a child, let me reiterate that the persons of three categories i.e. contracting party, promoters of the marriage and the guardians including the parents are liable for arranging and contracting the marriage for violating the provisions of the Child Marriage Restraint Act, 1929. It appears that qua authorization of the Union Council [under Section 9 of the Act] to make a complaint to take cognizance of an offence by a family Court is an outcome of a pragmatic legislative intent to achieve the objectives behind the Act. If marriage of a child is found to have been solemnized, Union Council is under a legal obligation to file a formal complaint against the persons violating the provisions of the Act before the Court to punish them and in this way, the efforts if any, made by the offenders/parents/guardians for screening of the violation made by them can effectively be frustrated. The prosecution of violators shall create deterrence in the society against the practice of child marriage. The legislature has, therefore, objectively given this mandate to the Union Council. The office of Union Council is a public body, created under the law. Being a statutory body, Union Council is obliged to perform its functions strictly in accordance with law. It may also be pointed out that under Section 2(v) of The Punjab Local Government Act, 2019, the 'Council' comprises over the Convenor and other councilors of a local government. Both elected councilors of the council and a convenor [Section 2(W)] are covered by the definition of a Councilor. From the date of its first meeting unless dissolved earlier [under section 233 of this Act], the term of office of the council, head of the local government, convenor and councilors shall be for a period of four years. Before assuming their office, all heads of the Local Government, conveners and councilors are required [under Section 114 of the Act] to take oath of their offices in terms

of seventh, eighth and ninth Schedule of the Act respectively. They pledge to perform their duties under the Punjab Local Government Act, 2019, Rules, Bye-laws and Regulations made thereunder honestly, efficaciously and efficiently

to the best of their ability. It appears that these provisions have been legislated to inculcate in them a sense of responsibility. In case they make any breach or omission, in discharge of their functions/duties, they have been held accountable. The government is empowered [under Section 121 of the Act] to appoint administrators, on the dissolution of local governments or expiry of the term of a council [under Section 113 of this Act] or occurrence of a vacancy in the office of the head of the local government and pending the constitution of a new local government or a council, or appointment of a new head of the local government by way of elections. The Government by an order publish in the official gazette shall appoint any of its officers to perform such functions and exercise such powers and authority of the respective local government as may be specified in that order, which have duly been mentioned/enumerated in detail in the Act. Inter alia, it is the duty of the Metropolitan Corporation, Town Committee and Tehsil Council to perform functions pertaining to "births, deaths, marriages and divorce registration" as given in item No.(j) Part I, Third Schedule, item No.(j) Part I Fourth Schedule and item No.(i) Part I Fifth Schedule of the Act respectively. It may be added that being settled proposition, even if, expression "misconduct" is not defined in the statute or the rules, yet when pointed out, it should be interpreted by the Courts narrowly in the sense of an infringement of binding rule of conduct applicable. Reliance in this regard is placed upon case titled "The Province of East Pakistan v. Muhammad Sajjad Ali Mazumdar" (PLD 1962 Supreme Court 71). However, a mechanism of accountability, oversight and responsiveness has definitely been devised through various provisions of Punjab Local Government Act, 2019. Any head of the Local

Government, Convenor, Councilor, Officer or servant of the Local Government or any other person [under Section 220 of the Act] may be held guilty of misconduct if he violates any provision relating to code of conduct prescribed [under Section 219], derelicts from duty or shows gross negligence in performance of duties with manifest wrongful intent, knowingly vitiates any provision of this Act or lawful directions or orders of the government, involves in an act that results in wrongful gain to himself or to any other person, exercise powers or authority vested in him under this Act or any other law for the time being in force or fails to or refuses to exercise such powers or authority, for corrupt, unlawful or improper motives and attempts or abets any act which constitutes misconduct under this section.

15. It will be relevant to observe that the trial of the offence under the provisions of the Child Marriage Restraint Act, 1929 is to be held by a Family Court exercising the powers of a Judicial Magistrate of the first class in accordance with the provisions of Family Courts Act, 1964 (XXXV of 1964). In addition to what has been discussed in the preceding paragraph, it is observed that due to child marriage, the possibilities/ chances/likelihood of infringement of fundamental rights of a child which have duly been guaranteed by the Constitution of Islamic Republic of Pakistan, 1973 are enhanced. As referred hereinabove, that the right of life is not a mere right to exist or live, it also encompasses the idea of leading a meaningful and dignified life. Offering of an opportunity to get education by the state is also a fundamental right of a minor, denial whereof would amount to denial to excel and progress in life. The education enlightens the soul of a human being. Besides shedding positive effects on his body, the education also refines human behavior. Examining this proposition while seeing it through the prism of rule "loco parentis" is observed that the paramount consideration before the Courts has always been the welfare and betterment of a minor. The Courts always act in loco parentis position while keeping in view a variety of considerations. A formalistic approach commonly associated with the adjudication of adversarial civil disputes may not be conducive to the

exercise of parental jurisdiction by this Court. A more proactive role shall have to be adopted so as to ensure the protection of the best interest of the minor. The expression welfare shall have to be construed in a way as to include in its compass all the dominant factors essential for determining the actual welfare of the minor/child with a progressive outlook enabling him to prove as a useful entity. Technicalities of law are not supposed to circumvent the exercise of jurisdiction and powers by the Courts in dealing with the matters pertaining to the minor/child. All courts are therefore, supposed to exercise their jurisdiction proactively to forestall any endeavor to cause a breach to the fundamental rights of the children, the protection/provision of which essentially is also in the welfare of the minor/child. Therefore, I feel it appropriate to hold that whenever it comes to the notice of a Court that prima facie a case of breach of fundamental rights of the minor is made out, the Court, in case of failure of the Union Council in moving a complaint before the Court, while adopting a proactive role in "loco parentis" should, without any hesitation, pass an appropriate order directing the Union Council to send a requisite complaint before the competent Court that a marriage has been contracted in violation of the provisions of the Child Marriage Restraint Act, 1929.

16. As referred in Para-5 of the judgment, Director Local Government and Community Development, Multan in view of his correspondence with Director General Local Government and Community Development, Lahore has issued some Standard Operating Procedure for taking punitive action against the Nikah Registrar violating the basic law to the following effect:-

"i. That section 5(2A) of MFLO, 1961 states that at the time of solemnization of marriage, the Nikah Registrar or the person who solemnizes a Nikah shall accurately fill all columns of the Nikahnama form with specific answers of the bride or the bridegroom. And in case of contravention, a punishment is prescribed under section 5(4)(i) of the said Ordinance i.e. if a

person contravenes the provisions of subsection (2A), he shall be punished to simple imprisonment for a term which may extend to one month and fine of twenty five thousand rupees.

ii. Further, under rule 21 of the West Pakistan Rules under Muslim Family Law Ordinance, 1965 (hereinafter 'rules"), no court shall take cognizance of any offence under the Ordinance or the rules unless on a complaint in writing by the union council, stating the facts constituting the offence; therefore, ensure that every union council should lodge complaints soon after the receipt of Nikahnama forms columns of which are not accurately filled. Furthermore, prepare a report, on quarterly basis, containing the details about the complaints lodged during the quarter and furnish the same to DG office for information;

iii. That cancel/revoke, after giving show-cause notice, the license of Nikah Registrar who breaches any of the provisions of MFLO, 1961 or rules made thereunder or any of the condition of his license.[In view of condition No.5 of the Conditions of the License, these directions may be deemed to be part of the conditions of the license.]

iv. That ensure that no incomplete (not accurately filled) Nikahnama be registered in the UCs and if any Secretary UC or any other official registers the incomplete Nikahnama, he may, forthwith, be proceeded against under the PEEDA Act, 2006 and keep noted that no laxity in this regard shall be tolerated.

In addition to above, the following further directions are being issued

(1) All the Nikah Registrars or other persons, who solemnize marriages are under legal obligation to scrutinize the credentials at the time of Nikah as to whether the marriage is solemnized with the free will of the parties and no child is exposed to marriage. Mere submission of oral entries for the purpose of age should not be

accepted unless any proof of age from the parties to the marriage preferably which should be in the shape of some authentic document either issued by the NADRA in the form of National Identity Card, B-Form or School Leaving Certificate, Medical Certificate based on ossification test issued by the competent authority and the Birth Certificate validly issued by the Union Council, etc. is produced.

(2) Furthermore, after perusing the record in compliance with SOP (ii) mentioned in para 17, in case the Authority fails to take the requisite action, it will be deemed that he himself has willfully failed to perform his function/duty amounting to negligence rendering himself liable for initiation of disciplinary proceedings against him under the relevant law.

17. So far as the prayer of the petitioner as reproduced in Para-1 of the judgment is concerned, the same in view of Articles 9, 14 and 35 of the Constitution of Islamic Republic of Pakistan, 1973, 'The State shall protect the marriage, the family, the mother and the child' the same is granted and the official respondents are hereby directed to remain within the four corners of law and restrain themselves from causing any illegal harassment to the petitioner in any manner whatsoever. Resultantly, the instant writ petition is allowed and respondents Nos.1 to 4 being public functionaries are directed to remain within the four corners of law and desist from causing any harassment to the petitioner.

18. Before parting with this order, it is observed that the Secretary Local Government, Punjab, Director General Local Government and Community Development, Lahore and head of the Local Governments as mentioned in the Punjab Local Government Act, 2019 shall bring the existing SOPs in conformity with the directions issued hereinabove, copy whereof shall be submitted before this Court through Addl. Registrar (Judicial) of the Bench within two months, after receipt of copy of this order. Office is directed to transmit copy of this order to all concerned.

19. I also duly appreciate the assistance rendered by Mr. Muhammad Shafiq, Research Officer/Civil Judge 1st Class, Lahore High Court Multan Bench, Multan to deal with the issue discussed and dealt with hereinabove.

MH/T-9/L **Petition allowed.**

P L D 2020 Lahore 848

Before Anwaarul Haq Pannun, J

PARVEEN BIBI---Petitioner

Versus

ADDITIONAL SESSIONS JUDGE and others---Respondents

Criminal Revision No. 7500 of 2020, decided on 19th February, 2020.

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

----S. 512---Record of evidence in absence of accused---Scope---Petitioner assailed order passed by trial court whereby her application for transposing to the record of trial, the statement got recorded by complainant under S.512, Cr.P.C. was dismissed---Contention of petitioner was that the complainant was residing out of country; that due to pitched enmity inter-se the parties, his coming to the country for recording of evidence was not safe; that it would cause delay and that the complainant would have to bear expenses unreasonably---Validity---Trial Court had ample power to direct the relevant authorities to ensure the safety of the person of complainant---Trial Court could also consider the possibility of recording of evidence of the prosecution witnesses by resorting to modern devices---Petitioner could not point out any impropriety or illegality in the impugned order---Order accordingly.

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

----S. 512---Record of evidence in absence of accused---Discretionary jurisdiction---Scope---Section 512, Cr.P.C., provides that there being no immediate prospects of arrest of an accused, on fulfillment of legal requirements, proving his absconsion, the court competent to try or send for trial to the court of Sessions or High Court may in absence of such person, examine the witnesses for the offences complained of if produced by the prosecution and record their depositions---On arrest of such

absconding accused, such deposition, may be given in evidence against him---Such deposition can only be given in evidence in certain exceptional circumstances, where the attendance of the witnesses, whose evidence has already been recorded under S.512, Cr.P.C., cannot be procured without any unreasonable amount of delay, expenses or inconvenience---Question of reasonableness or otherwise of the delay, expenses or inconvenience can only be determined by the court in the given facts and circumstances of the every individual case before it.

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

----S. 512---Record of evidence in absence of accused---Enabling provision of S.512, Cr.P.C.---Scope---Section 512, Cr.P.C., is enabling in its nature, for catering to certain exceptional circumstances and situations---Section 512, Cr.P.C. enables the court to preserve evidence for its use in certain circumstances against the absconding accused, especially when the prosecution is not at fault, and to safeguard the interest of a party giving evidence against some possible unscrupulous endeavor of the adversaries---Section 512, Cr.P.C. fully takes care of the situation tending to place a party for none of its fault in an awkward and unreasonable situation to its disadvantage.

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

----Ss. 512 & 353---Constitution of Pakistan, Art. 10-A---Record of evidence in absence of accused---Evidence to be taken in presence of accused---Right to fair trial---Scope---Constitution has enhanced the status and attributes of due process of law through insertion of Art. 10-A and right of fair trial has been granted the status of a fundamental right---Constitution guarantees the enforceability of said right for its enjoyment through a legal process by the courts which are the defenders and custodians of such rights of the citizenry---Accused facing the criminal charge, in order to ensure the avoidance to any breach to said fundamental right, demands a nicely drawn balance between the exceptional situations

mentioned in S. 512, Cr.P.C. and the mandatory rule embodied in S. 353, Cr.P.C.

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

----Ss. 353, 512 & 537---Evidence to be taken in presence of accused---Record of evidence in absence of accused---Provisions of S.353, Cr.P.C., to be mandatory---Scope---All evidence under Chapters XX and XXII-A of Criminal Procedure Code, 1898, shall be taken in the presence of the accused, except where his personal attendance is dispensed with, it shall be taken in presence of his pleader---Evidence recorded in violation of S.353, Cr.P.C., vitiates the proceedings and such illegality even cannot be cured under S.537, Cr.P.C.---Use of word 'shall' in S.353, Cr.P.C. as compared to word 'may' is sufficient to highlight the importance of recording of evidence in presence of the accused.

(f) Criminal trial---

----Absconsion---Scope---Absconsion of an accused is merely taken as additional circumstance leading to the guilt of an accused provided the charge against him is proved otherwise through unimpeachable incriminating evidence beyond a shadow of reasonable doubt.

(g) Criminal trial---

----Absconsion---Presumption of innocence---Scope---Accused is inherently deemed innocent unless found guilty by the court of competent jurisdiction---Accused can not be held guilty on the basis of proved absconsion as it is not a substitute to the incriminating evidence.

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

----S. 512---Qanun-e-Shahadat (10 of 1984), Arts. 46 & 47---Record of evidence in absence of accused---Section 512, Cr.P.C., duly galvanized with Arts. 46 & 47 of the Qanun-e-Shahadat, 1984, envisages, besides

enabling the court to weigh the circumstances judicially before resorting to the exceptions for using any deposition recorded during the absconsion of an accused as evidence against him.

Arbab Tasleem v. The State PLD 2010 SC 642 rel.

Safwan Abbas Bhatti for Petitioner.

Haroon ur Rasheed, Deputy Prosecutor General.

Naseer ud Din Khan Nayyar for Respondents.

ORDER

ANWAARUL HAQ PANNUN, J.---By means of instant criminal revision petition under Section 439, Cr.P.C., the legality and propriety of the order dated 30.01.2020 passed by learned trial Court/Addl. Sessions Judge, Hafizabad has been brought under challenge, whereby the petitioner's request for transposing the earlier recorded evidence under Section 512 Cr.P.C., of the complainant, Hassan Murtaza was turned down while to the extent of Masood Ahmad Bhatti, the draftsman (since dead), it has been partially allowed.

2. Briefly the relevant facts for the decision of instant criminal revision petition are that as a result of Qatl-i-amd of one Tahir Murtaza, allegedly committed by respondents Nos.2 and 3 along with their three accomplices, the FIR was lodged on the complaint of Hassan Murtaza. Record further reveals that initially the police submitted a report under section 512, Cr.P.C., on 15.07.2008 against the accused. Respondent No.3 Ali Raza was formally arrested on 31.03.2010. On commencement of trial of the case, due to non-availability of Hassan Murtaza complainant because of the alleged danger to his life coupled with other circumstances beyond his control, consequently, learned trial court on 02.11.2013 ordered that the file of the case be consigned to the record room. After arrest of some of the accused, on the application of the complainant, the case file was ordered to be resurrected on 27.10.2014. The accused

accordingly were summoned to face trial and the case was fixed for recording of evidence. The complainant Hassan Raza had been appearing before the trial court so that his evidence might be recorded but as a result of intentional concealment of accused/respondent Ali Raza, he was declared proclaimed offender vide order dated 09.05.2015 and evidence of Hassan Murtaza complainant was recorded on 20.05.2015 by learned trial court as PW-14 during the trial of co-accused, who allegedly abetted the crime. The proceedings of trial of co-accused had terminated during abscondence of respondent Ali Raza. At present, respondents Nos.2 and 3, after their arrest, are facing the trial. The record further evinces that since 31.03.2018, the complainant has been living abroad and as such he is not available for evidence. The present petitioner, who is mother of the deceased, through an application, which she moved before the trial court prayed that Masood Ahmad Bhatti, the Draftsman had since died and the complainant apprehending danger to his life at the hands of the accused party being abroad are not available, therefore, the statements which they had got recorded under Section 512 Cr.P.C., may be transposed to the record of present trial being a legal, valid and substantive piece of evidence. Learned trial court while accepting application to the extent of above-named draftsman (since dead), has dismissed the same to the extent of Hassan Murtaza Complainant, hence this criminal revision petition.

3. Learned counsel for the petitioner while relying upon case reported as Arbab Tasleem v. The State (PLD 2010 Supreme Court 642) contends that because of their wilful concealment, since the respondents were declared P.Os, consequently the statements of the PWs were recorded under Section 512 Cr.P.C., and that in view of long standing bloody enmity inter-se the parties, apprehending serious danger to his life at the hands of the accused, the complainant had gone abroad, his return for recording of his evidence would not be safe and will cause undue delay also, by transposing his previously recorded deposition to the record of the instant trial would serve the purpose behind procurement of his

attendance thus has prayed for acceptance of instant petition by setting aside the impugned order.

4. Conversely, learned counsel for the respondents while referring to Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973 (hereinafter to be referred as 'the Constitution') contends that unless evidence of the complainant is recorded while affording the accused a fair opportunity to cross-examine the PW, their right of fair-trial shall be infringed. Further contends that since the complainant, a star witness of the prosecution is living abroad at present, for enabling him to get his statement recorded while allowing the accused to cross-examine him to avoid any possible prejudice to their cause, the accused are ready to bear expenses of his boarding and lodging out of their pockets even. He while replying arguments of the learned counsel for the petitioner regarding the apprehension of danger to the life of the complainant states that learned trial court has ample powers to issue direction to the law enforcement agencies to ensure the protection to his life. Lastly states that evidence of the prosecution witness can even be recorded through video-link and the impugned order being unexceptional, therefore, he has prayed for dismissal of the instant criminal revision petition.

5. Arguments heard. Record perused.

6. In order to appreciate the above noted rival contentions of the learned counsel representing their respective parties, one of the relevant provisions of law, is being reproduced hereunder:-

> 512. Record of evidence in absence of accused. (1) If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him the Court competent to try or [send for trial to the Court of Session or High Court] such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions. Any such deposition may, on the arrest of such

person, be given in evidence against him on the inquiry into, or trial for the offence with which he is charged, if the deponent is dead or incapable of giving evidence or his attendance cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

(2) Record of evidence when offender unknown. If it appears that an offence punishable with death or [imprisonment for life] has been committed by some person unknown, the High Court may direct that any Magistrate of the first class shall hold an inquiry and examine any witness who can give evidence concerning the offence. Any deposition so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits of Pakistan.

The above provision makes it evident that there being no immediate prospects of arrest of an accused, on fulfilment of legal requirements, proving his abscondence, the court competent to try or send for trial to the court of Sessions or High Court may in absence of such persons, examine the witnesses, for the offences complained of if produced by the prosecution and record their depositions. It further says that on the arrest of such absconding accused, the deposition recorded, as aforesaid, may be given in evidence against him, in the inquiry or trial for the offence with which he is charged. However, such deposition can only be given in evidence in certain exceptional circumstances, where the attendance of the witnesses, whose evidence has already been recorded under Section 512 Cr.P.C., cannot be procured without any unreasonable amount of delay, expenses or inconvenience. The question of reasonableness of otherwise of the delay, expenses or inconvenience can only be determined by the court in the given facts and circumstances of every individual case

before it. It seems that the provision ibid is enabling in its nature, for catering to certain exceptional circumstances and situations. It enables the court to preserve evidence for its use in certain circumstances against the absconding accused especially when on its own part the prosecution is not at fault and to safeguard the interest of a party giving evidence against some possible unscrupulous endeavor of the adversaries. The provision fully takes care of the situation tending to place a party for none of its fault in an awkward and unreasonable situation to its disadvantage.

7. Before treading further, it may be expedient to examine some relevant provisions of Qanun-e-Shahadat Order (P.O No. 10) 1984 for advancing further on the subject under discussion to a point to draw a logical conclusion in the facts and circumstances of the case.

"46. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant: Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot, be found, or, who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases:

(1) When it relates to cause of death: --------

(2) Or is made in course of business

(3) Or against interest of maker .

(4) Or gives opinion as to public right or customs, or matters of general interest .

(5) Or relates to existence of relationship .

(6) Or is made in will or deed relating to family affairs .

(7) Or in document relating to transaction mentioned in Article 26, paragraph (a). .

(8) Or is made by several persons and expresses feelings relevant to matter in question:

47. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated: Evidence given by a witness in a judicial proceeding or before any person authorized by law to take it, is relevant for the; purpose of proving, in a subsequent judicial, proceeding or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable Provided that- the proceeding was between the same parties or their representatives-in-interest; the adverse party in the first proceeding had the right and opportunity to cross-examine ; the questions in issue were substantially the same in the first as in the second proceeding.

131. Judge to decide as to admissibility of evidence: (1) When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant, and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant and not otherwise. (2) If the fact proposed, to be proved is one of which evidence is admissible only upon proof of some other fact, such last mentioned fact must be proved before evidence is given of the fact first mentioned unless the party undertakes to give proof of such fact, and the Court is satisfied with such undertaking. (3) if the relevancy of one alleged fact depends upon

an other alleged fact being first proved, the Judge may in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact."

After considering the above Articles of Qanun-e-Shahadat Order in conjunction with each other, the Hon'ble Supreme Court of Pakistan in the case reported as Arbab Tasleem v. The State (PLD 2010 SC 642), relied upon by learned counsel for the petitioner, has held as under:--

"A plain reading of Article 46 would show that it illustrates the situations where statements having relevancy to the controversy, made in some earlier proceedings, subject to fulfilment of certain conditions, can be considered relevant and admissible piece of evidence. Particularly, sub-Article (1) shows that when the evidence or statement of a person, who is dead, as in the instant case, relates to the cause of his death or as to any of the circumstances of the transaction, which resulted in his death, then deviating from the normal course, such statement becomes relevant and gains evidentiary value because of the special circumstances that the person, who made such statement was no more alive/available. Similarly, Article 47 visualize relevancy and significance to the evidence of a witness in a judicial proceeding or before any person authorized by law to take evidence, when the said witness is dead or cannot be found or is incapable of giving evidence, subject to the conditions, provided in the proviso to the said Article, that the proceedings were between the same parties or their representative-in-interest, which for the purpose of criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of the said Article; when the adverse party in the first proceedings had the right and opportunity to cross-examine; the questions in issue were

substantially the same in the first as in the second proceeding. Article 131 of the Qanun-e-Shahadat, 1984 leaves at the discretion of the Judge to decide admissibility of any evidence and for this purpose gives wide powers to him subject to the language of this Article. Moreso, as there is no provision in the Qanun-e-Shahadat Order which specifically makes such piece of evidence inadmissible."

After above discussion, yet I feel it necessary to have a glance over the provision of Article 10-A [Inserted by the Constitution (Eighteenth Amendment) Act, 2010 (10 of 2010)] of the Constitution of Islamic Republic of Pakistan, 1973, which in its verbatim, reads as under:-

"10-A. Right to fair trial.---For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process."

Through the insertion of afore-quoted Article in Part-II of Chapter-I-Fundamental Rights, the Constitution in fact has enhanced the status and attributes of 'due process of law clause' as it is commonly known in different jurisdictions of the world, besides recognizing the importance of fair trial, which now under our constitutional dispensation, has been granted the status of a fundamental right of a person seeking determination of his civil rights or obligations or facing any criminal charge. The Constitution itself now guarantees the enforceability of this right for its enjoyment through a legal process by the courts which are the defenders and custodians of such rights of the citizenry. The status of the Constitution viz-a-viz other laws, being fully established now, needs no amplification through spoken or written words. In order to ensure the avoidance to any breach to this fundamental right, an accused facing the criminal charge, in my opinion, demands a nicely drawn balance between the exceptional situations pointed out above and the mandatory rule

embodied in the following provision of law i.e. Section 353, Cr.P.C which is reproduced as follows:-

> "353. Evidence to be taken in presence of accused. Except as otherwise expressly provided, all evidence taken under [Chapters XX, XXI, XXII and XXIIA] shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader."

Sequel to the discussion made so far, with reference to the above-referred statutory provisions, it can irresistibly be concluded that it is a mandatory rule that all evidence taken under Chapter XX (The trial of cases by Magistrate) XXII (Summary Trials) and XXII-A (Trials before High Courts and Courts of Session) shall be taken in the presence of the accused, except where his personal attendance is dispensed with, it shall be taken in presence of his pleader. The evidence recorded in violation of this rule vitiates the proceedings and such illegality even cannot be cured under Section 537, Cr.P.C. The mandatory command contained in the afore-quoted Section, using the word 'shall' as compared to the word 'may' in Section 512, Cr.P.C., is sufficient to highlight the importance of recording of evidence in presence of the accused. Resorting to referred above exceptional circumstances for giving previously recorded deposition in evidence under Section 512, Cr.P.C is only subject to the discretion of the Court after considering the circumstances of the case. The recording of examination-in-chief of a witness also includes cross-examination, conducted either personally or through a counsel/pleader of his own choice by the accused. Needless to reiterate that the accused is inherently deemed innocent unless found guilty by the court of competent jurisdiction. On the basis of proved abscondence itself no accused can be held guilty as it is not a substitute to the incriminating evidence. The abscondence of an accused is merely taken as additional circumstance leading to the guilt of an accused provided the charge against him is

proved otherwise, through unimpeachable incriminating evidence beyond a shadow of reasonable doubt. Inherent presumption of innocence remains attached to the accused irrespective of severity of charge unless proven guilty. Adopting due course of law, the compliance with the mandatory provision of Section 353, Cr.P.C., laying a general rule for recording of evidence either in presence of the accused or in case his presence is dispensed with, in presence of his pleader, is duly covered by Article 10-A of the Constitution guaranteeing fair trial as a fundamental right of the accused. The provision of Section 512, Cr.P.C., duly galvanized with Articles 46 and 47 of the Qanun-e-Shahadat Order, 1984 envisages besides enabling the court to weigh the circumstances judicially before resorting to the exceptions for using any deposition recorded during the abscondence of an accused as evidence against him. The court while conducting a trial must explore the possibilities for adhering to the general rule of recording of evidence. The facts of the instant case, when considered in the light of above discussion made on legal planks, it surfaced that when the accused-respondents were initially facing the trial, due to non-availability of the complainant, learned trial court on 02.10.2013, ordered that the file be consigned to the record room. Later on, the file was got resurrected by the complainant vide order dated 27.10.2014, the evidence of the complainant was recorded as PW-14, during the abscondence of the respondents, therefore, it is observed that both the parties remained busy in playing hide and seek with each other and with the process of court also. The complainant is currently residing out of the country and it has been stated that due to pitched enmity inter-se the parties, his coming to the country for recording of evidence may not be safe and even otherwise, it will cause delay and he will have to bear expenses unreasonably. Learned counsel for the respondents has shown his willingness to pay the expenses of boarding and lodging of the said witness, which shall be determined by the learned trail court, out of their pockets for coming to country for evidence. The learned trial courts

have ample power to direct the relevant authorities to ensure the safety of the person of the complainant on his arrival to the country. It is the fundamental right of every citizen to have an access to justice. The learned trial courts can also consider the possibility of recording of evidence of the PWs by resorting to modern devices. I feel it appropriate to observe here that the trial courts have been vested with vast powers for exercising it while taking into their judicial consideration the effects which the revolution in information technology has been brought about, bestowing the countries with a status of an individual unit while maintaining their political sovereignty which is a gift product of the modern state system. The learned counsel has not been able to point out any impropriety or illegality in the impugned order showing that the learned trial Court has either failed in exercise of its jurisdiction or has exceeded to the limits prescribed by the law while passing the impugned order to the prejudice of either of the parties, therefore, this petition is dismissed.

SA/P-5/L **Petition dismissed.**

PLJ 2020 Cr.C. (Note) 43

[Lahore High Court, Multan Bench]

Present: **ANWAARUL HAQ PANNUN, J.**

MUHAMMAD HAMEED KHAN--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 6262-B of 2019, decided on 22.10.2019.

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

----S. 497--Prevention of Electronic Crimes Act, (XL of 2016), Ss. 7, 13, 14 & 16--Pakistan Telecommunication (Re-organization) Act, (XVII of 1996), S. 31(1)--Pakistan Penal Code, (XLV of 1860), Ss. 419, 420 & 109--Post-arrest bail, grant of--Involvement of accused in illegal voice termination caused huge loss to Government--Offences with which had charged, did not fall within the prohibitory clause of Section 497, Cr.P.C. Accused has also not previous record of having committed such crime, as such in such like situation, grant of bail is a rule and refusal is an exception and no exceptional circumstances justifying refusal of bail has been agitated by prosecution--Investigation was completed and accused was no more required to police for further investigation, therefore, keeping petitioner behind bars would not serve any useful purpose--Bail was allowed.

[Para 4] A

Mr. Abdul Qayyum Rao, Advocate for Petitioner.

Mr. Abdul Wadood, Deputy Prosecutor General for State.

Date of hearing: 22.10.2019.

ORDER

After having been unsuccessful before the learned lower Court, Muhammad Hameed Khan, petitioner through the instant petition seeks his post-arrest bail in case F.I.R. No. 32/2019 dated 30.09.2019, under Sections 7, 13, 14, 16 of PECA-2016, 31(1) PT (RO) Act-1996 read with Section 419, 420, 109, PPC registered at Police Station FIA/CCRC, District Multan.

2. Precise allegation against the petitioner is that he is involved in illegal voice termination, caused hug loss to the Government, hence this case.

3. Heard. Record perused.

4. After hearing the learned counsel for the parties and going through the record, it is straightway observed that the offences with which the petitioner has been charged, do not fall within the prohibitory clause of Section 497, Cr.P.C. He has also not previous record of having committed such crime, as such in such like situation, grant of bail is a rule and refusal is an exception and no exceptional circumstances justifying refusal of bail has been agitated by the prosecution. The investigation is complete and the petitioner is no more required to police for further investigation, therefore, keeping the petitioner behind the bars would not serve any useful purpose. Resultantly, the application is accepted and the petitioner is admitted to post arrest bail subject to furnishing his bail bonds in the sum of Rs. 1,00,000/- with one surety in the like amount to the satisfaction of the learned trial Court.

(A.A.K.) **Bail allowed.**

PLJ 2020 Cr.C. (Lahore) 338 (DB)
[Multan Bench Multan]

Present **: ANWAARUL HAQ PANNUN AND MUJAHID MUSTAQEEM AHMED, JJ.**

ABDUL HAYEE & another--Appellant

versus

STATE and another--Respondents

Crl. A. No. 418 of 2019, heard on 5.11.2019.

Explosive Substances Act, 1908 (XI of 1908)--

----Ss. 5 & 5A--Arms Ordinance, 1965, S. 13(2)(a)--Criminal Procedure Code, (V of 1898), S. 410--Criminal appeal--Conviction and sentence--Challenge to--Benefit of doubt--Allegation--Some explosive material and hand grenade was recovered--Benefit of doubt--It is crystal clear that none of the witnesses had mentioned specification of hand grenades as well as detonator being part of those grenades qua country name, factory name and batch number, etc.--In absence of such specifications, it is difficult to hold that it was the same explosive/material which was recovered from the appellants as well as convicted co-accused have gone through the report of Punjab Forensic Science Agency regarding Trace Chemistry Analysis report whereby Bomb Disposal Technical (PW-3) had taken/removed 3.5 grams blasting material from each hand grenades as sample but in absence their specifications it does not establish that same were with regard to which hand grenade recovered from each appellant--Thus, the forensic report on which prosecution whole case hinges upon does not connect the appellants as well as their co-accused/convict (since not filed appeal) with the explosive material allegedly recovered from their possession--So far as allegation that appellants as well as co-convict were the members of banned organization and they were involved in terrorist activities to spread fear and panic among the public at large is concerned, PW-4 in his cross-examination has stated that *"I did not find*

any evidence against the accused persons connected the accused with any proscribed organization" and as such prosecution has failed to bring on record any cogent, concrete and confidence inspiring evidence. In this regard, defence put so many questions to prosecution witnesses but there is not a single document available on record whereby it could be gathered/established-that appellants as well as co-convict were member of any banned organization i.e. "Tehreek-e-Talban Pakistan" involved in promoting terrorist activities in the country. Further, they have been acquitted of the charge under Section 6 of ATA, 1997 punishable u/S. 7 of ATA of the Act ibid as well as Section 4 of the Explosive Substances Act, 1908 on the basis of same evidence--Story of the prosecution docs not appear to be real. Many cropped up questions have not been replied by the prosecution to satisfy the judicial mind of this Court. Having considered the evidence from all corners--Prosecution has miserable failed to establish charge against the appellants, as well as convicted accused (since not filed appeal) beyond shadow of reasonable doubt. The evidence produced by the prosecution is discrepant and suffering from serious infirmities and contradictions--All the above narrated facts and circumstances when evaluated on judicial parlance reflect that the prosecution has failed to establish culpability of the appellants as well as co-convict (since not failed appeal) in the instant case through reliable, trustworthy and confidence inspiring evidence--Conviction passed by the trial Court against the appellants in the circumstances is against all canons of law recognized for the safe dispensation of criminal justice. As per dictates of law benefit of every, doubt is to be extended in favour of the accused--Moreover, it is golden principle of law that the Court may err in letting off 100 guilty but should not convict one innocent person on the basis of suspicion. Resultantly while setting aside the convictions' HT& sentences recorded by the trial Court vide impugned judgment instant appeal is allowed as a consequence whereof both the appellants are ordered to be acquitted of the charge framed against them by extending them the benefit of doubt.

[Pp. 344, 345, 346 & 347] A, B, C, D & F

Benefit of doubt--

----Principle--It is established principle of law that for extending the benefit of doubt in favour of the accused, so many circumstances are not required, rather one circumstance which creates reasonable dent in the veracity of the prosecution version, can be taken into consideration for the purpose, not as a matter of grace, rather as a matter of right. [P. 346] E

Benefit of doubt--

----By the apex Court, the benefit of acquittal can also be extended to the non-appealing convict for purpose of doing complete justice.

[P. 347]G

1972 SCMR 194; 1985 SCMR 662; PLD 1991 SC 447 and 2004 PCr.LJ Karachi 1492 *ref.*

Ch. Dawood Ahmad Wains, Advocate for Appellants.

Malik Modassar Hussain, DPG for State.

Nemo for Complainant.

Date of hearing : 5.11.2019

JUDGMENT

Anwaar-ul-Haq Pannun, J.--Abdul Hayee son of Noor Muhammad and Muhammad Yousaf son of Karamat Ali, the appellants alongwith convicted accused Hijrat Ullah son of Mati Ullah were involved in case FIR No. 38/2017 dated 28.07.2017, offence under Sections 4/5 of the Explosive Substances Act, 1908, Section 13 (2)(c) of the Arms Ordinance, read with Section 7 of the Anti-Terrorism Act, 1997; registered with Police Station CTD Multan. They were tried by D&SJ/Judge Anti-Terrorism Court, Multan. The learned trial Court seized with the matter vide its judgment

dated 28.03.2019, convicted and sentenced both the appellants alongwith their co-accused namely Hijrat Ullah, who had not filed appeal, in the following terms:--

1) Abdul Hayee

2) Muhammad Yousaf

3) Hijrat Ullah (since not filed appeal)

i) Under Section 5 of the Explosive Substances Act, 1908.

Sentenced to undergo three years R.I. each.

ii) Under Section 5-A of the Act ibid.

Forfeiture of whole property of the appellants alongwith co-accused/co-convict in favour of the Government.

They were also given the benefit of Section 382-B of Cr.P.C.

Hijratullah (*co-accused/convict)*

i) Under Section 13(2)(a) of the Arms Ordinance, 1965.

sentenced to undergo R.I. for two years with fine of Rs. 10,000/- and in default whereof to further undergo S.I. for one month.

However, the appellants alongwith co-accused/convict (since not filed appeal) were acquitted of the charge under Section 4 of the Explosive Substances Act, 1908 as well as Section 6 of the Anti-Terrorism Act, 1997, punishable under Sectoin 7 of ATA ibid.

Sentences of co-accused/convict Hijrat Ullah were ordered to run concurrently.

Feeling aggrieved by the judgment of the learned trial Court the appellants have assailed their conviction and sentence by filing captioned appeal.

3. Prosecution's story as portrayed in the FIR (Exh.PA/1) lodged on the complaint (Exh.PA) of Kaleem Ullah Arshad 967/CPL is to the effect

that on 28.07.2017, at about 3.55 PM, he alongwith other posse of CTD Multan, was present at Vehari Chowk, Multan in search for the arrest of proclaimed offenders and terrorists. Upon receiving information that three persons belonging to TPP (Tehreek-e-Taliban Pakistan), are going towards Chowk Southern Vehari Road, Multan in order to launch some terrorist activities who are in possession of firearms and explosive substance and in case a raid is conducted, they can be arrested whereon after briefing his companions regarding the operation reached at the pointed place and by encircling them arrested the accused persons. The first accused told his name as Hijrat Ullah son of Atta Muhammad, Caste Pathan, R/o Harbans Pura, Lahore. On his personal search, a loaded pistol .30 bore was recovered from the waist belt kept under his shirt. On unloading the pistol 5 live bullets were recovered. On further search in the Zip pocket of the belt a live hand grenade was also recovered. Rs.2,000/- was also recovered from the front pocket of his shirt. The second accused told his name and address as Abdul Hayee son of Noor Muhammad (appellant). On his search of dark blue colour shoulder bag, which he had hanged on his right shoulder, one live hand grenade was recovered. On further search Rs.500/- was also recovered from the front pocket of his shirt. The third accused told his name and address as Muhammad Yousaf son of Karamat Ullah (appellant). On his personal search, one live hand grenade was recovered from pocket of his waist belt. Rs.300/- was also recovered from his front pocket. The complainant secured the recovered hand grenades and pistol at a safe place and cordoned the place of occurrence.

4. The investigation was encapsulated into a report under Section 173, Cr.P.C., which was duly submitted, the learned trial Judge took the cognizance, supplied the requisite statements under Section 265(c), Cr.P.C., framed charge against them on 21.11.2017, to which they pleaded not guilty and claimed trial. Thereafter, the prosecution was directed to lead its evidence in order to substantiate the charge.

5. At the trial, the prosecution in order to prove its case produced as many as 06 witnesses.

6. Learned DPG while giving up all the remaining PWs and by tendering in evidence the report of Fire Arm and Tool Marks and Trace Chemistry Reports issued by PFSA, Lahore as Exh.PQ and Exh.PR respectively vide his statement dated 07.02.2019, closed the prosecution evidence.

7. Thenceforth, the appellants were examined under Section 342, Cr.P.C.; wherein they refuted the allegations levelled against them in the prosecution version. They did not opt to appear as their own witness in terms of Section 340(2), Cr.P.C., however, opted to adduce defence evidence but later on by tendering certain documents in their defence closed the same.

The appellant **Abdul Hayee** in reply to a specific question "why this case against you and why the PWs deposed against you" stated as under:

> *"It is false case. All the proceedings are fictitious and has been done by the CTD while sitting at the police station. In fact, no such occurrence as mentioned by the complainant/prosecution ever took place, rather I was apprehended from my house by the local police of District Khushab without any case and after intervening of the respectables I was released but after a week police again summoned that he is again required for investigation of some case but after a week with mala fide intention I was handed over the CTD Gujranwala. My family members made their level best and approach many high ups of the department but their efforts remained unsuccessful and ultimately in order to show their efficiency the CTD department involved me in the instant case for without being any fault on my part. My parents protested against the police and I was remained under investigation CTD police Gujranwala and then CTD police Gujranwala handed over to me CTD Police Station Multan alongwith other accused persons Muhammad Yousaf and CTD police*

station Multan introduced a fake story of fake instant occurrence at southern by-pass Multan and involved me in this false case. Nothing has been recovered from me. Recoveries are planted. My parents upon receiving information along with respectables appeared before I.O. of CTD Multan and requested to release me because I am innocent but I.O. did not record their versions and mala fidely made a.concocted story and after proceeding at police station challaned me in this false case. I have no concern with TTP or any other proscribed/ banned organizations and there is no such like other complaint against me in any police station or any Court of law. All the witnesses are CTD officials, hence, they deposed falsely against me to strengthen the prosecution case".

The appellant **Muhammad Yousaf** in reply to the same question has answered infra:

"It is false case. All the proceedings are fictitious and has been done by the CTD while sitting at the police station. In fact, no such occurrence as mentioned by the complainant/prosecution ever took place, rather I was apprehended by the employees of different agencies from outside of my house. Upon which my father approach many high ups of the department but their efforts remained unsuccessful. My father Karamat Ullah lodged case FIR No. 171/17 dated 14.03.2017 under Section 365, PPC at Police Station Baghban Pura, District Gujranwala against the four unknown accused persons and my father also filed petition under Section 491, Cr.P.C. in the Court of learned Sessions Judge, Gujranwala against the DPO Gujranwala and Incharge CTD Peoples Colony Gujranwala but police did not produce me before the Court and stated that they have not arrested Muhammad Yousaf and pressurized my father to withdraw the petition otherwise they will expire me in a fake police encounter upon this situation my father withdraw the petition under Section 491, Cr.P.C. but CTD police did not release me and handed

over me to CTD police station Multan and introduced a fake story of arrest of me alongwith other accused persons and planted the fake recoveries. All the recoveries are fake and planed one. CTD Mullan with the connivance of CTD police Gujranwala involved me in this false case. My father alongwith respectables appeared before I.O. of this case and requested that Muhammad Yousaf is innocent, they will not complaint at any forum of his arrest in case of release of Muhammad Yousaf but they did not agree and even not recorded their statements of innocence and my father also produced a petition under Section 491, Cr.P.C. alongwith order of Sessions Judge, copy of FIR No 171/17 registered at Police Station Baghban Pura Gujranwala and other documents but they did not took on record of case file and challaned me in this false case. I have no concern with TTP or any other proscribed/banned organizations and there is no such like other complaint against me in any police station or any Court of law. All the witnesses are CTD officials, hence, they deposed falsely against me to strengthen the prosecution case.

8. On conclusion of trial, the learned trial Court convicted and sentenced the appellants alongwith their co-accused/convict Hijrat Ullah in the above stated terms.

9. After hearing learned counsel for the appellants as well as learned DPG and going through the record it is straightaway observed that admittedly no specifications of hand grenades (P-1, P-7 and P-11) have been mentioned in the complaint (Exh.PA) neither in FIR (Exh.PA/1) nor in the statement of complainant Kaleem Ullah Arshad 967/CPL (PW-4) and even in the recovery memos. (Exh.PD, Exh.PG & Exh.PJ) as well as in the statements of attesting witnesses i.e. PW-4 Kaleem Ullah Arshad 967/CPL and Ejaz Ahmad 966/CPL as well as Muhammad Iqbal Bomb Disposal Technician (PW-3). Further, Mustafa Kamal Inspector CTD Multan/Investigating Officer (PW-6) has also not deposed the specifications of the aforesaid hand grenades in his examination in chief. From the above, it

is crystal clear that none of the witnesses had mentioned specification of hand grenades as well as detonator being part of those grenades qua country name, factory name and batch number, etc. In absence of such specifications, it is difficult to hold that it was the same explosive material which was recovered from the appellants as well as convicted co-accused. We have gone through the report of Punjab Forensic Science Agency regarding Trace Chemistry Analysis report (Exh.PR) whereby Muhammad Iqbal, Bomb Disposal Technical (PW-3) had taken/removed 3.5 grams blasting material from each hand grenades as sample but in absence of their specifications it does not establish that same were with regard to which hand grenade recovered from each appellant. Thus, the forensic report on which prosecution whole case hinges upon does not connect the appellants as well as their co-accused/convict (since not filed appeal) with the explosive material allegedly recovered from their possession. One of the appellants namely Muhammad Yousaf being missing, his father Karamat Ullah lodged case FIR No. 171/17 dated 14.03.2017 under Section 365, PPC at Police Station Baghban Pura District Gujranwala against unknown accused persons and he also filed petition under Section 491-A, Cr.P.C. in the Court of learned Sessions Judge, Gujranwala. It has also been noticed that learned trial Court while passing impugned judgment in its Para No. 24 has observed that *"so far as quantum of punishment is concerned, it is an admitted fact that the accused persons are not previous convict. The prosecution has also failed to prove that the accused persons belong to TTP or any other proscribed organization. It is also admitted by the prosecution that none of them have been placed under 4th Schedule of ATA, 1997. They are also first offenders"*. Both the appellants as well as co-convict are admittedly the residents of different areas i.e. appellant Abdul Hayee is resident of Mohallah Baaki Aal Gaon. Dhaka. Post Office Noushera, District Khushab, appellant Muhammad Yousaf is resident of Chowk Qabarustan near Janazgah, Gujranwala and co-accused/convict Hijrat Ullah is resident of Harbans Pura, Lahore. Had they been belonging to any proscribed organization, which in the instant case is not proved, there should have been

common intention inter se but as observed herein above, since it is not proved therefore, it is beyond understanding as to how three persons assembled/ gathered while being in possession of certain articles at the same time when the raid was conducted, the complainant stated story appears to be fishy. No cell phone was recovered from their possession. Hence, no evidence is available on record to hold that how they have been assembled or their exists any commonality of interest amongst them. We have gone through the evidence of complainant Kaleem Ullah Arshad 967/CPL (PW-4), at the time of conducting cross-examination upon him, learned defence counsel requested the Court to de-seal the parcels containing hand grenades recovered from accused Muhammad Yousaf and Abdul Hayee which were de-sealed in open Court in presence of counsel for both sides. There is no serial number or any other number mentioned on the hand grenade recovered from accused Muhammad Yousaf. Likewise, there was no serial number or any other number mentioned on the body of hand grenade recovered from accused Abdul Hayee. Moreover, appellant Muhammad Yousaf in his defence evidence tendered certain documents which appears to be free of any manipulation as none knew that the same would be used as piece of defence evidence. More so, previously, there is neither any conviction nor they had ever been found involved in any other atni-sate activities. Thus believing endeavor made on behalf of the appellants, the prosecution story regarding recovery of hand grenades has been doubtful.

10. So far as allegation that appellants as well as co-convict were the members of banned organization and they were involved in terrorist activities to spread fear and panic among the public at large is concerned, PW-4 Kaleem Ullah Arshad 967/CPL in his cross-examination has stated that *"I did not find any evidence against the accused persons connected the accused with any proscribed organization"* and as such prosecution has failed to bring on record any cogent, concrete and confidence inspiring evidence. In this regard, defence put so many questions to prosecution witnesses but there is not a single document available on record whereby it

could be gathered/established that appellants as well as co-convict were member of any banned organization i.e. "Tehreek-e-Talban Pakistan" involved in promoting terrorist activities in the country. Further, they have been acquitted of the charge under Section 6 of ATA, 1997 punishable under Section 7 of ATA of the Act ibid as well as Section 4 of the Explosive Substances Act, 1908 on the basis of same evidence.

11. The accumulative effect of the above discussion is that story of the prosecution does not appear to be real. Many cropped up questions have not been replied by the prosecution to satisfy the judicial mind of this Court. Having considered the evidence from all corners, we are of the view that prosecution has miserable failed to establish charge against the appellants, as well as convicted accused (since not filed appeal) beyond shadow of reasonable doubt. The evidence produced by the prosecution is discrepant and suffering from serious infirmities and contradictions.

12. All the above narrated facts and circumstances when evaluated on judicial parlance reflect that the prosecution has failed to establish culpability of the appellants as well as co-convict namely Hijrat Ullah (since not failed appeal) in the instant case through reliable, trustworthy and confidence inspiring evidence. It is established principle of law that for extending the benefit of doubt in favour of the accused, so many circumstances are not required, rather one circumstance which creates reasonable dent in the veracity of the prosecution version, can be taken into consideration for the purpose, not as a matter of grace, rather as a matter of right. Respectful reliance in this regard is placed on the ratio decidendi of august Supreme Court of Pakistan in the cases of *"Tariq Pervez vs. The State"* (1995 SCMR 1345) *"Riaz Masih alias Mithoo vs. The State"* (1995 SCMR 1730) and *"Muhammad Akram vs. The State* (2009 SCMR 230). In the ease of *"Tariq Pervez vs. The State"* (1995 SCMR 1345), the august Supreme Court of Pakistan has held as under:

> *"--Art.4--Benefit of doubt, grant of--For giving benefit of doubt to an accused it is not necessary that there should be many circumstances*

creating doubts--If a simple circumstance creates reasonable doubt in a prudent mind about the guilt of accused then he will be entitled to such benefit not as a matter of grace and concession but as a matter of right".

13. From the facts and circumstances narrated above, we are persuaded to hold that conviction passed by the learned trial Court against the appellants in the circumstances is against all canons of law recognized for the safe dispensation of criminal justice. As per dictates of law benefit of every doubt is to be extended in favour of the accused. Moreover, it is golden principle of law that the Court may err in letting off 100 guilty but should not convict one innocent person on the basis of suspicion. Resultantly while setting aside the convictions and sentences recorded by the learned trial Court *vide* impugned judgment dated 28.03.2019, instant appeal is allowed as a consequence whereof both the appellants are ordered to be acquitted of the charge framed against them by extending them the benefit of doubt. They are in jail, directed to be released in this case, in a trice, if not required in any other case.

14. Since Hijrat Ullah (convict) who has not appealed in this case, when his co-accused (appellants in instant appeal) were placed in the same circumstances have been acquitted, he is also held entitled to the same benefit and can also be acquitted. In line with the rule laid down by the apex Court, the benefit of acquittal can also be extended to the non-appealing convict for purpose of doing complete justice. Reliance in this regard is placed upon case titled *Muhammad Aslam etc v. The State* (1972 SCMR 194) *Muhabbat Ali etc v. the State* (1985 SCMR 662), *Waqar Zaheer v. The State* (PLD 1991 SC 447) and *Fahim-ul-Haq v. The State* (PCr.L.J. 2004 Karachi 1492). In case titled *Muhammad Aslam v. The State* (supra), the Hon'ble Supreme Court of Pakistan even acquitted one of the co-accused who was an absconder. In our opinion therefore, in order to do complete justice in the circumstances of the case wherein we have found that the case of convicted accused Hijrat Ullah is at par with other appellants whom we

have acquitted, he also deserves the same relief/treatment. Accordingly, his conviction and sentence is also set aside and he is acquitted of the charge. He is also in jail, therefore, directed to be released forthwith in this case if not liable to be detained in any other case.

(A.A.K.) **Appeal allowed.**

PLJ 2020 Cr.C. (Lahore) 915

[Multan Bench Multan]

Present: **ANWAARUL HAQ PANNUN, J.**

ARSALAN ZOHAIB and another--Appellants

versus

STATE, etc.--Respondents

Crl. As. No. 996 & 1046 of 2018, heard on 12.11.2019.

Pakistan Penal Code, 1860 (XLV of 1860)--

----Ss. 302, 392, 411 & 109--Sentence--Challenge to--Not nominated in FIR--Supplementary statement--Joint test identification parade--Ocular account--Validity--Such identification parade carries no value in eye of law because the parade so conducted and held was joint parade in which accused had been made to sit in two different rous alongwith other dummies--Holding of joint identification parade of multiple accused persons in one go had been disapproved in cases as 2019 SCMR 956 and 2017 SCMR 1189--In instant case was replete with doubts and benefit of reasonable shadow of doubt would always favour accused as matter of right and not of grace--Appeal was allowed. [P. 922] B & D

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

----Art. 129--Criminal Procedure Code, (V of 1898), S. 173--Pakistan Penal Code, (XLV of 1860), Ss. 302, 392, 411 & 109--Sentence--Challenge to--Star witness--Appreciation of evidence--Validity--Neither name of witness does figure in report of S. 173, Cr.P.C in column of witnesses neither any application was submitted for summoning as witness--He was star witness of alleged occurrence but his non-appearance for recording evidence in support of prosecution version creates serious dent in case but such aspect went unattended by trial Court which in perception caused miscarriage of justice. [P. 921] A

Pakistan Penal Code, 1860 (XLV of 1860)--

----Ss. 302(b), 392, 411 & 109--Sentence--Challenge to--Post-mortem--Autospy on dead body of deceased--Duration of injuries and death was 1½ hour whereas between death and post-mortem examination was 4½ hours--Purpose of conducting post-mortem examination is always to ascertain cause of death, number and locale of injuries kind of weapon used in crime and duration between injuries and death as well as death and post-mortem but medical evidence by itself does not raise finger towards specific culprit--Appeal was allowed. [P. 922] C

Mr. Khalid Ibn-e-Aziz, Advocate for Appellant (in Crl. A. No. 996/2018).

Syed Jafar Tayyar Bukhari, Advocate for Appellant (in Crl. A. No. 1046/2018)..

Mr. Muhammad Abdul Wadood, Deputy Prosecutor General for State.

Ch. Khawar Siddique Sahi, Advocate for Complainant.

Date of hearing: 12.11.2019.

JUDGMENT

Through this single judgment, I propose to decide the titled Criminal Appeals filed by appellants, namely, Arsalan Zohaib and Zeeshan (separately tried] against impugied judgments dated 20.11.2018, passed, on the conclusion of trial, in case FIR No. 707, dated 27.10.2014, registered at Police Station Gaggo Burewala, District Vehari in respect of offences under Sections 302, 392, 411 & 109, PPC, whereby they have been convicted and sentenced as under:-

(i) <u>Arsalan Zohaib</u>

<u>Under Section 392, PPC</u>

Rigorous Imprisonment for 10-years and fine of Rs. 50,000/- and in case of default, to undergo simple imprisonment for three months.

(ii) <u>Zeeshan</u>

<u>Under Section 302(b), PPC</u>

Imprisonment for life and compensation of Rs. 5,00,000/- payable to the legal heirs of the deceased under Section 544-A, Cr.P.C, failing which to further undergo six months S.I

<u>Under Section 392, PPC</u>

Rigorous Imprisonment for 10-years and fine of Rs. 50,000/- and in case of default, to undergo simple imprisonment for three months.

Benefit under Section 382-B, Cr.P.C. was extended to both the accused/convicts. The sentences of appellant Zeeshan were directed to run concurrently.

2. It is pertinent to mention here that two separate trials of the aforesaid case have been conducted, one against appellant Zeeshan being juvenile and other against appellant Arsalan Zohaib and acquitted co-accused Mirza Afzaal Mahdi.

3. The case of the prosecution as contained in the FIR (Exh.PA) lodged on the written complaint (Exh.PA/1) of the complainant Khan Bahadar (PW-6) is to the effect that on 27.10.2014 at 07:00 p.m., he along with Shaukat Ali (deceased) were proceedings towards main road from their land on a motorcycle; Munir Ahmad S/o Nazir Ahmad (given up), Sultan Mahmood S/o Ghulam Haider (PW-7) were also with them on other motorcycle; when they reached at 'Soling', two unknown persons, boarded on a motorcycle-125, waylaid them on gun point, started searching and took out cash amount of Rs. 1500/- from his pocket, Rs. 2700/- from Shaukat Ali; During search, they tied to apprehend the accused persons whereupon,

accused No. l made fire hitting at the chest of Shoukat Ali, who fell down on the ground; they attended him but in the meanwhile, the accused persons made their escape good.

4. The investigation was encapsulated into report under Section 173, Cr.P.C. against the appellants. During trial, the learned trial Court, *vide* order dated 02.06.2016, declared appellant Zeeshan Juvenile, therefore, to extent, separate report under Section 173, Cr.P.C. was submitted and his trial conducted separately. While taking cognizance of the offence, the learned trial Judge after supplying the requisite copies of the statements to the appellants as required under Section 265(c), Cr.P.C., charge sheeted them, to which they pleaded not guilty, while professing their innocence and claimed trial. The learned trial Judge directed the prosecution to produce its evidence for establishing the charge. The prosecution, in both trials, in order to prove the charge against the appellants, has produced as many as 09 PWs. In both the trials, medical evidence has been furnished by Dr. Khalid Maqsood, Medical Officer (PW-4), who stated that on 28.10.2014, he conducted the post-mortem examination on the dead body of deceased Shoukat Ali and observed the following injury:

1. A lacerated wound by fire arm measuring about .5 cm x .5 cm x on right sided chest x about 2 cm from right nipple medially x over 5th-6th rib x margins inverted x burnt x corresponding hole present on Qamiz. Right sided chest tube placed and intact.

In his opinion, death was occurred due to Injury No. 1, *i.e*. by fire arm injury which is sufficient in ordinary course of nature to cause death due to hemorrhage shock. The probable time that elapse between injury and death was about 1½ hours and between death and post-mortem was about 4½ hours.

5. The ocular account in this case has been furnished by Khan Bahadar/complainant (PW-6) and eye-witness Sultan Mehmood (PW-7). The

matter was investigated by Muhammad Eyyaz S.I (PW-9). Identification parade in this case was conducted by Mr. Muhammad Asim Shafique, Magistrate who appeared before the Court as PW-5. Rest of the witnesses being formal in nature, are not of much importance, therefore, in order to avoid unnecessary account, the detail thereof is not being given.

6. When examined under Section 342, Cr.P.C., appellants denied every bit of incriminating material so produced. While replying the question that as to why this case against them and why the prosecution witnesses had deposed against them, they replied as follows:

Arsalan Zohaib

"All the PWs are related inter se, interested and inimical towards me as well as my co-accused. They deposed against me due to political grudge as the real cousin of complainant party Muhammad Yousaf Kasalia is sitting MPA frcm our area and I alongwith my father and other family member are not supporter and voter for the said MPA. My father has also elected as councilor from said area. Moreover, I alongwith the complainant and PWs used to reside in the same vicinity. The complainant and PWs are well known to me and my other family member, as my mother is running a maternity hospital in the same town Gaggo, where they complainant party used to visit regularly. The Complainant has own piece of land in Chak No. l87/EB and 245/EB, whereas I and my father are also owners of landed property. If I was present at the time of alleged occurrence the complainant have no reason to nominate me in this case. Furthermore, according to prosecution evidence prior to my implication in this case complainant was fully aware of my name as well as name of my father alongwith my address. So the alleged proceedings of identification parade are fake and prosecution has maneuvered the false evidence against me. During the alleged identification proceedings one of the witnesses Sultan Mehmood PW-

7 stated before the judicial Magistrate that I am not his accused as is evident from the report of identification parade Exh.PG, Ex.PG/1 and ExhPG/2. During the course of evidence none of the alleged eye-witnesses including complainant utter single word regarding my identification during the dark night. Furthermore, no source of light was taken into possession by the I.O. nor it was produced by the prosecution during the course of evidence. All the evidence was maneuvered and fabricated by the I.O. I have been falsely Implicated by the complainant due to above said as well as other grudge."

Zeeshan

"My father was a contractor of supplying the labour. In the days of occurrence, he used to supply labour to Ganjshakara Gaee Mills situated at Gaggo. He snatched this contracted from the complainant party. Due to this grudge the complainant party falsely involved me in this unseen occurrence. One day after this unseen occurrence, the complainant alongwith police came the residential quarter of my father situated in the said mill to arrest me. Luckily I was not present in the above house and they could not cause my arrest. All the PWs are related inter se and they deposed against me due to above said grudge. Moreover, the alleged occurrence was of dark night prosecution did not adduce any evidence regarding identification of the assailants. During the course of evidence alleged prosecution witnesses did not utter a single word regarding the identification of assailants. Furthermore, no source of light was taken into possession during the course of investigation. The prosecution witnesses are highly inimical towards me and are interested witnesses."

7. Learned trial Court, on conclusion of the trial, proceeded to convict the appellants as aforesaid. Hence, the titled appeals.

8. Learned counsel for the appellants submits that initially, the FIR was lodged against four unknown accused persons, however, later on name of two accused surfaced through supplementary statement of one Mehmood Akhtar dated 02.11.2019 but the said witness was not produced before the Court; that the identification parade of the appellants was jointly conducted under the supervision of Judicial Magistrate which is not permissibly under the law; that during identification parade, no role was assigned to the appellants; that recovery of cash amount is joint.

9. Conversely, learned Deputy Prosecutor General assisted by learned counsel for the complainant submits that the appellants were duly identified by the complainant and the witnesses in the motorcycle lights; that during identification parade, the complainant and the witness identified the appellants while assigning specific roles; that recovery of weapons of offence have been effected on pointing out of the appellants.

10. Arguments heard. Record perused.

11 Before undertaking the judicial scrutiny of the entire prosecution's evidence, it is observed that the occurrence, in this case, has allegedly taken place on 27.10.2014 at 07:00 p.m. The complainant, who had put the machinery of law into motion, while recording his statement to Muhammad Ayyaz Khan SI (PW-9) in the form of complaint (Exh.PA/1) on the basis whereof, formal FIR (Exh.PA) was chalked out, appeared before the Court as PW-6 narrated the story as mentioned in the FIR.

12. In order to prove the ocular account, the prosecution has depended upon the testimony of Khan Bahadar/complainant (PW-6) and eye-witness Sultan Mehmood (PW-7). Perusal of record reveals that the appellants have been nominated in this case on the basis of statement of one Mehmood Akhtar S/o Muhaitimad Sharif who was witness of *Waj Takkar*. Most important aspect of this case, which surprised this Court was non examination of said witness, the star witness of this incident, which too without any explanation, therefore, inference can be drawn that had he been

produced before the Court, he would not support the case of the prosecution, in this respect reliance can be placed on the case reported as *Shah Izzat alias Shahzad v. Adnan, Constable No. 5355 and another* (2017 PCr.LJ 25). Relevant portion therefrom is quoted herein below:

> "The prosecution has withheld its best evidence. Non-production of said witness further makes the story of prosecution dubious. It is well-settled principle of law that if a best piece of evidence is available with a party and the same is withheld by him, then it is presumed that the party has some evil motive behind it in not prociucing the said evidence".

Under Article 129 of Qanun-e-Shahadat Order, 1984, Court may presume existence of certain facts. For further convenience the above mentioned Article is quoted herein below:

> "**129. Court may presume existence of certain facts.** The Court may ptesume the existence of any fact, which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.
>
> (g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.

It is also observed that neither the name of said witness does figure in the report under Section 173, Cr.P.C. in the column of witnesses neither any application was submitted before the learned trial Court for summoning him as witness. He was star witness of the alleged occurrence but his non-appearance before the Court for recording his evidence in support of prosecution's version creates a serious dent in the prosecution case but this important aspect went unattended by the trial Court, which in our perception caused miscarriage of justice.

13. The FIR was lodged against unknown accused persons and after the arrest of the appellants as a result of supplementary statement of one Mehmood Akhtar (not produced), in order to affirm their presence at the place of occurrence, joint test identification parade was conducted under the supervision of Mr. Asim Shafique Magistrate 1st Class, Mailsi (PW-5). Although the witnesses of ocular account have duly identified the appellants during the identification parade but joint test identification parade conducted under the supervision of a Magistrate has been disapproved by the Hon'ble Supreme Court of Pakistan. Such identification parade carries no value in the eye of law because the parade so conducted and held was a joint parade in which the appellants had been made to sit in two different rows along with many other dummies. Holding of a joint identification parade of multiple accused persons in one go has been disapproved by the Hon'ble Supreme Court of Pakistan in a recent judgments reported as *"Mian Sohail Ahmad and others v. The State and others"* (2019 SCMR 956) and *"Gulfam and another versus The State"* (2017 SCMR 1189).

14. Dr. Khalid Maqsood (PW-4) had conducted autopsy on the dead body of deceased and observed the injuries as mentioned in the post-mortem examination report. The duration of injuries and death was 1½ hour whereas between death and post-mortem examination was 4½ hours. The purpose of conducting post-mortem examination is always to ascertain the cause of death, number and locale of injuries kind of weapon used in the crime and duration between injuries and death as well as death and post-mortem but the medical evidence by itself dbes not raise finger towards any specific culprit.

15. Having scanned the entire prosecution evidence and material available on record, I am of the view that the case in hand is replete with doubts and the benefit of reasonable shadow of doubt would always favour the accused as a matter of right and not of grace. Reliance is placed on the case reported as *"Muhammad Akram versus The State"* (2009 SCMR 230) wherein, it has been held as under:

"It is an axiomatic principle of law that in case of doubt, the benefit of thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of *Tariq Pervaiz v. The State* 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

16. For what has been discussed above, these appeals are **allowed,** the conviction and sentence of appellants Arsalan Zohaib and Zeeshan are set aside and they are acquitted of the charge by extending the benefit of doubt to them. Appellant Arsalan Zohaib is on bail. His surety stands discharged from his liability. Appellant Zeeshan is in jail. He be released forthwith if not required in any other case.

(S.A.Q.) **Appeal allowed.**

PLJ 2020 Cr.C. (Lahore) 932 (DB)

Present: **TARIQ SALEEM SHEIKH AND ANWAARUL HAQ PANNUN, JJ.**

Mst. **MUNIRAN BIBI--Appellant**

versus

STATE, and another--Respondents

Crl. Appeal No. 1085 of 2018, decided on 10.10.2019.

Control of Narcotic Substances Act, 1997 (XXV of 1997)--

----Ss. 9(c) & 48--Conviction & sentence--Allegation of--Recovery of charas--Benefit of doubt--Material contradictions--Non-availability of rap--Non-production of witnesses--Challenge to--Case of prosecution was not proved beyond any shadow of doubt--Prosecution's case being depleted with material contradictions in it, thus prosecution failed to prove safe custody as well as safe transmission of sample parcels, of contraband/material allegedly recovered from possession of appellant--Moreover, no rappat regarding departure of complainant of PW for patrolling as well as arrival or departure of lady constable was available on record-- During cross-examination admitted it correct that "the arrival or departure of lady constable is not mentioned in any rapt of said date There is no rapt available on record regarding departure of ASI for patrolling--There is also no rapt available on record regarding arrival of SI with lady accused …. Similarly no rapt is available on record regarding handing over of case property to Moharar--No rapt regarding departure of raiding party is not available on record-- Furthermore, ASI, complainant deposed that he sent complainant for registration of case through PQR to police Station--Prosecution witness deposed that on same day, he received a draft of complaint through PQR--sent by TASI for registration of F.I.R, on basis thereon, he dictated to data entry operator intact who composed same--Non-production of witness and inexplicable conduct of

complainant not proceeding to police station himself to register FIR are matters of concern and collectively of doubt.

[Pp. 935 & 936] A, B, C & D

2018 SCMR 2039, 2001 PCr.LJ 1875 and 1998 PCr.LJ 2187.

Control of Narcotic Substances Act, 1997 (XXV of 1997)--

----S. 29--Benefit of doubt--Onus of proof--Acquittal of--Realities of prosecution are not transparent/clear, conviction and sentence of appellant cannot be sustained--Prosecution failed in establishing its case against accused beyond any shadow of doubt--Though there is a slight difference in manner and standard of proof in cases registered under CNSA, but prosecution is always burdened to discharge initial onus of proof--Though under Section 29 of CNSA, some departure has been introduced to general principle, yet prosecution cannot be absolved from its duty to discharge bonus of proof--Initial onus of proof is always on prosecution and when once it is discharged, then accused would be burdened to prove contrary in terms of principles in Section 29 of CNSA--Case of prosecution is rot of doubt and for earning acquittal, accused is not obliged to establish number of circumstances creating doubts but even a single circumstance, creating a reasonable doubt in prudent mind is sufficient to extend benefit of doubt to accused--Appeal allowed.

[P. 937] E

Mr. Rizwan Ahmad Khan, Advocate for Appellant.

Malik Riaz Ahmad Saghla, Deputy Prosecutor General for State.

Date of hearing: 10.10.2019.

JUDGMENT

Anwaarul Haq Pannun, J.--Through this appeal under Section 48 of The Control of Narcotic Substances Act, 1997(CNSA, 1997), the appellant

Mst. Muniran Bibi has challenged his conviction and sentence awarded to her, *vide* judgment dated 26.11.2018 in case/FIR No. 434/2018, dated 15.08.2018, offence under Section 9(c) of CNSA, 1997, registered at Police Station Model Town, Burewala, District Vehari, passed by learned Addl. Sessions Judge/Special Judge (CNS), Burewala, whereby the appellant has been convicted and sentenced as under:

Section 9(c) of CNSA, 1997

"to undergo 04 years with fine of Rs. 20,000/- and in default, she shall further undergo 06 months S.I. The benefit of Section 382-B, Cr.P.C. was extended to the convict."

2. The prosecution's version as contained in the FIR (Exh.PA). lodged on the complaint(Exh.PAD) of Mukhtar Ahmad T/ASI (PW-5) is that on 15.08.2018, the accused/appellant was apprehended in consequence of raid and upon her search, charas weighing 1480 grams was recovered. Out of recovered contraband, 74 grams charas was separated and sealed into sample parcel whereas, the remaining case property was also sealed into separate parcel *vide* recovery memo (Exh.PB/1).

3. After investigation and on receiving the report under Section 173, Cr.P.C., the learned trial Judge took the cognizance, supplied the copies of the statements as required under Section 265-C, Cr.P.C. to the appellant, framed charge, to which the appellant pleaded not guilty, proceeded to record the evidence of the prosecution witnesses. Muhammad Afzal 618/C (PW-1) chalked out formal FIR (Exh.PA). He also kept the sample parcel and case property for safe custody in the malkhana and then on 16.8.2018, delivered sample parcel to Muhammad Shabbir SI/NIU(PW-4), who deposited the same in the office of Punjab Forensic Science Agency, Lahore. He also conducted investigation of the case, inspected the spot, prepared site plan (Exh.PC), recorded the statements of witnesses under Section 161, Cr.P.C., and sent the accused to judicial lock up. *Mst.* Nasreen Akhtar 788//LC (PW-2) and Ali Asghar 449/C (PW-3) are the recovery witnesses of the alleged

occurrence. Mukhtar Ahmad T/ASI (PW-5) is the complainant of the case, who narrated the story of FIR. Learned Prosecutor while tendering positive report of Punjab Forensic Science Agency, Lahore (Exh.PE) closed the prosecution's evidence. The, appellant when examined under Section 342, Cr.P.C., she while refuting prosecution's evidence, pleaded her innocence. In reply to the questions that why this case and why the PWs deposed against her, the appellant replied as under:

> *"On the alleged day of occurrence I alongwith my relatives namely Shumaila Bibi came at Court premises for meeting my husband. I entered in Bakhshi Khana to meet my husband after getting permission from the Bakhshi Khana Squad both me and my relatives Shumaila Bibi was checked in detail while entering the Bakhshi Khana. We remained there about 30 minutes alongwith our kids from where Iqbal ASI without assistance of any lady constable arrested both of us and took us to P.S Model Town, Burewala where he planted this case against us. I never involved in such like cases. My husband is behind the bars. Even I have already migrated from Burewala. I just come to visit my husband. This fact is clearly indicated that the writing of both the said FIRs No. 435/18 and 434/18, writing of complaint and site plan are same. Even I/O of both two cases admitted in his evidence that the writing of site plans in both cases are not mine whether it was prepared by any other person. I am innocent. I never involved in such like cases. My husband is already in prison. There is no person left behind who look after my minor kids. There are major contradictions in the statements of the PWs. Moharrar of P.S Model Town, Burewala appeared in the Court alongwith computerized Roznamcha. According to Daily Roznamcha total facts indicating that both the FIRs were bogus and planted one."*

Neither the appellant recorded her statement under Section 340(2), Cr.P.C. nor produced any defence evidence. On conclusion of trial, learned trial

Judge convicted and sentenced the appellant through the impugned judgment as alluded to in Para No. 1 of the instant judgment. Hence, this appeal.

4. Arguments heard. Record perused.

5. After perusal of evidence and record, we find that the case of prosecution is not proved beyond any shadow of doubt against the appellant. Muhammad Afzal 618/C deposed that on the same day (15.08.2018), Muhammad Shabbir SI/NIU handed over to him one sealed parcel of sample charas and other sealed parcel of chars 1406/grams as case property for keeping the same at police malkhana in his safe custody and he kept the same in his custody intact. He further deposed that he deposited sealed parcel of charas as case property in judicial malkhana. He did not depose about keeping the sample parcel in the malkhana for safe custody. He further deposed that on 16.08.2018, he handed over the sealed parcel of sample charas to Muhammad Shabbir SI/NIU for its safe transmission to the office of Punjab Forensic Science Agency, Lahore *vide* Road No. 681/21. On the other hand, Muhammad Shabbir SI (PW-4) deposed that on 17.08.2018, he received sample parcel from Moharrar and personally submitted said sample in P.F.S.A Lahore.

6. In view of above discussion, the prosecution's case being depleted with material contradictions in it, thus the prosecution has failed to prove safe custody as well as safe transmission of sample parcels of the contraband/material allegedly recovered from possession of the appellant. It has been held in case titled *"The State through Regional Director ANF vs. Imam Bakhsh and others"* (2018 SCMR 2039) that:

> *"The chain of custody begins with the recovery of the seized drug by the Police and includes the separation of the representative sample(s) of the seized drug and their dispatch to the Narcotics Testing Laboratory. This chain of custody, is pivotal, as the entire construct of the Act and the Rules rests on the Report of the Government Analyst, which in turn rests on the process of sampling and its safe*

and secure custody and transmission to the laboratory. The prosecution must establish that the chain of custody was unbroken, unsuspicious, indubitable, safe and secure. Any break in the chain of custody or lapse in the control of possession of the sample, will cast doubts on the safe custody and safe transmission of the sample(s) and will impair and vitiate the conclusiveness and reliability of the Report of the Government Analyst, thus, rendering it incapable of sustaining conviction. This Court has already held in Amjad Ali v. State (2012 SCMR 577) and Ikramullah v. State (2015 SCMR 1002) that where safe custody or safe transmission of the alleged drug is not established, the Report of the Government Analyst becomes doubtful and unreliable."

7. Moreover, no rappat regarding departure of Mukhtar Ahmad ASI complainant (PW-5) for patrolling on 15.08.2017 as well as arrival or departure of lady constable *Mst.* Nasreen Akhtar (PW-3) is available on record. Muhammad Afzal 618/C(PW-1) during cross-examination admitted it correct that *"the arrival or departure of lady constable Nasreen Akhtar is not mentioned in any rapt of said date There is no rapt available on record regarding departure of Mukhtar Ahmad ASI for patrolling. There is Also no rapt available on record regarding arrival of Shabir Ahmad SI with lady accused …. Similarly no rapt is available on record regarding handing over of case property to Moharar. No rapt regarding the departure of raiding party in the instant case is not available on record."* Contrary to that, Mukhtar Ahmad T/ASI, complainant (PW-5) deposed that "*I made rappat in roznamcha regarding my departure from and arrival at P.S.* The above discussed facts, caters doubt on the prosecution's case. Reliance in this regard is placed upon case titled *"Hakim Ali vs. State"* (2001 PCr.LJ 1875) and *"Arif Khan vs. State"* (1998 PCr.LJ 2187).

8. Furthermore, Mukhtar Ahmad T/ASI, complainant (PW-5) deposed that he sent the complainant for registration of the case through Mushtaq Ahmad PQR to police Station. Muhammad Afzal 618/C (PW-1)

deposed that on the same day (15.08.2018), he received a draft of complaint through Mushtaq Ahmad PQR. sent by Mukhtar Ahmad TASI for registration of F.I.R, on the basis thereon, he dictated to data entry operator intact who composed the same as Exh.PA. The said Ghulam Mustafa PQR was neither examined as a witness during the trial of the case nor he was cited as a witness by the prosecution nor his statement was recorded by the I.O under Section 161 of, Cr.P.C. Non-production of aforesaid witness and the inexplicable conduct of the complainant (PW-5) not proceeding to the police station himself to register the FIR are matters of concern and collectively of doubt. It has been held in case titled *"Minhaj Khan vs. The State"* (2019 SCMR 326) that:

> *"The discrepancies in the testimonies of the two witnesses; the purported lack of knowledge about certain things which they ought to have remembered while having a photographic recollection of other insignificant things; not knowing those things which they should have; the fact that Constable Jehanzeb Khan reached the police station before the complainant PW-2; the non-production of Constable Jehanzeb Khan who took the written complainant and was an eye-witness of the occurrence and of the recovery memorandums; and the inexplicable conduct of the complainant PW-2 in not proceeding to the police station himself to register the FIR are matters of concern and collectively of incredulity. The conclusion therefrom that we draw is that the prosecution had failed to establish its case against the petitioner beyond reasonable doubt, or, at worst, that the petitioner was involved in a false case for ulterior reasons."*

9. In view of above discussed facts, when the realities of the prosecution are not transparent/clear, the conviction and sentence of the appellant cannot be sustained and we are of the view that the prosecution has failed in establishing its case against the appellant beyond any shadow of doubt. Though there is a slight difference in the manner and standard of proof in the cases registered under the Control of Narcotic Substances Act,

1997 but the prosecution is always burdened to discharge the initial onus of proof. Though under Section 29 of the Control of Narcotic Substances Act, 1997, some departure has been introduced to this general principle, yet the prosecution cannot be absolved from its duty to discharge the onus of proof. The initial onus of proof is always on the prosecution and when once it is discharged, then the accused would be burdened to prove the contrary in terms of principles laid down in Section 29 of the Control of Narcotic Substances Act, 1997. The case of the prosecution is not free of doubt and for earning the acquittal, the accused is not obliged to establish number of circumstances creating doubts but even a single circumstance, creating a reasonable doubt in the prudent mind is sufficient to extend the benefit of doubt to the accused. Reliance in this regard is placed upon case titled *"Muhammad Ashraf and others v. The State and others"* (PLD 2015 Lahore 1) and *"Muhammad Zaman v. The State and others"* (2014 SCMR 749).

10. For what has been discussed above, we are of the considered view that the prosecution has failed to discharge its onus for upholding the conviction recorded by the learned Addl. Sessions Judge/Special Judge (CNS), Burewala, against the appellant. Consequently, while allowing this appeal, we set aside the judgment dated 26.11.2018 and acquit the appellant from the charge. The appellant is in jail, she be released forthwith if not required in any other case.

(S.A.Q.) **Appeal allowed.**

PLJ 2020 Cr.C. (Lahore) 1298 (DB)

[Multan Bench, Multan]

Present: **TARIQ SALEEM SHEIKH AND ANWAARUL HAQ PANNUN, JJ.**

MUHAMMAD ARSHAD etc.--Appellants

versus

STATE, etc.--Respondents

Crl. A. No. 868-J of 2012, Crl. Rev. No. 80 of 2013,
heard on 10.10.2019.

Pakistan Penal Code, 1860 (XLV of 1860)--

----Ss. 324/336-B/337-A(1)/33-A(iii)/33-F(i)--Anti-Terrorism Act, (XXVII of 1997), S. 7--Conviction & sentence--Challenge to--Allegation of thrown acid--FIR was lodged against persons--Nomination of--Supplementary statement--Recovery of case property--Motive--Benefit of doubt--Acquittal of--It is not believable that accused/appellant kept acid bottle which he allegedly used in commission of offence" along-with him for a period of one month (as he was arrested on 16.07.2012 after about one month of lodging of FIR and then got it recovered to I.O on 26.07.2012) and did not destroy it despite fact that he has sufficient opportunities to destroy same--Hence, recovery of acid bottle is not proved against appellant--Court is not inclined to accept story regarding motive as set up by prosecution and as such, same does not ring true to our judicious mind hence is disbelieved--Prosecution has failed in proving case against appellant beyond any shadow of doubt--The benefit of doubt has accrued in favour of accused.

[Pp. 1305] A, B & C

Universal Principle of Law--

----Conviction must be founded on unimpeachable evidence and certainty of guilt and hence any doubt that arises in prosecution case must be resolved in favour of accused--Moreover it is cardinal principle of criminal jurisprudence that a single instance causing a reasonable doubt in mind of

Court entitles accused to benefit of doubt not as a matter of grace but as a matter of right--Order accordingly. [P. 1306] D

2009 SCMR 230 *ref.*

Syed Jaffar Tayyar Bukhari, Advocate with Appellant

Mehar Muhammad Shahid Imran, Advocate for Complainant/ Petitioner

Malik Mudassir Ali, Deputy Prosecutor General for State.

Date of hearing: 10.10.2019.

JUDGMENT

Anwaarul Haq Pannun, J.--Through this single judgment, we propose to decide Criminal Appeal No. 868-J of 2012 filed by the appellant against his conviction and Criminal Revision No. 80/2013 filed by the complainant/petitioner for enhancement of sentence of the convict, as both have arisen out of the same judgment dated 15.12.2012, passed, on the conclusion of a trial, in case FIR No. 174, dated 18.06.2012, for offences under Sections 324/336-B/337-A(i)/337-A(iii)/337-F(i), PPC and under Section 7 (a) of the Anti-Terrorism Act, 1997, registered at Police Station ChhabKalan, District Khanewal, by the learned Judge, Anti-Terrorism Court, Multan, whereby the appellant has been convicted and sentenced as under:--

Under Section 336-B, PPC

"Imprisonment of 14(fourteen) years R.I on three counts with a fine of One Million Rupees on three counts and in case of non- payment of fine, the convict shall undergo six, months S.I on three counts."

(Injuries on the person of *Mst.* Abida Bibi)

"Under Section 337-A(i), PPC

Sentenced to two years as Tazir and he shall also be liable to pay "Daman" amounting to Rs. 30,000/-.

Under Section 337-F(i), PPC

Sentenced to one year as Tazir and he shall also be liable to pay "Daman "amounting to Rs.30,000/-.

The "Daman "amounts were to be paid by the convict to Mst. Abida Bibi injured (PW-5)."

(Injuries on the person of *Mst.* Zainab minor)

"Under Section 337-A(i), PPC

Sentenced to two years as Tazir and he shall also be liable to pay "Daman" amounting to Rs.30,000/-.

Under Section 337-F(i), PPC

Sentenced to one year as Tazir and he shall also be liable to pay "Daman" amounting to Rs.30,000/-."

"The "Daman" amounts were to be paid by the convict to Mst. Zainab Bibi, minor through her natural guardian."

"All the sentences awarded to the convict shall run concurrently. The convict is entitled for benefit of Section 382-B, Cr.P.C."

2. The prosecution's story unfolded through F.I.R. (Exh.PC/1) lodged on the written complaint (Exh.PC) of Saddar Din complainant (PW-3), is to the effect that on the intervening night of 16/17.06.2012, when his son Liaquat Ali, daughter-in-law *Mst.* Abida Bibi and grand-daughter *Mst.* Zainab were sleeping outside the boundary wall of their cattle-pen, some unknown persons had thrown acid on them.

Later-on, the complainant through his supplementary statement implicated the accused/appellant along-with one Muhammad Saeed @ Kashi (since discharged from the case).

The motive behind the occurrence was that Muhammad Arshad accused had visiting terms with *Mst.* Sajida cousin of Liaquat Ali (PW-4) who restrained him from visiting *Mst.* Sajida whereupon he felt angry and sprinkled acid upon Liaquat Ali, *Mst.* Abida and *Mst.* Zainab (minor) and seriously wounded them.

3. Registration of the case, after its usual investigation, encapsulated into a report under Section 173, Cr.P.C.which was duly submitted before the learned trial Court, the appellant, after supplying him with the copies of incriminating material under Section 265-C, Cr.P.C, when charge sheeted, he while professing innocence, pleaded not guilty, and claimed trial, thereupon prosecution was directed to produce evidence.

4. he prosecution has produced as many as eleven witnesses besides tendering, in evidence, report of Punjab Forensic Science Agency, Lahore as Exh.PM.

5. On 17.06.2012, Dr. Muhammad Akbar, C.M.O. at THQ Hospital Mianchannu, District Khanewal (PW-1), medically examined the injured Liaquat Ali and observed as under:--

Description of Injuries

1. Burn mark over whole of face.
2. Burn mark on front and left side of neck.
3. Burn mark on whole of front of chest.
4. Burn mark on upper half of front of abdomen.
5. Burn mark on whole of back of left chest.
6. Burn mark on whole of left buttock.
7. Burn mark on whole of front of left thigh.
8. Burn mark on front of penis.
9. Burn mark on front of testes.
10. Burn mark on upper half of front of right thigh.
11. Burn mark on whole of front and sides of left leg.
12. Burn mark on whole of front of right leg.

The probable time of injuries was 16 to 18 hours. All the injuries were caused with acid.

According to the expert opinion by Registrar Surgical Unit No. 3, Nishtar Hospital Multan, the injured Liaquat Ali has 46% of burn over the face, chest, abdomen and on limbs. Patient treated conservatively. As there is keloid formation and permanent disfigurement, so the injuries No. 1 to 12 are' declared as "Itlaf-i-Salahiyyat-i-udw" falls u/s 336, PPC.

6. Dr. Benazir Sajid, WMO(PW-9) medically examined *Mst.* Abida Bibi and observed the following injuries on her person.

Superficial burns involving most of the face, small area on the front of the base of the neck, upper part of front of chest, small area on the left lateral trunk, most of the front left leg, small area on the lateral aspect of left thigh, small area on the front of right upper arm, small area on the back of right leg, surrounding skin was hperemic. No pus was visible. Estimated percentage of chemical burns 28 to 30%. All the injuries were kept under observation for clinical assessment.

These burns were caused by some chemical. Duration of injury was within 24 hours.

According to examination/scar distribution, burns on the head and neck were declared as u/s 337-A(i), PPC and burns on the rest of body as 337-F(i), PPC.

Dr. Benazir Sajid, WMO (PW-9) also medically examined *Mst.* Zainab and observed the following injuries on her person.

Superficial burns involving left side of the face and small area just proximal to the wrist, surrounding skin was hyperemic. Estimated percentage of chemical burns 5 to 8%. All the injuries were kept under observation for clinical assessment.

These burns were caused by some chemical. Duration of injury was within 24 hours.

7. The ocular account in this case has been furnished by Saddar Din, complainant (PW-3), Liaquat Ali, injured (PW-6) and *Mst.* Abida Bibi, injured (PW-5). Muhammad Akram Inspector (PW-10) is Investigating Officer of the case. Muhammad Ajmal 424/C (PW-7) is the recovery witness of the motorcycle and acid bottle (P-7), which were taken into possession by the I.O. *vide* recovery memo (Exh.PF). The evidence of rest of the witnesses is formal in nature, therefore, avoiding repetition, its detail is not given.

8. When examined under Section 342, Cr.P.C, the appellant denied every bit of incriminating material produced against him. While replying the question as to why this case against him and why the prosecution witnesses had deposed against him, he stated as under:--

> *"Infact, some unknown persons in darkness of night injured Liaquat, his wife and their daughter by sprinkling acid. Some persons were apprehended by police on suspicion but were got released by Mst. Abida PW. The PWs suspected affair of Mst. Sajida with me and I was named on suspicion after deliberation and preliminary investigation. PWs are inter-se related."*

9. The appellant neither opted to appear under Section 340(2), Cr.P.C. nor has produced any defence evidence. On the conclusion of trial, the appellant has been convicted and sentenced as aforesaid, hence the aforementioned criminal appeal as well as criminal revision petition.

10. Arguments heard. Record perused.

11. Initially the FIR was lodged against two unknown accused persons. The name of the present appellant came on surface through supplementary statement of the complainant (PW-3), whereas co-accused Muhammad Saeed alias Kashi was discharged from the case by the learned trial Court *vide* its order dated 18.10.2012. The complainant (PW-3) stated that during said night, at about 11/12 a.m., he received information that some unknown persons had thrown acid on Liaquat Ali, *Mst.* Abida Bibi and *Mst.* Zainab Bibi. On that information, he alongwith Khadim Hussain and Khalid PWs reached the spot where they noticed that Liaquat

Ali, *Mst.* Abida Bibi and minor *Mst.* Zainab Bibi had received acid burn injuries on their bodies. He further deposed that Liaquat Ali injured disclosed to them that one unknown accused after sprinkling acid upon them succeeded to decamp from the spot. The foot prints of one person were found available around the cots of above said three injured. They also noticed the foot prints of another person as well as the prints of the tyres of motorbike near the cots of the injured PWs. During cross-examination, he deposed that *"My son Liaquat the injured informed me through mobile phone about the occurrence. When I came at the spot I found my son lying unconscious"*. In next breath, he stated that *"I was informed about the occurrence a son namely Imran of my cousin, Imran told me that Arshad and Kasi poured acid on my son Liaquat*". The said Imran has not been produced in the witness box by the prosecution for the reasons best known to it. Furthermore, the complainant (PW-3) during cross-examination deposed that *"Khadim Hussain my brother and Khalid my nephew had already reached at the place of occurrence before my reaching"*. He deposed that the police caught Khalid as suspect of the case and took with them. Volunteered that he has no connection with the case. He admitted it correct that *"my daughter in law Abida protested and said if Khalid was caught she would not cooperate in investigation of this case. It is correct that on the protest of Abida, the police released Khalid"*. The aforesaid PWs were also not produced by the prosecution in the witness box.

12. On the other hand, Liqauat Ali, injured (PW-4) deposed that at 11 night, he heard a noise and awoke from his sleep, he saw Arshad accused present in Court standing with a box in the light of lantern; he raised "lalkara" and told him to be ready for death and from the box in his hand he sprinkled acid on him, his wife Abida and his daughter Zainab: accused Arshad was on visiting terms with household of his uncle Khadim Hussain PW; he stopped him from the visits; he fell unconscious at the spot after receiving acid burns injuries and was taken to THQ Hospital, Mian Channu. The lantern in the light of which, the injured (PW-4) identified the accused was neither taken into possession by the I.O nor the same has been produced

by the complainant before him. During cross-examination, the injured (PW-4) stated that *"I told my father the incident after 21.06.2012. I told him about two/three days from 21.06.2012." Mst.* Abida Bibi, injured (PW-5) during cross-examination deposed that *"when my father in law Saddar Din came at the place of occurrence at the time of occurrence, I told him that acid had been thrown by Arshad accused present in Court*. Liaquat Ali, injured (PW-4) deposed that he came to his house from hospital on 21.06.2012; the police Inspector Akram Khan came to him at his house and recorded his statement. Whereas *Mst.* Abida Bibi, another injured (PW-5) stated during cross-examination that she did record her statement before the Investigating Officer on 18.06.2012 when he was present at her home. She further deposed that she did not tell police about the name of Arshad in her statement. Volunteered that name of Arshad was told to her by her husband four/five days after recording her statement on 18.06.2012. Dr. Muhammad Akbar, CMO (PW-1) deposed that on 17.06.2012, he medically examined the injured Liaquat Ali and under the head of General Physical Examination, the injured was conscious fully oriented in time and space but the I.O did not record his statement in the hospital and thereafter recorded his statement on 21.06.2012. The parties are known to each-other. It is astonishing to; note here that Arif Zaman ASI (PW-2) during cross-examination deposed that *"Liaquat Ali came to me on 17.06.2012 at Police Station. He was accompanied with his wife and daughter. He himself spoken and told his name as Liaquat Ali son of Saddar Din*". Despite this fact the I.O. did not record their statements. Moreover, in view of above, it is, concluded that had both the injured PWs informed the complainant that Arshad had committed the alleged occurrence, he would had implicated the accused/appellant immediately in the alleged occurrence by lodging FIR instead of lodging it against unknown accused persons. This fact creates serious doubts about the veracity of prosecution's case.

13. So far as recovery of acid bottle (P-7) is concerned, Muhammad Ajmal 424/C (PW-7) deposed that on 26.07.2012, the accused/appellant made disclosure, led the police party to his residence where he produced

motorcycle and acid bottle containing little quantity of acid (P-7), which were taken into possession by the I.O *vide* recovery memo (Exh.PF). He also transmitted the sample parcel to the office of Punjab Forensic Science Agency, Lahore on 3.9.2019. Muhammad Akram, Inspector/I.O (PW-10) supported the version of PW-7. On the other hand, Muhammad Rafique 640/HC (PW-8) deposed that on 18.06.2012, he was posted at Police Station Chab Kalan, Tehsil Mian Channu, District Khanewal, on the said date, he received two sealed parcels one containing clothes and the other containing bottle of acid for keeping them in safe custody in police Mall Khana and also for their onward transmission to the office of Chemical Examiner, Punjab, Lahore. During cross-examination, Muhammad Ajmal 424/C (PW-7) admitted it correct that *"in my statement u/s 161 Cr. P.C I stated the colour of bottle recovered and it was green and also it was one and half litre capacity bottle."* He further admitted it correct that *"P-7 is white in colour and it hardly can contain half litre liquid material. "* Hence, in view of above, the recovery of aforesaid acid bottle (P-7) is of no avail to the prosecution. Even otherwise, it is not believable that the accused/appellant kept the acid bottle (P-7) which he allegedly used in the commission of offence" along-with him for a period of one month (as he was arrested on 16.07.2012 after about one month of lodging of the FIR and then got it recovered to the I.O on 26.07.2012) and did not destroy it despite the fact that he has sufficient opportunities to destroy the same. Hence, the recovery of acid bottle (P-7) is not proved against the appellant.

14. Regarding motive, it has been alleged that the accused/appellant Muhammad Arshad had visiting terms with *Mst.* Sajida, cousin of Liaquat Ali (PW-4), who abstained him from visiting her, whereupon he felt angry and sprinkled acid upon Liaquat Ali, *Mst.* Abida and *Mst.* Zainab (minor). The said *Mst.* Sajida has not been produced by the prosecution in the witness box in order to substantiate motive part of the occurrence. During cross-examination, he admitted it correct that Sajida is his niece and daughter of Khadim Hussain PW and sister of Khalid PW who eloped with Arshad accused. He further admitted it correct that Sajida told

them and to the police that she will live with Arsahd and on that reason the case of abduction was cancelled by the police. Liaquat Ali injured (PW-4) also admitted it correct that they kept trying for the returning of his cousin Sajida to avoid bad name to the family. In view of above, we are not inclined to accept the story regarding motive as set up by the prosecution and as such, the same does not ring true to our judicious mind hence is disbelieved.

15. For what has been discussed above, the prosecution has failed in proving the case against the appellant beyond any shadow of doubt. The benefit of doubt has accused, in favour of accused as the Hon'ble Supreme Court of Pakistan has held in case titled *"Muhammad Khan and another vs. State"* (PLJ 2000 SC 1041) that *it is axiomatic and universal recognized principle of law that conviction must be founded on unimpeachable evidence and certainty of guilt and hence any doubt that arises in prosecution case must be resolved in favour of accused*. Moreover it is cardinal principle of criminal jurisprudence that a single instance causing a reasonable doubt in the mind of Court entitles the accused to the benefit of doubt not as a matter of grace but as a matter of right. Reliance is placed on case titled as *"Muhammad Akram versus The State"* (2009 SCMR 230) and *"Tariq Pervaiz Vs. The State"* (1995 SCMR 1345). Consequently, we accept criminal appeal No. 868-J of 2012, set aside conviction and sentence of the appellant Muhammad Arshad, awarded by learned trial Court *vide* impugned judgment dated 15.12.2012 and acquit him of the charge by extending him the benefit of doubt. The appellant is on bail. His surety is discharged from the liability of his bail bonds.

16. Since, the accused/appellant has been acquitted of the charge by giving him the benefit of doubt, therefore, the instant criminal revision petition No. 80 of 2013 having no substance stands dismissed.

(M.M.R.) **Order accordingly.**

PLJ 2020 Cr.C. (Lahore) 1478 (DB)

[Multan Bench, Multan]

Present: **TARIQ SALEEM SHEIKH AND ANWAARUL HAQ PANNUN, JJ.**

RIAZ HUSSAIN--Appellant

versus

STATE and another--Respondents

Crl. A. No. 661 of 2015 & M.R. No. 95 of 2015, decided on 1.10.2019.

Pakistan Penal Code, 1860 (XLV of 1860)--

----Ss. 302, 148 & 149--Conviction & sentence--Challenge to--Allegation of murder--Non-recovery of case property--Delay in post-mortem--Ocular account--Evidence of prosecution was disbelieved--Acquittal of co-accused--Benefit of doubt--Acquittal of--No recovery of Kalashnikov was affected from accused during the course of investigation and rest of the accused were alleged armed with sota/sticks, non-interference of the PWs for saving life of the deceased makes their presence at the place of occurrence doubtful--**Held:** It is trite law that in murder case it is prime duty, excluding all other hypothesis to establish the presence of the PWs at the place of occurrence at the relevant time--Occurrence took place on 22.03.2013 at 7.30 PM whereas post-mortem over the dead body of the deceased was conducted on 22.03.2013 at about 8.30 a.m. and according to doctor M.O. THQ (PW-10) rigor mortis has been-developed, thus delayed post-mortem itself indicates that when the occurrence has taken place during night hours neither within" populated area rather at a deserted place, none has seen the occurrence--So far as recovery of 'Turban' (P-1) is concerned, the ocular account regarding tic main occurrence has since been disbelieved by us, therefore, recovery alone is of no consequences--Even otherwise, the recovery is deemed to be corroborative in nature, it is used for support of direct evidence and as per dictates of justice whenever direct evidence is disbelieved it would not be

safe to maintain conviction on confirmatory evidence--As far as motive is concerned, it is double edged weapon which can cut either way--It is the prosecution's own case that there exists enmity between appellant's party on account of love marriage of brother of the complainant namely with daughter of accused the complainant has opted to involve as many six other persons besides appellant, in this case, when, there exists no earthly reasons for sharing of their intention with the alleged principal accused--**Furhter Held:** It is settled principle of law that if evidence of the prosecution is; disbelieved *qua* bulk of accused it cannot be believed qua the other in the absence of very strong corroboration, which is squarely missing in the case in hand--It is established principle of law that for extending the benefit of doubt in favour of the accused, so many circumstances are not required, rather one circumstance which creates reasonable dent in the veracity of the prosecution version, can be taken into consideration for the purpose, not as a matter of grace, rather as a matter of right--Moreover, it is golden principle of law that the Court may err in letting off 100 guilty but should not convict one innocent person on the basis of suspicion.

[P. 1483, 1484 & 1485] A, B, C, D, E, F & G

M/s. M. Yousaf Zubair and Mirza Azeem Baig, Advocates for Appellant.

Malik Riaz Ahmad Saghla, D.P.G. for State.

Malik Aamer Manzoor, Advocate for Complainant.

Date of hearing: 1.10.2019.

JUDGMENT

Anwaarul Haq Pannun, J.--Riaz Hussain son of Lal Bakhsh (appellant) along with co-accused namely Ghulam Shabbir, Sawan, Hazoor Bakhsh, Liaqat Hussain and Ahmed Bakhsh, being involved in case FIR No. 51/2013 dated 22.03.2013, offence under Sections 302, 148, 149, PPC,

registered with Police Station Umer Kot, District Rajanpur, was tried by learned Addl. Sessions Judge, Rojhan. On the conclusion of trial, the learned trial Court while acquitting all the co-accused, convicted and sentenced the appellant Riaz Hussain *vide* judgment dated 15.05.2015 in the following terms:

> ➢ *Under Section 302 (b), PPC, sentenced to death as Ta'zir with direction to pay Rs. 2,00,000/- as compensation to the legal heirs of deceased in terms of Section 544-A, Cr.P.C. and in case of default in payment thereof, to further undergo S.I. for six months.*

2. Riaz Hussain, convict/appellant has assailed his conviction and sentence by filing Crl. Appeal No. 661/2015. The learned trial Court has submitted Murder Reference No. 95/2015 for confirmation or otherwise of the sentence of death inflicted upon the convict in terms of Section 374, Cr.P.C. Both matters have arisen out of the same judgment, therefore, are being disposed of through consolidated judgment.

3. Prosecution's story as projected through the statement (Exh.PA) of Nazar Hussain son of Kareem Bakhsh (PW-1) on the basis of which formal FIR (Exh.PA/1) was lodged is to the effect that on. 22.03.2013, at about 7.30 p.m, after visiting Bangla Hidayat, he along with Karam Elahi, Sadiq Hussain and Piran Ditta was going towards their home on foot and as soon as they reached near date palm tree, abruptly, Riaz Hussain (appellant), Sawan, Hazoor Bakhsh, Ahmad co-accused (since acquitted) armed with sotas and Liaqat (since acquitted) armed with Kalashnikov emerged there and asked Karam Elahi that his brother Nadir Hussain had abducted their girl so they would teach him a lesson. Riaz Hussain gave sota blow hitting Karam Elahi on his mouth. Sawan gave sota blow which landed on his neck, Hazoor Bakhsh inflicted sota blow which hit on left ear of Karam Elahi. When the complainant tried to intervene, accused Liaqat Hussain pointed his Kalashnikov towards him and imparted threats of dire consequences. Then Riaz Hussain (appellant) tied his turban on the neck of Karam Elahi and

dragged him upto 40 meters. On hue and cry of the complainant, the accused persons left the deceased and fled away from the place of occurrence on motorcycle. Subsequently, co-accused Ghulam Shabbir (since acquitted) was also implicated in this case in the supplementary statement made by the complainant. They shifted Karam Elahi in an injured condition to the Chowk of Bangla Hadayat where the injured succumbed to the injuries. The complainant along with Sadiq Hussain and Piran Ditta (PW-2) witnessed the occurrence.

The motive behind the occurrence as alleged in the FIR is that three years earlier Nadir Hussain brother of the complainant contracted love marriage with *Mst.* Zahida Perveen. Due to this grudge, M/s. Riaz Hussain, Sawan, Hazoor Bakhsh, Ahmad Bakhsh and Liaqat Hussain in prosecution of their common object/intention committed this murder. Hence, instant FIR.

4. Khuda Bakhsh SI/I.O. (PW-09) deposed that on 22.03.2013 he along with other police officials was present at Bangla Hidayat Chowk on patrol duty on official vehicle where Sadiq Hussain, Piran Ditta and Nazar Hussain brought dead body of Karam Elahi. He sent the dead body through Muhammad Jahangir 1091/C for post-mortem examination along with documents *i.e.* injury statements (Exh.PE) and inquest report (Exh.PE/1). Then, he along with. witnesses visited the place of occurrence, prepared rough site plan. (Exh.PF). On 23.03.2013 he secured last worn clothes of the deceased *i.e*. Ghadar (P-3), Shalwar (P-4), Qameez (P-5) and Sweeter (P-6); produced by Jahangir constable *vide* recovery memo. (Exh.PC). He on 14.04.2013 arrested accused Sawan, Riaz Hussain and Hazoor Bakhsh and obtained their physical remand. On 18.04.2013, the complainant nominated accused Ghulam Shabbir in his supplementary statement. On 25.04.2013 he arrested accused Ghulam Shabbir and obtained his physical remand. During physical remand the appellant Riaz made disclosure on 25.04.2013 and in pursuance thereof he got recovered ‘pagri’ of white colour (P-1) which was taken into possession *vide* recovery memo. (Exh.PB). He also got recovered motorcycle (P-2) which was taken into possession *vide* recovery memo.

(Exh.PB/1). The Investigating Officer also prepared site plan of the place of recovery as Exh.PB/2. On 15.05.2013. the I.O. got prepared scaled site plan (Exh.PD) from the Patwari concerned. He recorded the statements of the PWs stage-wise. He deposited the case property with the Moharrar of Maalkhana.

5. The investigation was encapsulated into submission of report under Section 173, Cr.P.C., the learned trial Judge took the cognizance, supplied the requisite statements under Section 265(c), Cr.P.C., framed the charge against appellant to which he pleaded not guilty and claimed trial.

6. In order to prove the charge against the appellant, the prosecution has produced ten (10) prosecution witnesses.

7. The ocular account in this case has been furnished by Nazar Hussain, the complainant (PW-1) and Piran Ditta (PW-2). Khuda Bakhsh, SI/I.O. (PW-9) conducted investigation of this case.

Dr. Abdul Hafeez (PW-10) had conducted post-mortem examination on the dead body of deceased Karam Elahi on 22.03.2013 at about 8.30 a.m. and observed following injuries on his person:-

"1. A small bruise of about 0.7 cm x 0.8 cm over the right side of nose and another bruise of about 0.5 cm x 0.5 cm in size over the right cheek.

2. There are two bruises of about 1 x 0.5 and 2 x 0.8 cm over the right and left knee joints.

Examination of neck.

A bruise (ligature mark) of about 11 x 2 cm deeply grooved mark up to the level of both right and left lobule (ear).

After conducting post-mortem examination, doctor rendered the following opinion:

"On the basis of above mentioned injuries, the probable cause of death was strangulation by means of cloth (ligature) that caused asphyxia and ischemia to vital organs that is brain, which was sufficient to cause death in ordinary course of nature.

Probable time that elapsed between injury and death was within minutes while between death and post-mortem was within 14 hours."

Statements of rest of the prosecution witnesses are formal in nature.

8. Learned DDPP *vide* his statement dated 10.06.2015 gave up PW Ghulam Qadir as being unnecessary, thereafter, he *vide* his statement dated 13.07.2015 closed the prosecution evidence.

9. The appellant when examined under Section 342, Cr.P.C.; wherein he refuted the incriminating material contained in the prosecution version. He did not opt to appear as his own witness in terms of Section 340(2), Cr.P.C., however, he opted to adduce defence evidence and thereafter by tendering Exh.DA in his defence closed the same. While replying to the question why this case against him and why the PWs deposed against him, appellant made the following deposition:

"It was blind murder. The complainant in connivance with the police falsely involved me and others on the suspicion that Nadir Hussain brother of Karam Elahi had abducted Mst. Zahida Perveen, daughter of Sawan. In fact, the case for abduction of Mst. Zahida was got registered by Sawan but when Zahida Perveen made statement before the Court denying her abduction then Sawan did not pursue the said case but the complainant had suspicion that we had murdered Karam Elahi which is wrong. The witnesses are inter se related and on the instigation of complainant, they have given false evidence".

10. On the conclusion of trial, the learned trial Court, convicted and sentenced the appellant as mentioned supra, however, his co-accused were acquitted by the learned trial Court.

11. After hearing learned counsel for the parties as well as learned Law Officer and going through the record, it is observed that five persons namely Riaz Hussain, Sawan, Hazoor Bakhsh, Liaqat Hussain and Ahmad Bakhsh were arraigned as accused out of them four accused-persons namely Sawan, Hazoor Bakhsh, Ahmad Bakhsh and Liaqat Ali were declared innocent during the course of investigation and they had been acquitted by the learned trial Court, on the same strength of evidence only the appellant has been convicted and sentenced, while applying the principle of *falsus in uno falsus in omnibus*. Further keeping in view the overall depiction of occurrence when no recovery of Kalashnikov was affected from accused Liaqat Ali during the course of investigation and rest of the accused were alleged armed with sota/sticks, non-interference of the PWs for saving life of the deceased makes their presence at the place of occurrence doubtful. It is trite law that in murder case it is prime duty, excluding all other hypothesis to establish the presence of the PWs at the place of occurrence at the relevant time. Conduct shown by the PWs during the course of occurrence, it must commensurate with the natural conduct of the person placed in the similar situation of the common prudence. Furthermore, occurrence took place on 22.03.2013 at 7.30 PM whereas post-mortem over the dead body of the deceased was conducted on 22.03.2013 at about 8.30 a.m. and according to doctor Abdul Hafeez, M.O. THQ Rojhan (PW-10) rigor mortis has been developed, thus delayed post-mortem itself indicates that when the occurrence has taken place during night hours neither within populated area rather at a deserted place, none has seen the occurrence. The co-accused have been acquitted by the learned trial Court, meaning thereby that appellant Riaz alone strangulated the deceased with turban of white colour (P-1) which compels us to hold that without the alleged assistance/help of the acquitted co-accused apparently it was not possible for the appellant single handedly to strangulate Karam Elahi (deceased) who was aged about 45 as per post-mortem report and healthy. The learned trial Court while disbelieving evidence of the prosecution has acquitted the co-accused, which had also

caused serious repercussion upon the veracity of the evidence of PWs. Applying the principle of *falsus in uno, falsus in omnibus,* the same evidence is liable to be disbelieved once again.

12. So far as recovery of 'Turban' (P-1) is concerned, the ocular account regarding the main occurrence has since been disbelieved by us, therefore, recovery alone is of no consequences. Even otherwise, the recovery is deemed to be corroborative in nature and it is used for support of direct evidence and as per dictates of justice whenever direct evidence is disbelieved it would not be safe to maintain conviction on confirmatory evidence. In the case of *Muhammad Jail vs. Muhammad Akram and others* (2009 SCMR 120) the august Supreme Court of Pakistan had held as under:

> *"----S. 302(b)--Appreciation of evidence--Principle--In a case of direct evidence other pieces of evidence are used for corroboration or in support of direct evidence--When direct evidence is disbelieved, then it would not be safe to base conviction on corroborative or confirmatory evidence."*

13. As far as motive is concerned, it is double edged weapon which can cut either way. It is the prosecution's own case that there exists enmity between appellant's party on account of love marriage of brother of the complainant namely Nadir Hussain with daughter of accused Sawan, the complainant has opted to involve as many six other persons besides appellant, in this case, when, there exists no earthly reasons for sharing of their intention with the alleged principal accused.

14. Fact also remains that in the crime report besides the appellant, Sawan, Hazoor Bakhsh, Liaqat Hussain and Ahmad Bakhsh were also arrayed as accused whereas Ghulam Shabbir was implicated subsequently through supplementary statement out of them Sawan, Hazoor Bakhsh, Liaqat Hussain, Ahmad Bakhsh and Ghulam Shabbir were acquitted of the charge on the same set of evidence. It is settled principle of law that if evidence of

the prosecution is disbelieved *qua* bulk of accused it cannot be believed qua the other in the absence of very strong corroboration, which is squarely missing in the case in hand. Respectful reliance in this regard is placed on the *ratio decidendi* of august Supreme Court of Pakistan in the cases of *Akhtar Ali and others vs. The State* (PLJ 2008 SC 269), *Shera alias Sher Muhammad's case* (1999 SCMR 697) and *Sher Bahadur's case* (1972 SCMR 651).

15. All the above narrated facts and circumstances when evaluated on judicial parlance reflect that the prosecution has failed to establish culpability of the appellant in the instant case through reliable, trustworthy and confidence inspiring evidence. It is established principle of law that for extending the benefit of doubt in favour of the accused, so many circumstances are not required, rather one circumstance which creates reasonable dent in the veracity of the prosecution version, can be taken into consideration for the purpose, not as a matter of grace, rather as a matter of right. Respectful reliance in this regard is placed on the ratio decidendi of august Supreme Court of Pakistan in the cases of *"Tariq Pervez vs. The State"* (1995 SCMR 1345) *"Riaz Masih alias Mithoo vs. The State"* (1995 SCMR 1730) and *"Muhammad Akram vs. The State"* (2009 SCMR 230). In the case of *"Fariq Pervez vs. The State"* (1995 SCMR 1345), the august Supreme Court of Pakistan has held as under:

> *"----Art. 4--Benefit of doubt, grant of--For giving benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubts--If a simple circumstance creates reasonable doubt in a prudent mind about the guilt of accused, then he will be entitled to such benefit not as a matter of grace and concession but as a matter of right."*

6. From the facts and circumstances narrated above, we are persuaded to hold that conviction passed by the learned trial Court the against the appellant in the circumstances is against all canons of law

recognized for the safe dispensation of criminal justice. As per dictates of law benefit of every doubt is to be extended in favour of the accused. Moreover, it is golden principle of law that the Court may err in letting off 100 guilty but should not convict one innocent person on the basis of suspicion. Resultantly while setting aside the conviction and sentence recorded by the learned trial Court *vide* impugned judgment dated 15.09.2015, Crl. Appeal No. 661 of 2015 filed by the appellant **allowed** as a consequence whereof he is ordered to be acquitted of the charge framed against him by extending the benefit of doubt. He is in jail, directed to be released in this case, in a trice, if not required in any other case.

17. Murder Reference No. 95 of 2015 is answered in **negative**. Death sentence is **not confirmed.**

(M.M.R.) **Appeal allowed.**

2020 Y L R Note 18

[Lahore (Multan Bench)]

Before Anwaarul Haq Pannun, J

LIAQAT ALI and another---Petitioners

Versus

The STATE and another---Respondents

Criminal Miscellaneous No. 5731-B of 2018, decided on 28th November, 2018.

Criminal Procedure Code (V of 1898)---

----S. 498---Penal Code (XLV of 1860), Ss. 420, 467, 468 & 471---Cheating and dishonestly inducing delivery of property, forgery for valuable security, forgery for purpose of cheating, using as genuine a forged document---Pre-arrest bail grant of---Scope---Accused persons were alleged to have prepared forged affidavits and submitted before the court in a suit for specific performance---Said suit was pending adjudication, therefore, veracity and genuineness of alleged forged affidavits would be determined by the said court---Accused persons had joined the investigation and nothing was to be recovered from them---Pre-arrest bail was allowed, in circumstances.

Syed Jafar Tayyar Bukhari for Petitioners.

Abdul Wadood, Deputy Prosecutor General for the State.

Date of hearing: 28th November, 2018.

ORDER

ANWAARUL HAQ PANNUN, J.---The petitioners, after dismissal of their pre-arrest bail by the Court below, seek confirmation of their ad-interim pre-arrest bail granted to them vide order dated 8.10.2018 in case FIR No.116 dated 6.9.2018. registered at Police Station Civil Line,

Sahiwal under sections 420, 467, 468 and 471, P.P.C. with the allegation that they prepared forged and fictitious affidavits regarding the property of the complainant and fraudulently submitted the same before the Court in a suit filed by their co-accused in connivance with each other despite knowledge of its forged character, hence this case.

2. Arguments heard. Record perused.

3. The petitioners have been alleged to have prepared forged and fictitious affidavits and submitting the same before the Court in a suit for Specific Performance of Contract filed by their co-accused titled "Muhammad Aslam v. Munir Ahmad etc." in connivance with his co-accused by arraying the complainant as defendant. Admittedly, the said suit is pending adjudication before the Court of competent jurisdiction, therefore, veracity and genuineness of alleged forged affidavits shall be determined by the learned Court dealing with the matter. The petitioners have joined the investigation and at present, nothing is to be recovered from their possession. Moreover, Section 193, P.P.C. can be invoked by the learned trial court, adopting 195(c), Cr.P.C.

4. For what has been discussed above, this petition is allowed and ad-interim pre arrest bail already granted to the petitioners vide aforesaid order stands confirmed subject to their furnishing fresh bail bonds in the sum of Rs.100,000/- (one lac) each with one surety each in the like amount to the satisfaction of the trial Court.

SA/L-12/L **Pre-arrest bail granted.**

2020 Y L R 176

[Lahore (Multan Bench)]

Before Anwaarul Haq Pannun, J

MUHAMMAD AMIN---Appellant

Versus

The STATE and another---Respondents

Criminal Appeal No. 407 of 2009, heard on 25th March, 2019.

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

----Ss. 302 & 324---Qatl-i-amd, attempt to commit qatl-i-amd---Appreciation of evidence---Delay of about more than twenty five hours in lodging the FIR---Effect---Occurrence took place at 4.00 p.m. on 29.11.2007 in the house of the accused, in which both the deceased and injured had received injuries with blunt weapon---First Information Report was lodged on 30.11.2007 at about 5.35 p.m. by the real brother of the deceased, after an unexplained delay of about 25 hours and 35 minutes of the occurrence---Possibility of consultation and deliberation for cooking up a besuiting story could not be ruled out, in circumstances.

Mehmood Ahmad and 3 others v. The State and another 1995 SCMR 127 and Muhammad Rafique v. The State 2014 SCMR 1698 rel.

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

----Ss. 302 & 324---Qatl-i-amd, attempt to commit qatl-i-amd---Appreciation of evidence---Delay in conducting the post-mortem and medical examination---Effect---Occurrence took place at 4.00 p.m. on 29.11.2007 in the house of the accused, in which both the deceased and injured had received injuries with blunt weapon---Post-mortem examination was conducted after the delay of about 35 hours of the occurrence---Delay in conducting medical examination of the injured and

post-mortem examination over the dead body of the deceased had exorbitantly caused serious suspicion about the correctness and veracity of the prosecution case

Muhammad Rafique v. The State 2014 SCMR 1698 rel.

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

----Ss. 302 & 324---Qatl-i-amd, attempt to commit qatl-i-amd---Appreciation of evidence---Benefit of doubt---Prosecution case was that the accused while armed with iron pipe had inflicted injuries on the persons of deceased, his wife as well as on the person of khalazad of his wife---Ocular account had been furnished by three persons including injured and complainant---Admittedly, both the eye-witnesses were real brothers of the deceased---Presence of said witnesses at the relevant time at the place of occurrence was doubtful---Admittedly, said witnesses were residents of a different place, which was 04-kilometer away from the place of occurrence---Record showed that the marriage of the deceased with the accused took place 13/14 years before---Although they were issue-less but there was nothing on the record to suggest that they were leading a dog and cat life or prior to the alleged occurrence and other unpleasant incident had taken place, necessitating or compelling the real brothers of the deceased to come forward for beseeching their sister and exhorting the accused to live an amicable life by way of mending his ways---Neither complaint of torture had statedly been made by the deceased to her brothers prior to the occurrence nor it had been asserted anywhere in the evidence by them---Acclaimed presence of said witnesses at the place of occurrence, without any particular or tangible cause or object had created a serious doubt for accepting their presence at the spot---None out of the said two witnesses had made any effort either to save the deceased or the injured from the alleged assault of the accused, when he was not armed with any conventional weapon of offence rather he had inflicted the injuries only with an iron pipe---Post-mortem examination

report and the Medico-Legal Certificate of injured and evidence of Medical Officers indicated that the deceased had received as many as four injuries; three lacerated wounds and one mark of swelling on its temporal region---Injured had received as many as five blunt weapon injuries on his person---Said description of injuries allegedly caused by blunt weapon, according to the prosecution case, on the body of the injured and the deceased had, stirred up judicious anxiety requiring determination as to whether the accused could have inflicted said injuries on the person of the deceased and the injured in presence of eye-witnesses---Record revealed that none out of said witnesses either tried to intervene or made any tangible effort to overpower the accused in order to save the deceased and injured from the assault of the accused---Unnatural conduct and behaviour of the witnesses casted serious doubt about their presence at the spot---Witnesses were greater in number as compared to the accused, who was alone---Witnesses could easily overpower the accused---Record transpired that injured was resident of 7/8 kilometers away from the place of occurrence---Injured had no ostensible reason or business for his legitimate presence in the house of the accused---Injured had claimed that in-fact out of infuriation/provocation, the accused started giving blows on the person of the deceased and when he tried to save her, the accused also inflicted injuries on his person---Medical examination of the injured showed that he received as many as four injuries including a fracture---Number and gravity of injuries indicated that injured had not received the injuries incidentally---Circumstances suggested that injured had not received injuries on his person during the wake of his effort to save the deceased from the assault of the accused, rather it showed that he had been inflicted injuries by the accused out of some retaliation/ reaction due to some extraordinary reasons/circumstances--- Weak motive had been stated by the prosecution for the offence allegedly committed by the accused, which was not believable---Circumstances established that prosecution case was not free of doubts, benefit of which would resolve in favour of accused---Appeal was allowed and accused was acquitted by

setting aside conviction and sentence recorded by the Trial Court, in circumstances.

Muhammad Khan and another v. State 1999 SCMR 1220 rel.

(d) Criminal trial---

----Injured witness---Statement of injured witness---Scope---Stamps of injuries on the person of the witness might have established his presence at the relevant time at a particular place of occurrence but the injuries itself were not the proof that whatever the witness was telling was truth.

Shahid Ullah v. Eid Marjan and 2 others 2014 PCr.LJ 1684 and Amin Ali and another v. The State 2011 SCMR 323 rel.

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

----Ss. 302 & 324---Qatl-i-amd, attempt to commit qatl-i-amd---Appreciation of evidence---Recovery of weapon of offence from the accused---Reliance---Scope---Iron pipe was allegedly recovered on pointing out of the accused underneath the cot lying in his residential room, which was not stained with blood---No corresponding report could have been procured to fortify the recovery of weapon of offence---Since, the peculiar account of the prosecution had been disbelieved, therefore, the recovery of weapon of offence, lost its significance.

(f) Criminal trial---

----Benefit of doubt---Principle---Single instance causing a reasonable doubt in the mind of the court, entitled the accused to the benefit of doubt not as a matter of grace but as a matter of right.

Tariq Pervaiz v. The State 1995 SCMR 1345 rel.

Mudassir Altaf Qureshi for Appellant.

Nemo for the Complainant.

Muhammad Abdul Wadood, Deputy Prosecutor General for the State.

Date of hearing: 25th March, 2019.

JUDGMENT

ANWAARUL HAQ PANNUN, J.---Through the titled appeal under section 410, Cr.P.C., the appellant Muhammad Amin has challenged the vires of judgment dated 25.03.2009 passed by learned Addl. Sessions Judge, Burewala, District Vehari, on the conclusion of trial, in case FIR No.309/2007, for offence under Sections 302/324, P.P.C., registered at Police Station Fateh Shah, District Vehari whereby he has been convicted and sentenced as under:-

Under Section 302(b), P.P.C.

Imprisonment for life and fine of Rs. 1,00,000/- and in case of default, to undergo further for six months S.I.

Under Section 324, P.P.C.

Rigorous imprisonment for seven years with fine of Rs.50,000/- and in case of default, further undergo for three months S.I.

Under Sections 337A(i), 337F(iii) and 337F(v), P.P.C.

Liable to pay Rs.25,000/- as Daman for each of the injuries to injured Falak Sher.

Benefit of Section 382-B, Cr.P.C. was directed to be extended to the appellant.

2. The prosecution's story unfolded through FIR (Ex. PC) lodged on written complaint (Exh.PH) of Ghulam Farid, the complainant (PW-10) is to the effect that Mst. Muniran Bibi (deceased), his sister, was married to the appellant Muhammad Amin about 13/14 years back but she remained issueless. On 29.11.2007, he along with Falak Sher, Mumtaz and Muhammad Iqbal went to the house of Muhammad Amin accused to exhort him that he should mend his behavior as his sister was being subjected to torture by him. At about 4.00 p.m., when they reached at the house of the appellant, he out of his provocation gave iron pipe blows on

the head, arm and legs of Mst. Muniran Bibi . He also extended iron pipe blows on the right arm and legs of Falak Sher injured. Thereafter appellant/accused fled way from the place of occurrence. Falak Sher injured was shifted to the hospital by Muhamad Iqbal whereas Mst. Muniran Bibi succumbed to her injuries at about 04:00 a.m. i.e. next morning. He reported the occurrence to the police vide Ex.PH which is signed by him.

3. Registration of the case, after its usual investigation encapsulated into a report under Section 173, Cr.P.C which was duly submitted before the learned trial court, the appellant, after supplying him with the copies of incriminating material under Section 265(c) Cr.P.C, was charged sheeted to which he denied and pleaded not guilty, while professing his innocence and claiming trial, the prosecution was directed to produce evidence.

4. The prosecution has produced as many as eleven witnesses beside tendering, in evidence, report of SHO (Mark-A) as well as report of Moharrir of Police Station (Mark-B) regarding report of Chemical Examiner.

5. The medical evidence has been furnished by Dr. Ambreen Fatima WMO, THQ Hospital, Burewala (PW-6) and Dr. Fayyaz Saleem M.O T.H.Q Hospital, Burewala (PW-8). PW-6 stated that on 01.12.2007, she conducted post-mortem examination on the dead body of Mst. Muniran Bibi and observed the following injuries:-

i. A lacerated wound 3cm x 1.5cm with swelling into 8cm x 4 cm on right temporal.

ii. A swelling about 4 cm x 2-1/2cm on the left temporal region of head.

iii. A lacerated wound cm x cm with swelling 14 cm on the front and inner side of right leg.

iv. A lacerated wound cm x cm on the front of left leg with bruises all over left leg and thigh.

Opinion

In her opinion, death was occurred due to injury No.1 because of intra cerebral hemorrhage. This injury was sufficient to cause death in ordinary course of nature and was ante-mortem. The probable time between injury and death was in between 6 to 24 hours while between death and post-mortem was about 35 hours.

Dr. Fayyaz Saleem, M.O. THQ Hospital, Burewala, (PW-8) conducted medical examination of injured Falak Sher on 30.11.2007 who was brought by Muhammad Nawaz 85/C and noted the following injuries:-

i. A swelling measuring 6 x 3 cm with ecchymosis on right eye.

ii. A swelling 7 cm x 4 cm with ecchymosis on left eye.

iii. A swelling 6 cm x 3 cm on right side of head 6 cm from right ear.

iv. A lacerated wound measuring 2 cm x 0.5 cm on back of right arm.

v. A lacerated wound 1 cm x 0.5 cm with swelling measuring 18 cm x 10 cm in front of right leg.

According to his opinion, all the injuries were with blunt weapon, injuries Nos.1 and 2 were kept under observation for Eye Surgeon opinion. Injuries Nos.3 to 5 were kept under observation for x-ray. He issued MLR No.330/07, carbon copy of the same which is available on file as Ex.PG which is in his hand and signed by him.

6. The ocular account in this case has been furnished by Mumtaz Ahmad (PW-7) and Falak Sher (PW-9) and the complainant Ghulam Farid (PW-10). Muhammad Aslam S.I, the investigating officer has appeared as PW-8. Abdul Sattar I.O. was examined as PW-11.

When examined under Section 342, Cr.P.C., the appellant denied every bit of incriminating material so produced. While replying the question that as to why this case against him and why the prosecution witnesses had deposed against him, he replied as follows:--

"Mst. Muniran Bibi deceased was living a deserted life. Her brother had nourished grudge against me. Therefore, he has implicated me in this false case with fake recovery."

7. The appellant neither opted to appear under section 340(2), Cr.P.C nor has produced any defence evidence.

8. Learned trial court, on conclusion of the trial, proceeded to convict the appellant as aforesaid. Hence, the titled appeal.

9. Arguments heard. Record perused.

10. Before undertaking exercise of appreciation of evidence of the prosecution, it will be appropriate to enumerate broadly stating the bare facts of the case. According to the prosecution's case, the occurrence has taken place at about 4.00 p.m. on 29.11.2007 in the house of the appellant situated within the abadi of Mauza Handala Khas, Basti Baghla, Police Station Fateh Shah. It is alleged that the appellant while armed with iron pipe had inflicted injuries on the persons of the deceased Mst. Muniran Bibi, his wife as well as on the person of Falak Sher. The complainant Ghulam Farid (PW-10) and Mumtaz Ahmad (PW-7) are inter-se real brothers. The deceased was their real sister whereas Falak Sher injured (PW-9) is their "Khalazad" i.e. son of sister of the mother of the complainant and the deceased. Ghulam Farid, complainant (PW-10) and Mumtaz Ahmad (PW-7) are the residents of a distant village/abadi named Basti Ghulam Farid Khan Aaloka, Tehsil Chishtian, District Bahawalnagar, which is situated at about 4/5 K.M from the place of occurrence. Falak Sher, injured (PW-9) is resident of Dullah Aakooka, Police Station Shehr Farid, Tehsil Chishtian, district Bahawalnagar. As

stated above, the alleged occurrence took place at 4.00 p.m. on 29.11.2007, whereas the FIR has been lodged at about 5.35 p.m. on 30.11.2007 with the delay of about 25 hours and 35 minutes. The post mortem examination over the dead body of the deceased Mst. Muniran Bibi was conducted by PW-1 Dr. Ambreen Fatima (M.O) Ex.W.M.O, THQ Hospital Burewala on 01.12.2007 who noted certain injuries, the description whereof has already been given in the preceding paragraph. She has noted the time which elapsed in between injury and death was in between 6 to 24 hours and in between death and post mortem was about 35 hours". The injured PW Falak Sher (PW-9) was medically examined by PW-8 Dr. Fiyyaz Saleem, Medical Officer, RHC Sahuka at 8.00 p.m. on 30.11.2007, after the delay of about 28 hours, the description of his injuries has also been mentioned in the preceding paragraph. The site plan Exh.PD/1-3 was prepared by Muhammad Arshad Rehman, Civil Draftsman (PW-5), after his inspection of the place of occurrence on 27.12.2007, it was handed over to the Investigating Officer on 28.12.2007. The said site plan indicates that the alleged incident took place inside a room of house of the appellant. The investigation of this case has been conducted by PW-11 Abdul Sattar S.I. Although his evidence shall be discussed little later but at this point, it will be appropriate to mentioned that when quizzed by the defence, he stated that "The place of occurrence is situated on the outer side of Basti Baghla in western side. About 8/10 persons were present there at the spot when he visited it. It is correct that persons who joined the investigation namely Mumtaz, Ghulam Farid and Mumtaz are residents of Basti Dulla Aakooka Tehsil Chishtian whereas Farid and Ashiq are residents of Chak No.48/KB, Ashraf, Yaseen, Nawab Ali and Talib Hussain are resident of Chak No.47/KB. It is correct that the person who joined the investigation were not residents of Basti Baghla where the alleged occurrence took place." He has not examined during his investigation any person belonging to the locality where the occurrence has allegedly taken place.

All the persons named above are the residents of the places situated distantly.

11. The appellant was arrested on 17.12.2007. The weapon of offence i.e. iron pipe was allegedly recovered on his pointing out underneath the cot lying in his residential room, vide recovery memo Exh.PB. The iron pipe was not stained with blood, thus no corresponding report of Chemical Examiner, could have been procured to fortify the recovery of weapon of offence.

12. After going through the prosecution's evidence, it is observed that allegedly the occurrence took place at 4.00 p.m. on 29.11.2007 at Mauza Handala Khas, Basti Bhagla, Police Station Fateh Shah, in the house of the appellant, in which both the deceased as well as Falak Sher (PW-9) had received injuries with blunt weapon. The FIR was lodged on 30.11.2007 at about 5.35 p.m. by Ghulam Farid (PW-10), the real brother of the deceased, after an unexplained delay of about 25 hours and 35 minutes of the occurrence, therefore, on part of the complainant party, the possibility of consultation and deliberation for cooking up a besuiting story cannot be ruled out. It has been held by the apex Court in case titled "Mehmood Ahmad and 3 others v. The State and another" (1995 SCMR 127) that:--

> "Delay of two hours in lodging the FIR in the particular circumstances of the case had assumed great significance as the same could be attributed to consultation, taking instructions and calculatedly preparing the report keeping the names of the accused open for roping in such persons whom ultimately the prosecution might wish to implicate."

Reliance may also be placed upon case titled "Muhammad Rafique v. The State"(2014 SCMR 1698). Undisputedly, the post-mortem examination over the dead body of the deceased was conducted by PW-1 Dr. Ambreen Fatima (M.O) on 01.12.2007, vide Exh.P.A, whereas the medical

examination of the injured Falak Sher (PW-9) was conducted on 30.11.2007 at about 8.00 p.m. by PW-8 Dr. Fiyyaz Saleem, M.O. vide Exh.PG. The post mortem examination as per statement of the PW-6 Dr. Ambreen Fatima M.O., was conducted after the delay of about 35 hours of the occurrence. The delay in conducting medical examination of the injured PW Falak Sher and post mortem examination over the dead body of the deceased has exorbitantly caused serious suspicion about the correctness and veracity of the prosecution's version. Reliance in this regard is also placed upon the case titled "Muhammad Rafique v. The State"(2014 SCMR 1698) wherein their lordships have been pleased to observe as under:--

> "the FIR had been lodged with a noticeable delay and post-mortem examination of the deadbody had also been conducted with significant delay in the following afternoon. All these factors had pointed towards a real possibility that the murder in issue had remained unwitnessed and time had been consumed by the local police in procuring and planting eye-witnesses and in cooking up a story for the prosecution."

13. Admittedly, the complainant Ghulam Farid (PW-10) and Mumtaz Ahmad (PW-7) are real brothers of the deceased. Their presence at the relevant time at the place of occurrence is also doubtful. Admittedly they are residents of a different place i.e. Basti Ghulam Farid Khan Aakooka, Tehsil Chishtian, District Bahawalnagar whereas the place of occurrence, the house of the appellant, is situated in Mauza Handala Khas, Basti Baghla, Police Station Fateh Shah, Tehsil Burewala. As per Mumtaz Ahmad (PW-7), his Basti is at a distance of about 04 K.M. from Baghla (place of occurrence).

14. It is also noticeable that according to the prosecution's version, the marriage of the deceased with the appellant took place 13/14 years before. Although they were issue-less but there is nothing on the record to suggest that they were leading a dog and cat life or prior to the alleged

occurrence any other unpleasant incident had taken place, necessitating or compelling the real brothers of the deceased, to come forward for beseeching their sister and exhorting the appellant to live an amicable life by way of mending his ways. Neither complaint of torture has statedly been made by the deceased to her above named brothers i.e. the complainant Ghulam Farid (PW-10) and Mumtaz Ahmad (PW-7), prior to the occurrence, nor it has been asserted anywhere in the evidence by them. Hence, in such circumstances, the acclaimed presence of these PWs at the place of occurrence, without any particular or tangible cause or object has created a serious doubt in mind of the Court for accepting their presence at the spot. It is also astonishing to note that none out of the two PWs has made any effort either to save the deceased or the injured PW Falak Sher (PW-9) from the alleged assault of the appellant, when he was not armed with any conventional weapon of offence rather he had inflicted the injuries only with an iron pipe. The perusal of post mortem examination report (Exh.PA) and the medico legal certificate (Exh.PG) of injured PW Falak Sher and evidence of the PW-6 and PW-8 respectively indicate that the deceased has received as many as four injuries i.e. three lacerated wounds and one mark of swelling on its temporal region. The injured PW Falak Sher had received as many as five blunt weapon injuries on his person. The above description of injuries allegedly caused by blunt weapon, according to the prosecution's case, on the body of the injured Falak Sher (PW-9) and the deceased has stirred up my judicious anxiety requiring to determine, whether the appellant could have inflicted these injuries on the persons of the deceased and the injured (PW-9) in presence of aforesaid PW-7 and PW-10, particularly when he was not armed with any conventional weapon of offence. Record reveals that none out of these PWs either tried to intervene or make any tangible effort to overpower the appellant in order to save the deceased and the injured PW-9 from the assault of the appellant, thus their unnatural conduct and behavior hereinabove, cast serious doubt about their presence at the spot. Had these two PWs (PW-7 and PW-10), real brothers of the deceased,

been present at the spot, their blood must have stimulated and propelled them to intervene with immediate effect, without considering the result, for an appropriate action in order to save the life of their deceased sister. Moreover, the PWs were greater in number as compared to the appellant, who was alone. They could have easily overpowered him. But as observed earlier, their statute like behavior seriously has questioned their presence at the spot. The entire occurrence as stated by the prosecution, if seen through the prism of extra-ordinary delay in lodging the FIR, conducting the medical examination of injured PW-9 through medico legal certificate (Exh.PG) and the belated post-mortem examination over the dead body of the deceased vide report (Exh.PA) has further thickens the doubt about their presence.

15. After doubting the presence of PW-7 and PW-8, at the place of occurrence at the relevant time, there remains the only evidence of Falak Sher, injured (PW-9) available with the prosecution who has rendered the ocular account. According to the evidence of PW-6 Dr. Ambreen Fatima who had conducted the post mortem examination over the dead body, the deceased was about 30 years of age, which she noted at the time of her post mortem examination. The age of this PW Falak Sher according to his own statement, he made, while appearing as PW-9 in this case was about 28 years. His evidence has been scanned by me quizzingly. According to his deposition, "he along with Ghulam Farid, Mumtaz and Iqbal went to his house for asking him not to torture his wife Mst. Muniran Bibi deceased, who was daughter of sister of his mother. But Muhammad Amin accused got provoked and inflicted an iron pipe on the head, legs, right arm, chest or Mst. Muniran Bibi deceased. He also inflicted injuries with iron pipe on his forehead, right arm, on both legs, in result of which his right leg was fractured". In cross-examination, he deposed that "he resides at a distance of 7/8 k.m. from the house of Muhammad Amin accused. Whereas Ghulam Farid complainant and his brother Mumtaz reside at a distance of 05 k.m. from his house". He further admitted that

"there are three rooms in the house of Muhammad Amin accused. His parents, sisters and brothers are also residing in the same house. It is correct that Mst. Kamoon is the step mother of Amin accused. Although she resides in a separate IHATA but on the same THARA". He further deposed that "he received injuries in the hands of Muhammad Amin when he was inflicting injuries to Mst. Muniran Bibi inside the room." The above excerpts from the statement of Falak Sher (PW-9) indicate (since I have already disbelieved the presence of Ghulam Farid, PW-10 and Mumtaz Ahmad, PW-7, the alleged eye-witnesses of the occurrence.) that he is resident of 7/8 K.M. away from the place of occurrence. He had no ostensible reason or business for his "legitimate presence" in the house of Muhammad Amin, appellant. It is a legal adage that sometimes telling a lie by a person is nullified by the circumstances. The pretended object and justification for his presence by Falak Sher at the place of occurrence is belied by the circumstances. Falak Sher (PW-9) has claimed that in-fact out of infuriation/provocation, the appellant started giving blows on the person of the deceased and when he tried to save her, the appellant also inflicted injuries on his person. Had there been one injury on the person of Falak Sher (PW-9), his claim could have been justifiable but according to the MLC (Exh.PG) and the deposition of PW-8 Dr. Fiyyaz Saleem, M.O, who medically examined him, Falak Sher had received as many as four injuries including a fracture. The number and gravity of injuries indicate that Falak Sher (PW-9) has not received the injuries, incidentally. It appears that this PW-9 has not received injuries on his person during the wake of his effort to save the deceased from the assault of the appellant, rather it shows that he had been inflicted injuries by the appellant out of some retaliation/reaction due to some extra ordinary reasons/ circumstances. Had Falak Sher (PW-9) genuinely been making effort to save the deceased from the physical assault of the appellant, as claimed by him, the number of injuries on his person would have definitely been lesser than the injuries available on his person, therefore, it appears that the deceased as well as this PW-9 were "sailing in the same

boat" at the time of receiving of injuries on their person at the hands of the appellant. It is trite law that the stamps of injuries on the person of a witness may establish his presence at the relevant time at a particular place of occurrence but the injuries itself are not the proof that whatever the witness is telling is the truth. It has been held in case titled "Shahid Ullah v. Eid Marjan and 2 others" (2014 PCr.LJ 1684) that:--

> "Mere stamp of injuries on the person of a witness would not be a proof of the fact that, wheatever he deposes would be the truthful account of the events. His veracity is to be tested from the circumstances of the case and his own statement whether it fits in the circumstances of the case or otherwise."

Reliance can also be placed upon case titled "Amin Ali and another v. The State"(2011 SCMR 323) that:-

> 12. Certainly, the presence of the injured witnesses cannot be doubted at the place of incident, but the question is as to whether they are truthful witnesses or otherwise, because merely the injuries on the persons of P.Ws. would not stamp them truthful witnesses. It has been held in the case of Said Ahmed supra as under:---
>
> "It is correct that the two eye-witnesses are injured and the injuries on their persons do indicate that they were not self-suffered. But that by itself would not show that they had, in view of the aforenoted circumstances, told the truth in the Court about the occurrence; particularly, also the role of the deceased and the eye-witnesses. It cannot be ignored that these two witnesses are closely related to the deceased, while the two other eye-witnesses mentioned in the F.I.R namely, Abdur Rashid and Riasat were not examined at the trial. This further shows that the injured eye-witnesses wanted to withhold the material aspects of the case from the Court and the prosecution was apprehensive that if independent witnesses are examined, their depositions might support the plea of the accused."

In the case of Mehmood Hayat supra at page 1417, it has been observed as under:-

"10. There is no cavil with the proposition laid down in the case of Zaab Din and another v. The State (PLD 1986 Peshawar 188) that merely because the P.Ws. had stamp of firearm injuries on their person was not per se tantamount to a stamp of credence on their testimony. "

In the case of Mehmood Ahmed supra, this Court at page 7 observed as under:-

"For an injured witness whose presence at the occurrence is not disputed it can safely be concluded that he had witnessed the incident. But the facts he narrates are not to be implicitly accepted merely because he is an injured witness. His testimony is to be tested and appraised on the principles applied for appreciation of any other prosecution witness."

13. From the above evidence of the P.Ws., they do not appear to be truthful witnesses; therefore, no implicit reliance can be placed on their evidence."

Moreover, the deceased and this PW-9, as observed, in the beginning of this paragraph, are almost of the same age grouping. It appears that they being "Khalazad" had something more than mere "acquaintance" with each-other, i.e. something moral and ugly, which unfortunately, the defence has not ably brought on the record. However, during the cross-examination over Falak Sher PW-9, the defence side, has put certain suggestions to this witness, though, he denied that he along with Mst. Muniran deceased was found in naked and compromising position in the area of Bhaini Farid Wali and thereupon, they both received injuries in result of torture of people of that vicinity." Keeping in view of the above, the injured PW Falak Sher had failed to furnish any "legitimate" explanation about his presence at the spot. Therefore, my judicial

conscious does not permit me to act upon the sole testimony of Falak Sher (PW-9), who himself has compromised his moral integrity, thus reject his testimony being not reliable witness of the occurrence.

16. The Investigating Officer has also unfortunately not diligently conducted the investigation in this case. As noted above, he has failed to associate with the investigation any of the person from the locality to dig out the truth. Let me quote hereunder Rule 25.2 of the Police Rules, 1934 which reads as under:-

> "25.2 Power of investigating officers.---(1) The powers and privileges of a police officer making an investigation are detailed in Sections 160 to 175, Criminal Procedure Code.
>
> ----------
>
> (2) ----------
>
> (3) It is the duty of an investigating officer to find out the truth of the matter under investigation. His object shall be to discover the actual facts of the case and to arrest the real offender or offenders. He shall not commit himself prematurely to any view of the facts for or against any person.

The Investigating Officer undoubtedly is obliged to act fairly and honestly while collecting the evidence, always keeping in mind the avowed object of the criminal justice system, that "no guilty persons should go escort free" but at the same time, "no innocent person should also be punished". Let me also express that keeping in view the mechanism/procedure and the empowerment of the Investigating Officer, under the law, he has a rare privilege and opportunity for having a visual touch with the scene of crime while investigating the case. He while recording the statements of PWs is not supposed to record their statements while acting as a "Stenographer" rather is obliged, as required under Section 161, Cr.P.C to "examine" the person whose evidence/ statement he is going to record. But unfortunately, in the instant case, the Investigating Officer only had

proceeded to join "the persons" in the investigation, who admittedly did not belong to the locality where the alleged occurrence has taken place.

17. So far as recovery of weapon of offence is concerned, according to prosecution's case, the weapon of offence i.e. iron pipe was allegedly recovered on pointing out of the appellant from underneath the cot lying in his residential room, vide recovery memo Exh.PB, which was not stained with blood. No corresponding report could have been procured to fortify the recovery i.e. weapon of offence. Since, I have disbelieved the peculiar account of the prosecution, therefore, the recovery of weapon of offence i.e. iron pipe, not stained with blood, loses its significance, cannot be relied upon. Even otherwise recovery is merely a corroborative piece of evidence to the ocular account, which has already been disbelieved.

18. A weak motive has been alleged/ stated by the prosecution behind the offence allegedly committed by the appellant, which is not believable. It appears that the prosecution after groaping in the darkness had made a self-harm effort for putting forth a concocted motive which had nothing to do with the case.

19. The nutshell of the above discussion is that the prosecution's case is not free of doubts, benefit of doubt has accrued in favour of the accused as the apex Court has held in case titled "Muhammad Khan and another v. State" (1999 SCMR 1220) that it is axiomatic and universal recognized principle of law that conviction must be founded on unimpeachable evidence and certainty of guilt and hence any doubt that arises in prosecution case must be resolved in favour of accused. Moreover it is cardinal principle of criminal jurisprudence that a single instance causing a reasonable doubt in the mind of Court entitles the accused to the benefit of doubt not as a matter of grace but as a matter of right. Reliance is placed on case law reported as "Muhammad Akram v. The State" (2009 SCMR 230) and "Tariq Pervaiz v. The State"(1995 SCMR 1345). Consequently, the instant appeal is allowed, the conviction and sentence awarded to the appellant by the learned trial Court, vide impugned

judgment dated 25.3.2009 is set aside and the appellant is acquitted of the charge by extending him the benefit of doubt. The appellant is on bail. His surety is discharged from the liability of his bail bonds.

JK/M-119/L **Appeal allowed.**

2020 Y L R 470

[Lahore (Multan Bench)]

Before Anwaarul Haq Pannun, J

DUR MUHAMMAD and another---Appellants

Versus

The STATE and another---Respondents

Criminal Appeal No. 248 of 2014, heard on 17th December, 2018.

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

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Benefit of doubt---Accused were charged for committing murder of son of complainant---Motive behind the occurrence was stated to be an exchange of hot words, over a dispute of passage, which took place few days earlier, between the deceased and the accused---Ocular account in the present case had been furnished by complainant and a eye-witness---Record showed that neither the complainant nor any other witness named in the FIR, who were greater in number than the accused persons, armed with only sotas and not any firearm weapon, had made any effort to interfere, in order to save the deceased---Conduct of the nearer and dearer of the deceased was not natural in circumstances---Said witnesses, during cross-examination had stated that the accused persons dragged deceased for about 2/3 minutes and continued to give him beating for a period of 10/15 minutes, but they remained standing at a distance of 22 feet towards east to the place of occurrence---Circumstances suggested that the presence of both the claimed eye-witnesses at the place of occurrence at the relevant time was not free from doubt---Motive had not been proved due to non-availability of evidence on record, which was set out in the FIR and had been dubbed to bald assertion made by the complainant's side, particularly in absence of any detail regarding date,

time and place of the occurrence, especially when there was also no pending litigation between the parties regarding the dispute of any passage---Investigating Officer had deposed that first version of accused persons was that daughters of accused were young enough and the deceased had evil intentions against them and he forbade him from visiting his house but he continued to stand in front of his house in routine---One evening at about 8.00/9.00 p.m. the deceased entered into their home by leaping over the wall and went inside the room where daughter of accused was sleeping---Accused tried to apprehend him and during the resistance by him, he got injured---Investigating Officer had stated that said first version of the accused was found correct during investigation---Version adopted by the accused in the facts of the case, seemed to be more plausible and probable as compared to the case of the prosecution---Circumstances established that the prosecution had failed in establishing its case beyond reasonable shadow of doubt---Appeal was allowed and accused were acquitted by setting aside conviction and sentence recorded by the Trial Court, in circumstances.

Liaqat Ali v. The State 2008 SCMR 95 rel.

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

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Consultation and deliberation in lodging the FIR---Effect---Record showed that FIR had been lodged by the complainant on the basis of legal advice rendered by a legal expert---Such FIR, which had been lodged after consultation and deliberation was suspicious and its veracity was deemed to be at stake being result of consultation and deliberation---Such version in the FIR might be called an adulterated first version of the complainant about the occurrence, hence could not be relied upon for the safe administration of justice.

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

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Recovery of weapon of offence on the pointation of accused---Reliance---Scope---Record showed that sotas, allegedly effected on pointing out of the accused persons, could easily be planted upon the accused---Recovery memos had been shown to be attested by the same witnesses, who were named in the FIR as eye-witnesses and whose presence at the spot had been disbelieved by the court, therefore, the recovery had also rendered no corroboration to the prosecution case.

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

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Medical evidence did not support the ocular account---Scope---Post-mortem report showed that deceased was a young man aged about 30-years---Medical Officer, who conducted post-mortem of the deceased, had opined that the cause of death was vaso vagal inhibition and crush syndrome resulted by all the injuries collectively inflicted by some blunt weapon and all the injuries were ante-mortem and were sufficient to cause the death in ordinary course of nature---Medical Officer had deposed in cross-examination that as per post mortem examination, there was no fracture of any bone of deceased nor there was apparently any serious injury---Nature of injuries had fallen under S. 337-A(i), P.P.C. or 337-F(i), P.P.C. or 337-L(2), P.P.C. and from the apparent nature of injuries, such like injuries did not cause the death in ordinary course of life---Circumstances established that medical evidence did not support the ocular account of the case.

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

----S. 342---Plea taken by the accused during his statement recorded under S. 342, Cr.P.C.---Effect---If the prosecution failed in establishing its case beyond reasonable shadow of doubt, the accused could be acquitted, even if he had taken a plea and thereby admitted the killing of the deceased.

Azhar Iqbal v. The State 2013 SCMR 383; Javaid v. The State PLD 1994 SC 679 and Nadeem-ul-Haq Khan and others v. The State 1985 SCMR 510 rel.

Malik Ghulam Abbas Ponta for Appellants.

Ch. Salamat Ali for the Complainant.

Syed Nadeem Ahmad Rizvi, Deputy Prosecutor General for the State.

Date of hearing: 17th December, 2018.

JUDGMENT

ANWAARUL HAQ PANNUN, J.---Through this criminal appeal, the appellants have called in question the judgment dated 21.04.2014, passed by learned Addl. Sessions Judge, Mian Channu in case/FIR No.582/2012 dated 20.10.2012, in respect of offences under sections 302, 34, P.P.C., registered at Police Station City Mian Channu, whereby while acquitting co-accused Muhammad Shabban, the appellants have been convicted under section 302(c), P.P.C. and sentenced to Rigorous Imprisonment for a period of fourteen 14-years each. The benefit of section 382-B, Cr.P.C was extended to the convicts/appellants.

2. The prosecution's story unfolded through FIR (Ex.PF/2) lodged on the written complaint (Ex.PF) of Mst. Haneefan Bibi (PW-6) is to the effect, that on 19.10.2012 at 8.00 p.m. Muhammad Ilyas son of the complainant, an auto-electrician by profession, on his way back to home after performing his duty, was forcibly stopped by the appellants, Shabban and one unknown accused near the tube-well of Zafar Arain and started giving him beating. On hearing his hue and cry, the complainant along with Ashfaq, Haji Muhammad Ashraf and Muhammad Hussain immediately reached there and witnesses in the light of electric bulb, installed at the tube-well that the said accused persons while armed with Sotas were giving beating to her son, which resulted into causing of severe bodily injuries. On the intervention of the complainant and the

PWs, the accused while brandishing their weapons, succeeded in making their escape good. The injured was shifted to THQ Hospital Mianchannu through local police where he succumbed to the injuries. The motive behind the occurrence is stated to be an exchange of hot words, over a dispute of passage, which took place few days earlier, between the deceased and the accused.

3. The investigation encapsulated into submission of report under section 173 Cr.P.C, the learned trial Judge after taking cognizance, supplied the requisite copies of the statements under Section 265(c), Cr.P.C., charge sheeted the accused, to which they denied while professing their innocence and claimed trial. The learned trial Judge ordered the prosecution to produce its evidence for establishing the charge. The prosecution has produced as many as nine(09) witnesses besides tendering report of Serologist (Ex.PO) in evidence. The medical evidence in the case, has been furnished by Dr. Muhammad Akbar, C.M.O. of THQ Hospital, Mian Channu (PW-1), who deposed that he had conducted medical examination of Muhammad Ilyas son of the complainant in injured condition on 19.10.2012 at 10.45 p.m, who was brought under the surveillance of Muhammad Azhar 737/C. PW-1 proved the MLC of the injured Muhammad Ilyas Ex.PB and pictorial diagram of injuries Ex.PB/1. He referred the injured to Nishtar Hospital, Multan for expert opinion and management. After the death of said Muhammad Ilyas, the doctor (PW-1) conducted post mortem examination over the dead body of the deceased on 20.10.2012 at 9.00 a.m. and observed the following injuries:-

Injury No.1:
Large contusion mark involving whole of the right shoulder.

Injury No.2:
Large contusion mark involving whole of the left shoulder.

Injury No.3:

Large contusion mark involving whole of the back of right chest.

Injury No.4:
Large contusion mark involving whole of the back of left chest.

Injury No.5:
Large contusion mark involving whole of the outer side and back of right arm.

Injury No.6:
Large contusion mark involving whole of front of outer side of left arm.

Injury No.7:
Multiple contusion marks on back of right forearm.

Injury No.8:
Multiple contusion marks on back of left forearm.

Injury No.9:
Multiple contusion marks on back.

Injury No.10:
Multiple contusion marks on back of right forearm.

Injury No.11:
Multiple contusion marks on front and outer side of left thigh.

Injury No.12:
Multiple contusion marks on front and outer side of right leg.

Injury No.13:
Multiple contusion marks on front and outer side of left leg.

Injury No.14:
Multiple contusion marks involving whole of right buttock.

Injury No.15:

Large contusion mark involving whole of left buttock.

Injury No.16:

Lacerated wound 02 cm x 0.5 cm x bone note exposed on top of head in its left half.

Injury No.17:

Lacerated wound 01 cm x 0.5 cm x bone note exposed. 2 cm below and outer side of left eye.

Injury No.18:

Lacerated wound 02 cm x 0.5 cm x skin deep, on front of left little finger.

Opinion:

According to PW-1, the cause of death in this case was vaso vagal inhabitation and crush syndrome resulted by all the injuries collectively inflicted by some blunt weapon. All the injuries were ante-mortem and were sufficient to cause the death in ordinary course of nature. The probable time between injury and death was about six to seven hours while between death and post mortem was six to eight hours. After post mortem examination, the doctor handed over the stitched dead body, last worn clothes, police papers and PMR No.34/2012 dated 20.10.2012 to Azhar Hussain 773/C. Post mortem report is Ex.PE with diagram with cut liners of the body of deceased is Ex.PE/1 which is in his hands and bears his signatures. Injury statement of the deceased Ilyas is Ex.PC whereas inquest report is Ex.PD.

4. The ocular account in this case has been furnished by Mst. Haneefan Bibi, complainant (PW-2) and eye-witness Muhammad Ashfaq (PW-3). Nusrat Hussain, SI/Investigating Officer has appeared as PW-9. Whereas, Mushtaq Ahmad son of Shair Muhammad, Ashraf son of Rehmat Ali and Muhammad Hussain son of Inayat Ali were given up being unnecessary by learned Prosecutor. Rest of the witnesses in the peculiar facts of this

case are not of much importance, therefore, in order to avoid unnecessary detail, their evidence is not being discussed. Needless to reiterate the documents tendered in evidence.

5. When examined under Section 342 Cr.P.C., the appellants refuted the incriminating material, produced in evidence against them, while replying the question as to why this case against them and why the prosecution witnesses had deposed against them, Dur Muhammad, appellant replied as follows:-

"On 19.10.2012 at about 8.00 p.m. I was irrigating my land with tubewell water and my son Shahid, my co-accused was going back to his home after serving meal to me. I heard the noise of my daughter Mst. Farzana Bibi, coming from my house. She was using the words "Bachao, Bachao". I immediately rushed to my house and saw one person with muffled face was standing outside the house and another person with muffled face, was grappling with my daughter in the courtyard of the house near a room. My daughter was fallen on the ground and the person was lying upon her. My son Shahid co-accused, was giving kicks and fists blow on the back of said persons. I tried to save my daughter, meanwhile, I also started giving slaps and fist blows to said person who left the courtyard of the house of scaling over the outer wall of the house. We followed him, some persons who had already gathered outside the house after hearing the noise, caught the said person and they also started to beat him and when his face was un-muffled, it was found that he was Muhammad Ilyas deceased who had been living with his parents at a bheni situated at a distance of 03/4-kanals from our house. I immediately called his parents from his house but it came to my knowledge that his mother and brother Ashfaq along with other family members of said Ilyas, had gone to chak No.95/151, to attend the marriage ceremony of their relatives and were not at home at that time. I then informed the police, the

police arrived at the spot and took Ilyas (deceased) alive to police station. Thereafter, having gained the knowledge of the occurrence, the complainant and the PWs came back from chak No.95/151 and with the consultation of Mr. Shahid Rafique, Advocate, got this case registered against me and my co-accused by twisting the real facts. Muhammad Ilyas had entered into our house with bad intention to abduct, or to commit rape or to outrage the modesty of my daughter Mst. Farzana Bibi, with the help of a person who was standing outside the house who later on ran away from the place of occurrence. Muhammad Shaban, my co-accused, was not residing at our bhani and was not present at the spot at that time. He has been involved in this case being my real uncle with ulterior motive to involve whole family in this case. Neither I nor my son Shahid inflicted injuries to the deceased with sotas. The deceased might have received injuries when he left the courtyard by scaling over the wall and while falling on waste material like bricks which were lying outside the wall and some of the injuries through the hands of the persons who were standing outside the house and caught the deceased outside the house near the door. PWs being close relative of deceased have deposed against me and my co-accused to secure our conviction by concocting a false version against me and my co-accused persons. The person with muffled face, standing outside the house was one of the companions of Muhammad Ilyas who ran away from there. During the investigation, my version and the version of my father was also found correct. Six/seven persons also appeared before the I.O. in support of our version. I and my co-accused are innocent. I was arrested by the police on the following day of occurrence along with Shahid and Shaban accused person and police kept us in wrongful confinement till I was produced before the court of Judl. Magistrate. I along with my son Shahid caused injuries to Ilyas

under grave and sudden provocation, inside my house when he was grappling with my daughter by putting her on the ground."

In reply to the said question, Shahid Hussain, appellant deposed as under:-

"On 19.10.2012 at about 8.00 p.m. my father Dur Muhammad co-accused was irrigating his land with tubewell water and I went there to serve meal to him. After serving meal, I was coming back to my home. When I reached near my house I heard the noise of my sister Mst. Farzana Bibi, coming from my house, she was using the words "Bachao, Bachao". My father Dur Muhammad also heard the noise in the fields who was at a distance of 04/5-acres from the house. My father also attracted to the spot. I immediately rushed to my house and saw one unknown person with muffled face was standing outside the house and another person, was grappling with my sister in the courtyard of the house near a room. My sister was fallen on the ground and the person was lying upon her. I tried to save my sister, meanwhile my father Dur Muhammad also reached in the courtyard of the house. I and my father gave slaps and fist blows to said person who left the courtyard of the house by scaling over the outer wall of the house. We followed him, some person who had already gathered outside the house after hearing the noise, caught the said person and they also started to beat him and when his face was un-muffled, it was found that he was Muhammad Ilyas deceased, who had been living with his parents at a bheni situated at a distance of 03/4-kanals from our house. My father immediately called his parents from his house but we came to know that his mother and brother Ashfaq along with other family members had gone to chak No.95/151, to attend the marriage ceremony of their relatives and were not at home at that time. My father then informed the police, the police arrived at the spot and took Ilyas (deceased) alive to police station.

Thereafter, having gained the knowledge of the occurrence, the complainant and the PWs came back from chak No.95/151 and with the consultation of Mr. Shahid Rafique, Advocate, got this case registered against me and my co-accused by twisting the real facts. Muhammad Ilyas had entered into our house with bad intention to abduct, or to commit rape or to outrage the modesty of my sister Mst. Farzana Bibi, with the help of a person who was standing outside the house who later on ran away from the place of occurrence. Muhammad Shaban, my co-accused, was not residing at our bhani and was not present at the spot at that time. He has been involved in this case being my real uncle with ulterior motive to involve whole family in this case. Neither I nor my father inflicted injuries to the deceased with sotas. The deceased might have received injuries when he left the courtyard by scaling over the wall and while falling on waste material like bricks which were lying outside the wall and some of the injuries at the hands of the persons who were standing outside the house and caught the deceased outside the house near the door. PWs being close relative of deceased have deposed against me and my co-accused to secure our conviction by concocting a false version against me and my co-accused persons. The person with muffled face, standing outside the house was one of the companions of Muhammad Ilyas who ran away from there. During the investigation, my version and the version of my father was also found correct. Six/seven persons also appeared before the I.O. in support of our version. I and my co-accused are innocent. I was arrested by the police on the following day of occurrence along with Dur Muhammad and Shaban accused person and police kept us in wrongful confinement till I was produced before the court of Judl. Magistrate. I along with my father Dur Muhammad caused some of the injuries to Ilyas under grave and sudden provocation, inside

my house when he was grappling with my sister by putting her on the ground."

6. Learned trial Court, on conclusion of the trial, proceeded to convict the appellants as aforesaid, hence this appeal.

7. Heard. Record perused.

8. At the very outset, it is observed that the learned trial Judge in para No.19 of the impugned judgment has held as under:--

"It has been found that the testimonies of PW-2 and PW-3 with regard to their presence are not confidence inspiring and the defence version rings true to the mind of the Court that these witnesses had gone to Chak No.95/15L to attend a marriage ceremony and after gaining knowledge of the occurrence, they arrived at the police station and got registered the case on the basis of legal advice furnished by Shahid Rafique, Advocate."

For coming to the above quoted conclusion, the learned trial Judge has assigned at least five reasons including (i) non-making of any effort by the complainant and other witnesses to save the skin of the deceased from the accused, (ii) non-association of any of the PWs with Muhammad Ilyas deceased, when he, in injured condition, got recorded Rapt Exh.PM/3 at police station at 9:55 p.m. and non-mentioning the names of any of the said PWs in the said Rapt, (iii) improvements made by the alleged eye-witnesses PW-2 and PW-3 in their statements, (iv) contradictions in the statements of PWs and (v) the lodging of FIR on the basis of legal advice rendered by the legal expert i.e. an Advocate.

The learned trial Judge in para 21 of the impugned judgment has proceeded to hold that "last but not the least, the prosecution completely failed to prove the motive of the occurrence set out in the FIR. The testimonies of PW-2 and PW-3 and even their presence at the place of occurrence at the time of occurrence, have been completely disbelieved

for the reasons recorded supra". The finding on the motive part is also recorded in the same paragraph i.e. 21 of the judgment. It was further held in the same para that "in the light of thread bare scanning of the evidence brought on record discussed above, it is held that the version of the complainant, prosecution about the ocular account of the occurrence furnished by PW-2 and PW-3 is disbelieved and discarded". The learned trial Court, while disbelieving the prosecution version, however, has proceeded to hold that "the defence version taken by the accused facing the trial is therefore believed as a result of which the presence and participation of accused Shabban in the occurrence is not proved". It has further been observed that "the murder of Muhammad Ilyas deceased was not a premeditated murder. The occurrence took place on the spur of moment. The accused Dur Muhammad and Shahid Hussain inflicted injuries to the deceased under grave and sudden provocation when the deceased Muhammad Ilyas was laying over Mst. Farzana Bibi, the daughter of accused Dur Muhammad and real sister of accused Shahid Hussain. As per medical evidence produced by the prosecution itself, the injuries inflicted by the accused Dur Muhammad and Shahid Hussain to Muhammad Ilyas were not sufficient to cause death in the ordinary course of nature. PW-1 admitted this fact in the cross-examination. It is therefore borne out from the evidence available on record that the accused Dur Muhammad and Shahid Hussain did not intend to cause the death of deceased Muhammad Ilyas, however, his death was the direct consequence of the injuries caused by them."

The learned trial Court despite coming to the above quoted conclusion still had proceeded to convict the appellants by observing that "accused Dur Muhammad and Shahid Hussain are therefore, proved to be guilty of Qatl-i-Amd of deceased Muhammad Ilyas, but it was neither a premeditated murder nor an honour killing stricto senso therefore, the case of the accused Dur Muhammad and Shahid Hussain is covered by section 302(c), P.P.C. and not 302(b), P.P.C. The charge against the

accused Dur Muhammad and Shahid Hussain under section 302(c), P.P.C. read with section 34, P.P.C., therefore, stands proved. Accordingly, the accused Dur Muhammad and Shahid Hussain are convicted under section 302(c), P.P.C. and sentenced to Rigorous Imprisonment for a period of fourteen 14-years each. The benefit of section 382-B of Cr.P.C. is also given to both the convicts. Since the deceased was not "Masoom-ud-Dam", therefore, I am not inclined to award compensation to the legal heirs of deceased under section 544, Cr.P.C."

9. I myself have gone through the evidence of prosecution witnesses. Neither the complainant nor any other PWs named in the FIR, who were greater in number than the accused persons, armed with only Sotas and not any firearm weapon, had made any effort to interfere, in order to save the skin of the deceased, so it can easily be concluded that the conduct of the nearer and dearer of deceased i.e. PWs was not natural. Such a strange and unbelievable conduct of the said eye-witnesses is against the natural and ordinary human conduct as complainant Mst. Hanifan Bibi (PW-2) and Muhammad Ashfaq (PW-3) during cross-examination stated that the accused persons dragged deceased Ilyas for about 2/3 minutes and continued to give him beating for a period of 10/15 minutes, but they remained standing at a distance of 22 feet towards east to the place of occurrence, Haji Ashraf PW also reached there, when the accused were beating the deceased. She also stated that "the accused were not carrying any firearm weapons, we tried to save my son from the clutches of the accused, but they pushed us back". She candidly stated in her statement that "we were four persons, while accused were three persons, we did not beat the accused persons", thus, this Court is not inclined to accept their testimonies. I, therefore, hold that the presence of both the acclaimed eye-witnesses at the place of occurrence at the relevant time, is not free from doubt. My this view find support from the dictum laid down in case titled "Liaqat Ali v. The State" (2008 SCMR 95), wherein it has been held as under:--

"Having heard learned counsel for the parties and having gone through the evidence on record, we note that although P.W.7 who is first cousin and brother-in-law of Fazil deceased claims to have seen the occurrence from a distance of 30 ft. (as given in cross-examination) and two other witnesses namely Musa and Ranjha were also attracted to the spot but none rescued Fazil deceased and appellant had a free hand to inflict as many as 9 injuries on his person. The explanation given by these witnesses that since Liaqat Ali had threatened them therefore, they could not go near Fazil deceased to rescue him is repellant to common sense as Liaquat Ali was not armed with a fire-arm which could have scared the witnesses away. He was a single alleged assailant and if the witnesses were there at the spot they could have easily overpowered him. This makes their presence at the spot doubtful."

10. It has also been noticed that the FIR had been lodged by the complainant on the basis of legal advice rendered by a legal expert i.e. an Advocate. Complainant Mst. Hanifan Bibi (PW-2) has stated that "I got drafted the application Exh.DA from an Advocate named Shahid". She further deposed that "Exh.PF is the same application, which was drafted by Shahid Wakeel in the police station and I thumb marked the same, Shahid Wakeel was called in the police station".

The above quoted portion of cross-examination of the complainant (PW-2) clearly indicates that the FIR has been lodged while procuring legal advice, after consulting a legal brain, in the manners be suiting to the complainant, therefore, such FIR, which has been lodged after consultation and deliberation is always seen with suspicious eyes as its veracity is deemed to be at stake being result of consultation and deliberations. It may be called an adulterated first version of the complainant about the occurrence, hence cannot be relied upon for the safe administration of justice.

11. The motive had also been disbelieved by the learned trial Judge on a valid reason due to non-availability of evidence on record, which was set out in the FIR and has been dubbed to bald assertion made by the complainant's side, particularly in absence of any details regarding date, time and place of the motive occurrence, especially when there was also no pending litigation between the parties regarding the dispute of any passage.

12. So far as the recoveries are concerned, the same were of ordinary sotas, allegedly effected on pointing out of the appellants, which can easily be planted upon the accused. More-over, when the recovery memos have been shown to be attested by the same PWs, who were named in the FIR, as eye-witnesses and whose presence at the spot has been disbelieved by the Court, therefore, the recovery had also rendered no corroboration to the prosecution case.

13. The time of occurrence in this case is undisputedly 8.00 p.m. night. The place of occurrence is also undisputedly quite near the house of the appellants. According to post-mortem report (Exh.PE), Muhammad Ilyas deceased was a young man aged about 30 years. Dr. Muhammad Akbar, C.M.O. (PW-1) opined that the cause of death in this case is vaso vagal inhibition and crush syndrome resulted by all the injuries collectively inflicted by some blunt weapon and all the injuries were ante-mortem and were sufficient to cause the death in ordinary course of nature. In cross-examination, however, he deposed that as per post mortem examination (Exh.PE), there was no fracture of any bone of deceased Ilyas nor there was apparently any serious injury. He admitted it to be correct that from the apparent, the nature of injuries, same may fall under section 337-A(i) or 337-F(i) or 337-L(ii), P.P.C. and from the apparent nature of injuries, such like injuries do not cause the death in ordinary course of life. Muhammad Nusrat SI/Investigating Officer (PW-9) deposed in cross-examination that "the first version of accused Dur Muhammad and Shahid accused before me was that daughters of accused Dur Muhammad were

young enough and the deceased Ilyas had evil intentions against them and he forbade him from visiting his house but he continued to stand in front of his hosue in routine and that on 19.10.12 at about 08/9.00 p.m. the deceased Ilyas entered into their home by leaping over the wall and went inside the room where Mst. Farzana daughter of Dur Muhammad accused was sleeping; and that on seeing him they tried to apprehend him and during the resistance by him, he got injured. It is correct that during my investigation on 31.10.12, the above said first version of the accused was found correct". The above quoted portion of statement of Muhammad Nusrat SI/I.O. (PW-9) lends support to prove that the version adopted by the accused in the facts of the case, was more plausible and probable as compared to the case of the prosecution. Surprisingly the learned trial Judge after coming to the above conclusion, on the basis of very valid reasons, while rejecting the prosecution's version, has illegally proceeded to convict the appellants under section 302(c), P.P.C., on the basis of their statements recorded under section 342, Cr.P.C. When the prosecution has been found to be failing in its basic responsibility for proving the charge against the appellants, they could not have been convicted on the basis of their plea, which under the law either should have been rejected or accepted in its totality, as raising of any plea by the accused does not absolve the prosecution from its actual duty of proving its case. It is trite law that when the prosecution fails in establishing its case beyond reasonable shadow of doubt, the accused is to be acquitted, even if he had taken a plea and thereby admitted the killing of the deceased. Reference is made to the case reported as "Azhar Iqbal v. The State" (2013 SCMR 383) wherein it has been held as under:-

> "It has straightaway been observed by us that both the learned courts below had rejected the version of the prosecution in its entirety and had then proceeded to convict and sentence the appellant on the sole basis of his statement recorded under section 342 Cr.P.C. wherein he had advanced a plea of grave and sudden provocation.

It had not been appreciated by the learned courts below that the law is quite settled by now that if the prosecution fails to prove its case against an accused person then the accused person is to be acquitted even if he had taken a plea and had thereby admitted killing the deceased. A reference in this respect may be made to the case of Waqar Ahmed v. Shaukat Ali and others (2006 SCMR 1139)"

Reference is also made to case reported as "Javaid v. The State" (PLD 1994 Supreme Court 679), wherein it has been held as under:--

"Even if defence plea is raised, burden on prosecution to prove the case beyond doubt is never lessened or lightened and remains the same and accused is always entitled to benefit of doubt if the prosecution case is not proved by satisfactory evidence."

This view is also fortified from the case reported as "Nadeem-ul-Haq Khan and others v. The State" (1985 SCMR 510), wherein it has been held that:--

"Defence of accused being plausible making prosecution case against them doubtful-Accused not found to have exceeded right of private defence of their person having received numerous and serious injuries---Conviction and sentence of accused was set aside in circumstances.

In a criminal case, it is the duty of the Court to review the entire evidence that has been produced by the prosecution and the defence. If, after an examination of the whole evidence, the Court is of the opinion that there is a reasonable possibility that the defence put forward by the accused might be true, it is clear that such a view reacts on the whole prosecution case. In these circumstances, the accused is entitled to the benefit of doubt, not as a matter of grace, but as of right, because the prosecution has not proved its case beyond reasonable doubt."

14. For what has been discussed hereinabove, it is held that the prosecution has failed in its basic duty of proving its case beyond any shadow of reasonable doubt and the learned trial Court has proceeded illegally in passing the conviction and sentence against the appellants through impugned judgment. Therefore, by allowing this appeal, the conviction and sentence of the appellants Dur Muhammad and Shahid Hussain are set aside and they are acquitted of the charge by extending the benefit of doubt to them. They are directed to be released forthwith from jail, if not required to be detained in connection with any other criminal case.

JK/D-6/L **Appeal allowed.**

2020 Y L R 619

[Lahore (Multan Bench)]

Before Anwaarul Haq Pannun, J

MUHAMMAD RASHID HUSSAIN and another---Appellants

Versus

The STATE and another---Respondents

Criminal Appeals Nos. 1268 of 2017, 449 and Criminal Revision No. 170 of 2018, heard on 3rd April, 2019.

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

----Ss. 324, 337-A(2), 337-F(2), 365-B, 376 & 34---Attempt to commit qatl-i-amd, shajjah-i-mudihah, ghayr-jaifah-badiah, kidnapping, abducting or inducing woman to compel for marriage etc., rape, common intention---Appreciation of evidence---Benefit of doubt---Prosecution case was that accused persons after trespassing into the house started be labouring the mother of complainant---Accused caused injuries by giving danda blows on the head of mother of complainant---Accused persons also forcibly abducted the wife of complainant by boarding her on a car---Accused persons also stole away 11 tola gold ornaments, cash of Rs. 1,20,000/- stitched and unstitched clothes and mobile phone---Ocular account in the present case had been furnished by four witnesses including complainant and victim---Record showed that Trial Court had passed conviction against the accused-appellants while believing the statement of injured mother of complainant---Cross-examination upon her could not have been conducted on account of her non-exposure, on any of the dates, before her death, in court---Crucial question emerged as to whether the conviction and sentence recorded by the Trial Court through its impugned judgment solely on the basis of a statement/examination-in-chief of a witness without affording any opportunity of cross-examination over the witness to the defence, would be sustainable or not---Trial Court had disbelieved the entire ocular account furnished by witnesses including victim and complainant and acquitted appellants and their co-accused of the charge

under Ss. 364-B & 376, P.P.C. which offences were graver in terms of entailing greater punishment---Discarding and non-reliance by the Trial Court upon such evidence also shed its adverse implications overall on the case of the prosecution---Remaining evidence relied upon by the Trial Court was examination-in-chief of injured mother of complainant, which in absence of giving a fair opportunity of conducting cross-examination, being inadmissible in evidence, could not be relied upon for maintaining and upholding the impugned conviction by High Court---Trial Court had proceeded to hold, both the accused-appellants guilty under S.324, P.P.C.---Perusal of provisions of S.324, P.P.C., in view of the alleged incriminating material on record, did not even remotely suggest the existence of any circumstance in the case for attracting provisions of S.324, P.P.C.---Nature of injuries noted down by the Female Medical Officer had been classified as shajjah-e-mudihah falling under S. 337-A(ii), P.P.C. and ghayr-jaifah-badi'ah falling under S. 337-F(ii), P.P.C. which had not been even declared as dangerous to life---Circumstances established that the prosecution had failed in bringing on record any admissible evidence to prove the charges against the accused persons---Appeal was allowed and accused were acquitted by setting aside the conviction and sentence recorded by the Trial Court, in circumstances.

Ghulam Haider v. The State 2018 MLD 450 and Arbab Tasleem v. The State PLD 2010 SC 642 rel.

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

----Arts.132 & 133---Cross-examination---Object---Object of granting a right of cross-examination could only be achieved after affording a fair opportunity to an opposite party, likely to be adversely affected, being on the receiving end in the shape of examination-in-chief from statement so recorded by the court, in all the matters---To adjudge the veracity, credibility and trustworthiness/ truthfulness of the witness enabled the court, for relying upon, while deciding the matter before it---Grant of a fair opportunity for cross-examining a witness by the adversary had its genesis and roots in the principle of audi alteram partem, duly codified in the shape of Art.10-A of the Constitution---Unless and until the accused

was offered/granted right of cross-examination over a witness who had deposed against him, such a statement would have no evidentiary value and as such would be inadmissible for acting upon it or for drawing any inference therefrom against the adversary party.

(c) Criminal trial---

----Recovery--- Scope--- Recovery was deemed to be a corroborative piece of evidence to the direct evidence---In case direct evidence was disbelieved, it would not be safe to maintain conviction on confirmatory evidence.

Muhammad Jamil v. Muhammad Akram and others 2009 SCMR 120 rel.

(d) Criminal trial---

----Benefit of doubt---Principle---One circumstance which created reasonable doubt in the veracity of the prosecution version would be sufficient for giving its benefit to the accused, not as a matter of grace rather as a matter of right.

Tariq Pervez v. The State 1995 SCMR 1345; Arif Hussain and another v. The State 1983 SCMR 428 and Muhammad Akram v. The State 2009 SCMR 230 rel.

Ch. Saeed Ahmad Farrukh for Appellants.

Abdul Wadood, D.P.G. for the State.

Nemo for the Complainant.

Date of hearing: 3rd April, 2019.

JUDGMENT

ANWAARUL HAQ PANNUN, J.---Rashid Hussain and Shahid Hussain sons of Munawwar Hussain, both Malik by caste, residents of Shamas Pura, Mian Channu, District Khanewal, the appellants were involved in case FIR No.476/2015 dated 11.10.2015, offence under Sections 496-A, 380, 324, 34, P.P.C., subsequently offences under sections 337A(ii), 337F(ii), 365-B, 376, P.P.C. were added, registered

with Police Station City Mian Channu, District Khanewal. They were tried by learned Additional Sessions Judge, Mian Channu. The learned trial court seized with the matter vide its judgment dated 05.12.2017 while acquitting co-accused namely Munawwar Hussain and Muhamamd Rauf of the charge by giving them the benefit of doubt, convicted and sentenced the appellants in the following terms:-

Name of the appellant	Conviction/sentence
Rashid Hussain and Shahid Hussain (appellants)	> Under Section 324/ 34, P.P.C., sentenced to undergo R.I. for five years each with payment of fine Rs.10,000/- each and in default whereof to further undergo S.I. for four months each. > Under Section 337-A(ii)/34, P.P.C., jointly directed to pay Arsh on five counts to the legal heirs of injured PW Mst. Rafia Begum (since died subsequently) which shall be 5% of the total amount of Diyat for the year, 2015-2016 which in total was Rs.4,20,067.5 > Under Section 337-F(ii)/34, P.P.C., jointly directed to pay Rs.10,000/- as Daman to the legal heirs of injured PW Mst. Rafia Begum (since died subsequently). > They were also extended the benefit of Section 382-B, Cr.P.C. > However, both the appellants were acquitted of the charge under sections 376 and 365-B, P.P.C.

2. Feeling aggrieved by the judgment of the learned trial court, the appellants Rashid Hussain and Shahid Hussain have assailed their conviction and sentence through filing of Crl. Appeal No.1268 of 2017, under section 410 Cr.P.C whereas the complainant has filed Crl. Appeal

No.449/2018, under section 417 Cr.P.C. against acquittal of respondents/accused namely Munawwar Hussain and Muhamamd Rauf. The complainant has also filed Crl. Revision No.170/2018, under section 439, Cr.P.C. for enhancement of sentence of appellants Rashid Hussain and Shahid Hussain. As all the matters, which have arisen out of one judgment of the learned trial court, therefore, are being disposed of through a consolidated judgment.

3. Prosecution's story as portrayed in the FIR (Exh.PA) lodged on the complaint (Exh.PC) of Shahid Imran son of Bashir Ahmad, Caste Arain (PW-3) is to the effect that during the intervening night of 10/11.10.2015 at about 2.30/3.00 a.m., his mother, wife and his son were present at home whereas the complainant was on his way back to home from Jaranwala after attending a marriage ceremony. He had friendly relations with accused persons. Accused persons Rashid Hussain armed with 'danda', Shahid Hussain armed with pistol along with two unknown accused who were also armed with firearm weapons, knocked at the door of his house, on the asking of his mother, the accused persons introduced them, whereupon his mother opened the door. Accused persons after trespassing into his house started be labouring his mother. Rashid Hussain caused injuries by giving 'danda' blows on the head of his mother. They also forcibly abducted his wife Mst. Shaista Bibi by boarding her on a white coloured car. Due to resistance, hue and cry, the witnesses Shehbaz Hussain son of Nawab Din and Binyamin and other residents of the locality attracted to the place of occurrence and witnessed the occurrence. In the meanwhile, the complainant also reached at his home. He found the luggage scattered hither and thither in the house. On checking, 11 tolas gold ornaments, net cash Rs.1,20,000/-, stitched and un-stitched clothes and mobile phone etc he also found stolen. Further alleged that accused persons had abducted his wife for the purpose of Zina. Hence, instant case.

4. Naveed Alam, ASI (PW-9) being posted as ASI at Police Station City Mian Channu was entrusted with the investigation of this case. He after reaching at the place of occurrence, recorded the statements of PWs

namely Shehbaz and Binyamin under section 161, Cr.P.C. regarding the occurrence. On the same day, he after inspecting the place of occurrence prepared its rough site plan (Exh.PK). On 15.10.2015, the complainant and PWs got recorded their supplementary statements nominating accused persons namely Rauf and Munawwar Hussain. On 20.10.2015 he arrested accused Rauf and Munawwar Hussain since acquitted: On 30.10.2015 he arrested the appellants. He on 02.11.2015 joined Mst. Shaista Bibi, the victim, in investigation, recorded her statement under section 161, Cr.P.C. and produced her before Ilaqa Magistrate for recording her statement under section 164 Cr.P.C and got her medically examined from DHQ Hospital, Khanewal. On 04.11.2015, accused Rashid Hussain in pursuance of his disclosure got recovered three gold rings (P-1/1-3), two gold ear rings (P-2/1-2) and necklace (P-3) which were taken into possession by the I.O. vide a recovery memo (Exh.PG) and also prepared its memo of identification (Exh.PE). On the same day accused Rashid also got recovered 'sota' (P-4) which the I.O. took into possession vide recovery memo (Exh.PH). He on 06.11.2015 brought accused Rashid and victim Shaista Bibi at PFSA, Lahore for the purpose of DNA test. On the same day accused Shahid in pursuance of his disclosure got recovered pistol .30 bore (P-5) along with four live bullets (P-6/1-4) which the Investigating Officer took into possession vide recovery memo (Exh.PF) and prepared its rough site plan. He on 10.11.2015 got remanded accused Rashid and Shahid to judicial lock up being found fully involved in this case. He recorded the statements of the PWs stage-wise. He deposited the case property with the Moharrar for its safe custody in the Malkhana and its onward transmission to the quarter concerned. The investigation was encapsulated into a report under section 173, Cr.P.C., which was duly submitted, the learned trial Judge took the cognizance, supplied the requisite statements under section 265(c), Cr.P.C., framed the charge against the accused on 16.01.2016, to which they pleaded not guilty and claimed trial.

5. Ocular account in this case consists of the statements of the Shahid Imran complainant (PW-3), Muhammad Binyameen (PW-4), Mst. Rafia

Begum (PW-5) and Mst. Shaista Bibi, the victim (PW-6). Investigation in this case was carried out by Naveed Alam, ASI (PW-9)

The medical evidence has been furnished by lady doctor Benazir Sajid, WMO (PW-10) who on 11.10.2015 medically examined Mst. Rafia Begum and observed as under:-

1. Incised wound 5 cm x 1 cm bone exposed close to the hair line in mid line of the head. Bleeding profusely.
2. A lacerated wound 4 cm x 1 cm bone exposed on the mid line of the head about 5 cm behind the hair line.
3. A lacerated wound 4 cm x 1 cm on the left side of the head about 5 cm above the ear, bone exposed, bleeding profusely.
4. A lacerated wound 5 cm x 1 cm bone exposed on the right side of the head about 6 cm above the ear, bleeding profusely.
5. A lacerated wound 6 cm x 1.5 cm bone exposed on the back of the head on the left side.
6. Incised wound muscle deep on the front of the right forum about 5 cm proximal wrist.

Patient was referred to Nishtar Hospital, Multan for further management.

OPINION:

According to the ward report of Nishtar Hospital, Multan, the patient remained in ward, managed conservatively and was discharged; that so according to the ward report, injuries Nos.1, 2, 3, 4, 5 comes under section 337-A(ii), P.P.C. and injury No.6 comes under section 337-F(ii), P.P.C. He also endorsed ward report Exh.PN/2.

Statements of rest of the prosecution witnesses are formal in nature.

6. Learned ADPP while giving up PWs Shehbaz Hussain and Shahbaz Ali 293/C being unnecessary and by tendering the report of PFSA as

Exh.PQ vide his statement dated 20.11.2017, closed the prosecution evidence.

7. Thenceforth, the appellants were examined under Section 342, Cr.P.C; wherein they refuted the prosecution's version.

The appellant Rashid Hussain while replying to the question why this case against him made the following deposition:--

"It is false case, the complainant Shahid Imran bore grudge against me and co-accused that a case FIR No.51/15 dated 24.03.2015 by one Muhammad Nadeem son of Noor Muhammad caste Rajput, resident of Mohallah Rehmania, Mian Channu against the complainant Muhammad Shahid Imran Exh.DG was registered with Police Station FIA, Multan. I and co-accused joined the investi-gation from the complainant side of Exh.DG for many times against the complainant Shahid Imran (as an accused), so due to that grudge alleged victim Shaista who was due to some matrimonial dispute with the complainant Shahid Imran left his house 15 days prior to 12.10.2015, filed a suit for dissolution of marriage Exh.DC/2 also filed an application for sending her Dar-ul-Aman Exh.DC/5 and also recorded her statement Exh.DC/7 on 16.10.2015 according to which no allegation of any kind against me and co-accused was levelled by victim Shaista rather she negated the happening of occurrence and on 30.10.2015 a compromise was effected between said Shaista victim and complainant Shahid Imran and in lieu of compromise as mentioned in order dated 30.10.2015 Exh.DC suit for dissolution of marriage was withdrawn and complainant in order to falsely implicate me and co-accused used Mst. Shaista as a tool to complete his revenge and succeeded in obtaining MLC against the facts, no alleged occurrence had ever been taken place, neither I nor any co-accused caused any injury on the person of Mst. Raffia Begum (since died), I and co-accused did not abduct Mst. Shaista the alleged victim nor she was subjected to rape by me. PW-2 Binyameen is closed friend

of complainant, so due to that reason he deposed falsely. I and co-accused are innocent and beg acquittal.

Appellant Shahid Hussain also deposed in line with his co-appellant Rashid Hussain.

8. They neither opted to appear as their own witness in terms of Section 340(2), Cr.P.C, nor opted to adduce defence evidence.

9. On the conclusion of trial, the learned trial Court has convicted and sentenced the appellants in the above stated terms while acquitting them of the charge under sections 365-B, 376, P.P.C. The learned trial court has acquitted their co-accused namely Munawwar Hussain and Muhamamd Rauf from the case by extending them the benefit of doubt.

10. Learned counsel for the appellants submits that allegedly the injured PW. Mst. Rafia Begum (PW-5) who after recording her examination-in-chief never appeared in the court for her cross-examination and as such her statement/examination in chief has no evidentiary value, thus, cannot be relied upon/treated as evidence. While referring to statement of PW-5, he argued that according to which the injury was caused with fist blows whereas that medical evidence, furnished by lady doctor Benazir Sajid (PW.10), has thickened the mystery as she has noted at least two sharp edged incised wounds on the person of injured PW, hence, there exists irreconcilable contradiction in the ocular and medical evidence; that keeping in view the medical evidence and other attending circumstances of the case, provision of Section 324, P.P.C. do not attract; that in fact no occurrence had taken place and injuries are maneuvered; that case has been falsely foisted upon the appellants. Further submits that two of the co-accused namely Munawwar Hussain and Muhammad Rauf were introduced through supplementary statements who were closely related to the present appellants and were also previously known to the complainant party, therefore, their induction in the case through supplementary statement speaks a volume about mala fide of the complainant; that while referring PW.3 learned counsel has pointed out that there was criminal litigation in

existence between the complainant and the appellants. Lastly added that the trial court has acquitted the appellants from the charge under sections 365-B, 376, 496-A, 380, 334, P.P.C. disbelieving ocular account, hence, the impugned conviction cannot sustain on the basis of same evidence.

11. Conversely, learned Law Officer assisted by learned counsel for the complainant has not only criticized the acquittal of the co-accused but has also defended the impugned judgment by opposing appellants' submissions. They have also argued, that both the appellants are specifically nominated as accused in a promptly lodged FIR; that alleged occurrence took place at the odd hours of night in the house of the complainant; that medical evidence corrobrates the ocular account; that Rashid appellant was armed with 'danda' whereas Shahid appellant was armed with pistol and recoveries have been made from them; that keeping in view the locale of injuries which have been caused on the head of an old lady, the observations of the doctor might have been due to some mis-understanding, therefore, there exist no contradiction in MLC and ocular account; that Mst. Shaista Bibi (PW-5) recorded her examination-in-chief and her cross-examination was reserved but on subsequent dates, it was the defence, which sought adjournments and the said PW being old and infirm lady used to be brought in the court through wheel-chair, she later on died, therefore, on account of conduct of the appellants, their objection for non-cross-examining the PW-5 will be of no avail to them; that the victim has also supported the version of the complainant and has thus prayed for dismissal of appeal against conviction and lastly has craved for acceptance of appeal against acquittal.

12. After hearing learned counsel for the appellants as well as the learned Law officer assisted by complainant's counsel and going through record, it is observed that learned the trial court charge sheeted both the appellants and their acquittal two co-accused-persons on 16.01.2016 under sections 365-B, 376, 324, 337A(ii), 337F(ii), 34, P.P.C. On the conclusion of trial, learned trial court while acquitting the co-accused namely Munawwar Hussain and Muhammad Rauf of the charge in toto has convicted and sentenced the appellant only under sections 324,

337A(ii), 337F(ii), 34 P.P.C. and only had acquitted them of rest of the charges. The learned trial court has disbelieved the evidence of all the PWs i.e. Shahid Imran, complainant (PW-3) who was admittedly not an eye-witness of the occurrence, Muhammad Binyameen (PW-4), the alleged eye-witness of the occurrence and Mst. Shaista Bibi wife of Shahid Imran (PW-6), the alleged abductee. The learned trial court has passed the conviction against the appellants while believing the statement of injure Mst. Rafia Begum (PW-5), mother of the complainant, who on 27.03.2017 while recording her examination-in-chief has deposed that "I opened the door, accused Rashid Hussain armed with Danda, Shahid Hussain armed with pistol along with two unknown persons were identified as Munawwar Hussain and Rauf were also armed with firearm weapons entered into the home forcefully and started beating me. Rashid Hussain made blows of fist and kicks on my body. I was seriously injured. Accused persons put Shaista Bibi while dragging her into the white colour car and decamped. In the meanwhile, my son Shahid Imran who had gone to Jaranwala also reached there". Initially, the complainant on the information so furnished to him by this witness as well as by rest of the PWs, alleged in the FIR that appellant Rashid Hussain armed with 'danda', while appellant Shahid Hussain armed with pistol trespassed into his house along with two unknown accused (subsequently named as accused through a supplementary statement), made 'danda' blows on the head of his mother who was seriously injured. The medical evidence in this case has been furnished by lady doctor Benazir Sajid (PW-10) who on 11.10.2015 while being posted as WMO at THQ Hospital, Mianchannu medically examined Rafia Begum, the injured PW (PW-5) under the surveillance of the police after observing the injured and issued MLC showing as many as six injuries on her person. Out of the noted injuries, injuries Nos.1 and 6 were found by her to be incised wounds whereas injuries Nos. 2, 3, 4 and 5 as lacerated wounds. She declared injuries Nos.1, 2, 3, 4 and 5 as Shajjah-e-Mudihah falling under section 337A(ii), P.P.C. whereas injury No.6 as Ghair Jaifa Badi'ah falling under section 337F(ii), P.P.C. She while facing the test of cross-examination had stated that injury No.1 cannot be caused by blunt weapon of any kind. From the

available record, it is obviously apparent that none of the accused was armed with any of the sharp edged weapon. It has been noticed that on 27.03.2017 after recording examination in chief of said injured PW-5, on the request of learned defence counsel Ch. Muhammad Asif, Advocate, the cross-examination upon her was reserved. The trial proceedings duly reflected through the interim orders sheet disclose that on none of the subsequently dates, the said injured PW.05 has exposed herself for cross-examination till 08.6.2017. The learned counsel for the complainant on 08.06.2017 produced the death certificate of PW.5 in the court. It is noticed that after 27.03.2017 till 08.6.2017 as many as seven times case has been adjourned but information of death of PW-05 was imparted to the court on 27.05.2017 and as such her presence has not been ensured for conducting cross-examination.

The resume of the above facts indicates that despite disbelieving all the remaining PWs, the learned trial court has recorded the impugned conviction against the appellants, only on the basis of statement/examination in chief of PW-5 recorded on 27.03.2017, the cross-examination upon her could not have been conducted on account of her non-exposure, on any of the dates, before her death, in court. As a result thereof, right of appellants/accused for conducting cross-examination could not have been exercised by them. Therefore, crucial question which emerges requiring its determination is whether the conviction and sentence recorded by the learned trial court through its impugned judgment, solely on the basis of a statement/ examination-in-chief of a witness without affording any opportunity of cross-examination over the witness (PW-5) to the defence, will be sustainable or not. This question can be answered after going through the provisions/Articles 132, 133 and 134 of the Qanun-e-Shahadat Order, 1984 read as follows:-

132. Examination-in-chief, etc. (1) The examination of a witness by the party who calls him shall be called his examination in chief.

(2) The examination of a witness by the adverse party shall be calls his cross-examination.

(3) The examination of a witness subsequent to the cross-examination by the party who called him, shall be called his re-examination.

133. Order of examination. (1) Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined then (if the party calling him so desires) re-examined.

(2) The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

(3) The re-examination shall be directed to the explanation of matters referred to in cross-examination and, if new matter is, by permission of the court, introduced in re-examination, adverse party may further cross-examine that matter.

The object behind granting a right of cross-examination can only be achieved after affording a fair opportunity to an opposite party, likely to be adversely affected, being on the receiving end in the shape of examination-in-chief from statement so recorded by the court, in all the matters. To adjudge the veracity, credibility and trustworthiness/ truthfulness of the witness enables the court, for relying upon, while deciding the matter before it. The grant of a fair opportunity for cross-examining a witness by the adversary has its genesis and roots in the principle of audi alterm partem , duly codified in the shape of Article 10-A of our Constitution. Under the law, unless and until, the accused is offered/granted right of cross-examination over a witness who has deposed against him, such a statement will have no evidentiary value and as such shall be inadmissible for acting upon it or for drawing any inference therefrom against the adversary party. In this regard reliance is placed upon case titled Peer Mazhar-ul-Haq v. The State (PLD 2005 SC 63). There are certain exceptions where examination-in-chief recorded by the court can be read against accused which have been enumerated in Section 512, Cr.P.C., and Article 46 of the Qanun-e-Shahadat Order, 1984, and evidence of a witness under the aforesaid provision being preserved can be relied upon only, thus, I hold that the

statement/examination-in-chief of PW-05 to be no evidence and as such no conviction can be sustained upon it. Respectful reliance is placed on case titled Miran alias Mir Muhammad v. The State (PCr.LJ 2013 Sindh 244).

13. Apart from the above, it is observed that the learned trial court has disbelieved the entire ocular account furnished by Shahid Imran complainant (PW-3), Muhammad Binyameen (PW-4), Mst. Rafia Begum (PW-5) and Mst. Shaista Bibi, the victim (PW-6) and acquitted appellants and their co-accused of the charge under sections 365-B, 376, P.P.C. which offences were graver in terms of entailing greater punishment, hence, discarding and non-reliance by the learned trial court upon such evidence, also sheds its adverse implications overall on the story of the prosecution. The only remaining evidence relied upon by the learned trial court was examination in chief of Rafia Begum (PW-5) which in absence of giving a fair opportunity of conducting cross-examination, being inadmissible in evidence cannot be relied upon for maintaining and upholding the impugned conviction by this court. Respectful reliance in this regard is placed on the ratio decidendi of august Supreme Court of Pakistan in the case of Ghulam Haider v. The State (MLD 2018 Sindh 450); wherein following principle was laid down:--

> "---Arts. 132 & 133---Cross-examination--- Object--- Cross-examination was the great legal engine invented to unearth the truth from the statement of a witness---Opportunity to cross-examination contemplated by the law, must be real, fair and reasonable---Cross-examination was not the empty formality, but a valuable right and best method for ascertain the truth".

The Hon'ble Supreme Court of Pakistan in the case of Arbab Tasleem v. The State (PLD 2010 SC 642) where in its head note (a) following principle was laid down:-

> "---Ss. 302(b)/34 & 324/34---Constitution of Pakistan (1973), Art. 185(3)---Qatl-i-amd and attempt to qatl-i-amd---Leave to appeal was granted only to examine whether conviction of accused under

section 302(b), P.P.C. on the basis of mere examination in chief of the eye-witness, who was not cross-examined by the accused, could have been treated by the court as statement under section 512, Cr.P.C. because at the time of recording of such statement accused was neither absent nor absconding."

It has also been noticed that learned trial court has proceeded to hold, both the appellants guilty under section 324, P.P.C. also through impugned judgment also. The perusal of provisions of Section 324, P.P.C., in view of the allegation incriminating material on record, does not even remotely suggest the existence of any circumstance in the case for attracting provisions of section 324, P.P.C. The nature of injuries noted down by the lady doctor Benazir Sajid (PW-10) as observed earlier have been classified as Shajjah-e-Mudihah falling under section 337-A(ii), P.P.C. and Ghair Badi'ah falling under section 337-F(ii), P.P.C. which have not been even declared by them dangerous to life. So far as the recovery is concerned, it is established principle of law that the recovery is deemed to be a corroborative piece of evidence to the direct evidence and as per dictates of justice whenever direct evidence is disbelieved it would not be safe to maintain conviction on confirmatory evidence. In the case of Muhammad Jamil v. Muhammad Akram and others (2009 SCMR 120) the august Supreme Court of Pakistan had held as under:-

"---S. 302(b)---Appreciation of evidence---Principle---In a case of direct evidence other pieces of evidence are used for corroboration or in support of direct evidence---When direct evidence is disbelieved, then it would not be safe to base conviction on corroborative or confirmatory evidence."

14. For what has been discussed herein above, prosecution has miserably failed in bringing on record any admissible evidence. When the major quantum of evidence has already been disbelieved by the learned trial court on valid consideration after properly appreciating evidence available on record while assigning justifiable reasonings. Moreover, in such like situations it becomes incumbent upon the Court to extend the

benefit of doubt in favour of the accused. Furthermore, to extend the benefit of doubt so many circumstances are not required rather one circumstance which creates reasonable doubt in the veracity of the prosecution version is sufficient for the purpose, not as a matter of grace rather as a matter of right. Respectful reliance in this regard is placed on the ratio decidendi of august Supreme Court of Pakistan in the case of Tariq Pervez v. The State (1995 SCMR 1345); wherein following principle was laid down:-

> "---Art. 4---Benefit of doubt, grant of---For giving benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubts---If a simple circumstance creates reasonable doubt in a prudent mind about the guilt of accused, then he will be entitled to such benefit not as a matter of grace and concession but as a matter of right."

Similarly in the case titled Arif Hussain and another v. The State (1983 SCMR 428), the august Supreme Court of Pakistan had further held as under:-

> "---S. 302---Murder---Evidence---Benefit of doubt---Prosecution case not free from doubt---Charges not brought home to accused in manner required under law---Accused given benefit of doubt and acquitted".

Similar view was affirmed in the case of Muhammad Akram v. The State (2009 SCMR 230).

Hence, instant Crl. Appeal No.1268 of 2017 is allowed, consequently, convictions and sentences imposed by the learned trial court vide judgment dated 05.12.2017 are set aside and both the appellants are acquitted of the charge imputed against them by extending them benefit of doubt. They are on bail. Their sureties are discharged.

15. As far as Criminal Revision No. 170 of 2018 filed by Shahid Imran complainant against respondents Nos.2 and 3/convicts namely Rashid Hussain and Shahid Hussain for enhancement of their quantum of sentences as well as to the extent of their acquittal in charges under

sections 376, 365-B, P.P.C. is concerned, for the reasons mentioned op-cit, instant criminal revision petition has been found meritless and the same stands dismissed.

16. As far as Criminal Appeal No.449 of 2018 filed by Shahid Imran complainant against acquittal of respondents Nos.2 and 3 namely Munawwar Hussain and Muhamamd Rauf is concerned, I am of the considered view that the learned trial court has rightly acquitted them. Furthermore, learned counsel for the petitioner has not been able to persuade this court to differ with the reasonings recorded by the learned trial in respect of acquittal of the said respondents, therefore, instant appeal has also been found meritless and the same also stands dismissed.

JK/M-120/L **Order accordingly.**

2020 Y L R 1120

[Lahore (Bahawalpur Bench)]

Before Asjad Javaid Ghural and Anwaarul Haq Pannun, JJ

AKHTAR HUSSAIN and others---Appellants

Versus

The STATE and others---Respondents

Criminal Appeal No. 127, Criminal Revision No. 64 and Murder Reference No. 15 of 2015, decided on 21st February, 2019.

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

----Ss. 302(b), 148 & 149---Qatl-i-amd, rioting armed with deadly weapon, unlawful assembly---Appreciation of evidence---Benefit of doubt---Ocular and medical evidence--- Contradictions---Accused were charged for committing murder of son of complainant by firing---Motive behind the occurrence was that the accused had suspicion of illicit relations inter-se deceased and female cousin of accused---Record revealed that the time elapsed between the death and post-mortem was more than 12 hours and less than 24 hours---Such fact showed that dead bodies of the deceased remained unattended after the occurrence---Delay in post-mortem examination over the dead bodies of the deceased also created doubt about the presence of the witnesses at the crime scene at the relevant time---Ocular account of the occurrence had been furnished by two witnesses including complainant---Said witnesses had claimed that at the time of occurrence they were present at the dera---Occurrence took place inside a room of the deserted dera as the prosecution had failed to establish that the dera, located in the fields distantly situated from the nearby village abadi, was being used for residential purposes---Occurrence having taken place during the odd and dark hours of the night, therefore, remained un-witnessed---Complainant had tried to bring on record that both the deceased were married to each other and produced in the court, secretary union council concerned but through the extensive cross-examination, it had come on record that there was an interpolation

in Register of Council for showing the registration of marriage of both the deceased---Belated contradictory and nefarious attempt on the part of the complainant in order to show that both the deceased were married was further falsified by inquest report wherein deceased lady's father's name was different---Post-mortem report of deceased lady also had the same defect---Prosecution had failed to prove the motive and its case against the accused---Appeal was allowed and accused were acquitted by setting aside conviction and sentence recorded by the Trial Court, in circumstances.

(b) Criminal trial---

----Site plan---Evidentiary evidence---Site plan was not a substantive piece of evidence.

State of Uttar Pradesh v. Babu and others AIR 2003 SC 3408; Tori Singh and another v. State of Uttar Pradesh AIR 1962 SC 399; Abdul Aziz and another v. The State PLD 1985 Lah. 534 and Sardar Khan and 3 others v. State 1998 SCMR 1823 rel.

(c) Criminal trial---

----Benefit of doubt---Principle---Single instance giving rise to a reasonable doubt in the mind of the court entitled the accused to the benefit of doubt not as a matter of grace but as a matter of right.

Muhammad Khan and another v. State 1999 SCMR 1220; Muhammad Akram v. The State 2009 SCMR 230 and Tariq Pervaiz v. The State 1995 SCMR 1345 rel.

Muhammad Amir Niaz Bhadera for Appellants.

Syed Jamil Anwer Shah for the Complainant.

Najeeb Ullah Khan Jattoi, Deputy Prosecutor General for the State.

Date of hearing: 21st February, 2019.

JUDGMENT

ANWAARUL HAQ PANNUN, J.---This single judgment shall decide Murder Reference No. 15 of 2015 submitted under section 374, Cr.P.C.

by the learned trial Court Criminal Appeal No.127 of 2015, filed under Section 410, Cr.P.C. by the appellants (i) Akhtar Hussain, (ii) Muhammad Gulzar, (iii) Muhammad Mukhtar and (iv) Muhammad Mumtaz and Criminal Revision No. 64 of 2015 filed under Sections 435/439, Cr.P.C. by Ghulam Nabi complainant seeking enhancement of sentences of the appellants Muhammad Mukhtar and Muhammad Mumtaz. All matters having arisen out of the same judgment dated 7.3.2015, passed in case FIR No.78/2011, dated 15.03.2011, offences under sections 302, 148, 149, P.P.C.; registered at Police Station Qaimpur, District Bahawalpur by the learned Addl. Sessions Judge, Hasilpur, whereby while acquitting Muhammad Yaseen, the appellants have been convicted and sentenced.

2. It is pertinent to mention here that during the pendency of the instant appeal, the appellants, namely, (i) Akhtar Hussain and (ii) Muhammad Mukhtar have been acquitted of the charge on the basis of their compromise with the legal heirs of Muhammad Ali i.e. one of the deceased vide judgment of this Court dated 23.12.2015 but the appeal in hand to the extent of appellants, namely, Muhammad Gulzar and Muhammad Mumtaz is still alive. Murder Reference No.15/2015 to the extent of Muhammad Gulzar, appellant is also in field. The appellants, namely, Muhammad Gulzar and Muhammad Mumtaz have been convicted and sentenced as under:--

Appellant Muhammad Gulzar under section 302(b), P.P.C. "Death sentence as Tazir along with Rs.1,00,000/- as compen-sation under section 544-A, Cr.P.C. payable to the legal heirs of deceased Mst. Parveen Bibi or in default thereof, to further undergo S.I. for six months."

Appellant Muhammad Mumtaz, under section 302(b), P.P.C. "Imprisonment for life along with Rs.50,000/- as compensation under section 544-A, Cr.P.C. payable to the legal heirs of deceased Mst. Parveen Bibi or in default thereof to further undergo S.I. for three months."

Both the convicts/appellants Muhammad Mukhtar and Muhammad Mumtaz were extended the benefit of section 382-B, Cr.P.C.

3. The case of the prosecution as contained in written application (Exh.PA), on the basis of which, FIR (Exh.PR) was chalked out, duly reiterated by Ghulam Nabi, complainant, resident of Mauza Jamalpur, Tehsil Hasilpur, District Bahawalpur, while appearing in the Court as (PW-1) is, to the effect that:-

"I am resident of Mauza Jamalpur, Allah Dad Thaheem is the lessee of land owned by Mehar Muhammad Aslam deceased. My son Muhammad Ali, me and Muhammad Bashir Ahmad are the employees of said Allah Dad, hence, residing in that land. In one room, Bashir Ahmad, Allah Dad and myself and in another room my son Muhammad Ali and his wife Parveen were sleeping. On 15.2.2011, at about 2:00 mid night we woke up on the noise of motorcycle. We saw in the light of bulb that Mukhtar Ahmad, Akhtar, Gulzar Ahmad and Muhammad Mumtaz all armed with guns .12 bore and Yasin accused present in the court, standing in the courtyard of said Dera with motorcycle 125 CC P-I. Bashir Ahmad, Allah Dad and myself identified them as accused persons. Muhammad Akhtar accused said me that his cousin Parveen Bibi is in the custody of Muhammad Ali, my son, she would be handed over to him. Meanwhile my son Muhammad Ali opened the door of his room. Mukhtar Ahmad accused present in the court opened fire from his gun which inflicted injury on the left hand of my son Muhammad Ali. Muhammad Ali fell down then Muhammad Akhtar accused present in the court fired with his gun upon Muhammad Ali which inflicted injury which hit on his back. Parveen Bibi daughter of Haq Nawaz tried to fled away, then Gulzar Ahmad accused present in the court opened fire with his gun which hit on the fore-head of Parveen. Then Mumtaz Ahmad accused opened fire with his gun, which caused injury on the abdomen of Parveen Bibi. Ghulam Yasin raised lalkara to the effect that both the injured be not escaped. I and above mentioned

witnesses tried to get hold the accused but all the said accused fled away from the place of occurrence raising their weapons and leaving motorcycle P-1 at side. We escorted the injured but they lost their lives. The motive behind this occurrence is that the accused had suspicion of illicit relations inter-se Muhammad Ali and Parveen Bibi. Prior to this occurrence, the accused persons extended threats of dire consequences to the deceased. I present an application Ex.PA to Akbar Ali SI for registration of case which is thumb marked by me in token of its correctness. I also presented motorcycle P-I to police official. I also received the dead body of my son Muhammad Ali vide receipt."

4. The investigation was encapsu-lated into a report under section 173, Cr.P.C., which was duly submitted before the learned trial Court, after taking cognizance of the offence, the learned trial Judge while supplying the requisite copies of the statements under section 265(c), Cr.P.C., to the accused, charge sheeted them, while professing their innocence, they pleaded not guilty and claimed trial. The learned trial Judge directed the prosecution to produce its evidence for establishing the charge. In order to establish its case, prove the charge, against the appellants, the prosecution has relied upon the eye-witnesses' account furnished by the complainant Ghulam Nabi (PW-1) and Allah Dad Iftikhar (PW-2) in the category of "ocular account". The medical evidence in the case, has been furnished by Dr. Kalsoam Iqbal, SWMO, THQ Hospital, Hasilpur (PW-6). She had conducted the postmortem examination over the dead body of Parveen Bibi. She deposed that on 15.3.2011, Akbar Ali SI Police Station Qaimpur presented by her the injury statement Exh.PM and inquest report Exh.PN/1-4 of deceased Parveen Bibi for her postmortem examination through Sajjad Ahmad 1982-C Police Station Qaimpur. The dead body was identified by Allah Dad son of Khawaja, caste Thaheem, resident of Mauza Chadua, Police Station Qaimpur and Bashir Ahmad son of Shah Muhammad, caste Dhangu, resident of Mauza Muchran Tehsil Khairpur Tamewali. The dead body was received at 1:00 p.m. and she conducted

the postmortem of the deceased Parveen Bibi at 2:00 p.m. on the same day, which read as under:--

EXTERNAL EXAMINATION:

A dead body of a female aged about 22/23 years lying supine on postmortem table. Length 4' 3" weight 50/55 k.g. rigor mortis developed, postmortem staining were present on the dependent parts of the body. Purification Nil. Condition of eyes opened, condition or orifices, mouth semi opened containing nostrils, all the sphincters relaxed, congestion present. Patehtcheal haemorrhage No.

EXAMINATION OF

CLOTHES:

She was wearing shalwar black in colour, shameez black, Dupatta line dar all blood, stained, signed by me and handed over to police.

EXAMINATION OF NECK:

On the neck, ligature mark or violence present ages on dissection. On the neck no ligature marks or violence present.

DESCRIPTION OF INJURIES:

i) A lacerated wound of size 20 cm x 25 cm damaged the frontal bone. RT parital bone of the skull in small pieces going deep (Damag) the brain membranes, metallic coming from the bone multiple forne bodies (pellets) present in the wound. This is the wound of entry. Exit wound is not present.

ii) A lacerated wound present over the right side size of wound 4cm x 5cm with inverted margins blackened and burnt going blindly situated at the right iliac region. This wound of entry corresponding whole of the Kameez is also present burnt in nature. On dissection, the wound muscle lacerated seat and peritoneum intact. Metallic bodies are present (pellets) along with wade was removed from the abdominal missile. This is the wound of entry. Exit wound is not present.

iii) There are multiple wounds on the thigh and the interior medial aspect of the right thigh measuring about 1.5 cm x 1.5 cm each. Skin deep. On dissection of the wound each wound containing mattelic bodies. These are the wounds of entry corresponding small whole on the shalwar was also present burnt in nature.

CRANIUM AND SPINAL CORD:

Scalp, skull, brain and membranes damaged already described, and healthy vertebras and found NAD, spinal card was also healthy.

THORAX:

Walls, ribs, cartridges all were found healthy and NAD, pleurae was NAD and healthy, larynx and trachea and blood vessels are also NAD and healthy, right lung and left lung and pericardium were NAD. Pericardium and heart were NAD and were containing few CC of blood.

ABDOMEN:

Walls, right ileac fossa damaged and already described and rest of the abdominal walls are NAD and healthy. Peritoneum, mouth, pharynx and esophagus, diaphragm, pancreas, liver, spieen, kidneys, bladder and organs of generation were found NAD and bladder contains few CC of urine. Vaginal swabs were taken for DNA test. Stomach was containing few CC of mixed digested food, small intestine containing chyme and gases, large intestine containing gases and fecal matter.

Probable time between injury and death within few minutes. and probable time between death and postmortem more than 12 hours and less than 24 hours.

FINAL OPINION:

After thorough internal and external examination of the dead body, I am of the opinion that above described injuries are ante mortem in nature and are caused by some firearm weapon, while injury No.1 collectively caused the destruction of vital organs (brain) leading

to the several hemorrhage and neurogenic shock and death while the other injuries enhance the rate of death. Injury No.1 is the main cause of death. Such types of injuries are sufficient to cause death in ordinary course of nature. However, final opinion will be given after receiving the report from chemical examiner and Histopathology. After conducting post mortem, I handed over post mortem report and other files for chemical examiner and dead body of Parveen Bibi deceased to Sajjad Ahmad 1982-C, post mortem report No.KA-04/2011 Ex.PP/1-6 and diagrams are true computer copies post mortem report which bears my signatures.

5. The learned Prosecutor gave up the prosecution witnesses, namely, Bashir Ahmad, Zulfiqar Ali 1782/C and Allah Wasaya, constable' which tendering into evidence, the report of Forensic Science Laboratory regarding marks examination report No.000024814 dated 10.7.2013 (Exh.PY) and report of Serologist bearing No.562 dated 20.08.2013 regarding blood stained earth of Muhammad Ali and Parveen Bibi, deceased (Ex.PZ), closed the prosecution's evidence. Both the accused/appellants when examined under section 342, Cr.P.C, refuted the entire evidence produced by the prosecution and in reply to a question as to why this case against them and why the PWs have deposed against them, Muhammad Gulzar, appellant replied as under:-

"PWs are closely related to the deceased and are highly inimical towards me and my co-accused and they have involved me and co-accused in this case falsely in order to grab handsome money from us in connivance with local police."

In responding to question have you anything else to say, the accused/ appellant Muhammad Gulzar replied as under:-

"I am innocent. I rely upon the statement of my co-accused Muhammad Mukhtar.

whereas Muhammad Mumtaz, appellant replied as under:--

"PWs are closely related to the deceased and are highly inimical towards me and my co-accused and they have involved me and co-

accused in this case falsely in order to grab handsome money from us in connivance with local police."

In responding to question have you anything else to say, the accused/appellant Muhammad Mumtaz replied as under:-

"I am innocent. I rely upon the statement of my co-accused Muhammad Mukhtar.

6. The appellant-Muhammad Mumtaz neither opted to appear as his own witness under section 340(2), Cr.P.C. nor produced any defence evidence, however, he relied upon the defence evidence already produced by him. The appellants in their defence, produced Sheikh Muhammad Saleem (DW-1) and Muhammad Imran (DW-2) whereas Ali Muhammad, Secretary Union Council No.27, City West, Mailsi was produced as CW-1. On the conclusion of trial, the learned trial Court has convicted and sentenced the appellants-Muhammad Gulzar and Muhammad Mumtaz through the impugned judgment dated 07.03.20915 as alluded to in para No.1 of the instant judgment, hence this appeal.

7. Learned counsel for the appellants submits that it was an un-witnessed midnight occurrence and as such, a blind murder, taken place inside a deserted dera situated in the agricultural land far away from village Abadi; adds that keeping in view the motive set out in the FIR, there was no motive with the appellants for committing murder of the deceased; adds that source of light as well as presence of PWs at the place of occurrence at the time of occurrence, could not have been established; Learned counsel for the appellants while referring inquest report submits that after coming to know about the occurrence, the FIR has been lodged by PW-1, at the instance of PW-2, acting as a puppet in his hands who is the land owner, having political enmity; lastly prayed for acquittal of the appellants.

8. On the other hand, learned Deputy Prosecutor General assisted by the learned counsel for the complainant have supported the impugned judgment by maintaining that the appellants are named in the FIR lodged with reasonable promptitude, that eye-witnesses have fully implicated the

appellants in the occurrence, that medical evidence is in line with ocular account, that the appellants have failed to point out any ill-will mala fide and animosity on the part of PWs for their false implication in the case and prayed for dismissal of the appeal.

9. Arguments advanced by the learned counsel for the parties have been heard and record perused.

10. Before analyzing the evidence of. the prosecution in the light of arguments of learned counsel for the parties, it may be appropriate that some undisputed features of the case, be enumerated herein below:-

(i) As per prosecution, the occurrence had taken place at 2:00 a.m. during the intervening night on 14/15.03.2011;

(ii) two persons, namely, Muhammad Ali son of the complainant (aged about 45/46 years) and Mst. Parveen (aged about 23/24 years) daughter of Haq Nawaz, who had no lit were murdered;

(iii) the cause of death of both the deceased according to the M.Os, eye-witnesses i.e. PW-1, PW-2, PW-5 and PW-6 was the result of firearm injuries,

(iv) the place of occurrence is dera located in the land of Mehar Muhammad Aslam;

(v) motive according to the FIR and the deposition of PW-1 behind the occurrence was that the accused had suspicion that Muhammad Ali had illicit relations with Mst. Parveen Bibi;

(vi) no recovery had been effected on the pointing out of the appellants during the course of investigation;

vii) the prosecution has not been able to establish any source of light available at the place of occurrence;

11. Proceedings with the case, in a chronological order, it is observed that Akbar Ali, SI (PW-9), the first Investigating Officer, when reached at the place of occurrence, Ghulam Nabi-complainant, presented him a written complaint Ex.PA and a motorcycle bearing registration No.9896-MLN Honda 125-C, red colour P-1. The Investigating Officer, after

making an endorsement on the complaint in the form of his police proceeding at 7.30 a.m. at Mauza Jamalpur, sent the same to Police Station for registration of the case whereupon FIR was accordingly registered. He kicked of his investigation by preparing inquest reports of deceased Muhammad Ali and Mst. Parveen Bibi Ex.PK and PN as required under Rules 25-35 of the Police Rules, 1934 which reads as under:--

Rule 25.35. The inquest Report: (1) When the investigation has been completed the investigating officer shall draw up a report, in duplicate by the carbon copying process, in Forms 25.35 (1) A. B. or C. according as the deceased appears to have died:-

A from natural causes.

B by violence.

C by poisoning.

(2) Such report shall state the apparent cause of death, give a description of any mark or marks of violence which may be found on the body and describe the manner in which and the weapon or instrument with which such marks appear to have been inflicted.

(3) The report shall be signed by the police officer conducting the investigation and by so many of the persons assisting in the investigation as concur therein and shall be forwarded without delay through the Superintendent to the District Magistrate or, if the District Magistrate has so directed, to the Sub-Divisional Magistrate.

(4) The following documents shall form part of such report:-

(a) The plan of the scene of death.

(b) The inventory of clothing, etc.

(c) A list of the articles on and with the body, if the body is sent for medical examination.

(d) A list of articles sent for medical examination, if any.

(5) In cases of death by hanging, the report shall give particulars as to the weight and sufficiency of the support and the nature of the thing used to bear the weight of the body.

(6) The carbon copy of such shall be filed in the police station register No.VI.

(7) A copy of all reports relating to deaths caused by railway accidents shall, when made by a police officer other than a railway police officer, be forwarded to the Assistant Inspector-General, Government Railway Police.

The observations of the Investigating Officer (PW-9) which he recorded while preparing the inquest report Ex.PK and Ex.PN, while discharging his official obligations, being privileged to have a visual touch with the scene of crime in its column No.8 of the same, observed that

regarding both the deceased. in Ex.PK and Ex.PN. The same fact has been affirmed by the lady Dr. Kalsoom Iqbal (PW-6) who while conducting the post mortem on the dead body of Mst. Parveen has observed that,

"A dead body of a female aged about 22/23 years lying supine on postmortem table. Length 4' 3" weight 50/55 k.g. rigor mortis developed, postmortem staining were present on the dependent parts of the body. Purification Nil. Condition of eyes opened condition or orifices, mouth semi opened containing nostrils, all the sphincters relaxed, congestion present. Patehtcheal haemorrhage No.

and opined that the time elapsed between the death and post mortem more than 12 hours and less than 24 hours. From the above, it appears that dead bodies of the deceased, remained un-attended after the occurrence. The delay in postmortem examination over the dead bodies of the deceased, also creates doubt about the presence of the PWs at the crime scene at the relevant time of occurrence. Moreover, the Investigating Officer had also got prepared a scaled plan as required under Rule 25.13 of Police Rules, 1934 which reads as under:-

Rule 25.13. Plan of scene.---(1) In all important cases two plans of the scene of the offences shall be prepared by a qualified police officer or other suitable agency one to be submitted with the charge sheet or final report and the other to be retained for departmental use.

(2) The following rules shall govern the preparation of maps or plans by patwaris or other expert:-

(i) Pursuant to paragraph 26 of the Patwari Rules, the Financial Commissioner, with the concurrence of the Inspector General of Police, issues the following instructions concerning the preparation by patwaris of maps needed to illustrate police inquiries.

(ii) In ordinary cases no demands for such maps will be made upon patwaris.

(iii) In the case of heinous crime, especially in cases of murder or riots connected with land disputes, the police officer investigating he case will, if he considers an accurate map is required, summons to the scene of the crime the patwari of the circle in which it occurred and cause him to prepare two maps, one for production in court as evidence and the other for the use of the police investigating agency. In the former reference relating to facts observed by the police officer should be entered while in the later references based on the statement of witnesses which are not relevant in evidence may be recorded. He will be careful not to detain the patwaris longer than is necessary, for the preparation of maps.

(iv) It is necessary to define. clearly the responsibility of the patwari and police officer in respect of these maps.

(v) The police officer will indicate to the patwari the limits of the land of which he desires map, and the topographical items to be shown therein. The patwari will then be responsible for drawing the maps correctly, by tracing if necessary, the second copy, for making, accurately on maps all these items and for entering on the maps due distances. He will not write on the maps, intended for

production is evidence in the court any explanations. The police officer may write any explanations on the traced copy of the map.

(vi) It is for the police officer himself to add to the second copy of the map such remarks as may be necessary to explain the connection of the map with the case under inquiry. He is also responsible equally with the patwaris for the correctness of all distances, but on the copy of the map drawn by the patwari for presentation, in court he will make no remarks or explanations based on the statements of witnesses.

(vii) It will be convenient if all the entries made by the patwari are made in black ink, and those added by the police officer in red ink.

(viii) Patwaris will not in any case be required by a police officer to make a map of an inhabited enclosure or of land inside a town or village site.

12. The draftsman Shaukat Ali, Patwari appeared as PW-7, he stated that on 15.03.2011 he was posted at Jamalpar. On the direction of police, he prepared a scaled site plan of the place of occurrence on pointing out of complainant and PWs in duplicate which is Ex.PQ and Ex.PQ/1 with scale 200 karams equal to one inch. In cross-examination, said draftsman (PW-7) deposed as under:-

"I have no where given any note in both the scaled site plan Ex.PQ and Ex.PQ/1 that the name of the PWs were so and so who pointed me points Nos.1 to 9 in this Site Alan. The room situated on the eastern was without shutters and doors. Volunteered both doors and roof were in broken condition. There was bot furniture or untensil in that room and the same was vacant. I have no where pointed out in the scaled site plan any fire place (Chulha) or any bath room situated in the compound of the house. I have not pointed out the place in my scaled site plan from where the I/O had taken into possession the motorcycle. The actual Abadi of Mauza Jamalpur is about 1-1/2 k.m. away from the place of

occurrence. The nearest Abadi of the place of occurrence is Mauza Jamalpur."

13. Although, there is a judicial consensus that the site plan is not a substantive piece of evidence. It. has been held in the case reported in State of Uttar Predesh Appellant v. Babu and others, Respondents (AIR 2003 Supreme Court 3408) and Tori Singh and another, Appellants v. State of Uttar Pradesh, Respondent (AIR 1962 Supreme Court 399) wherein it has been held that,

"A rough sketch map prepared by the sub-inspector on the basis of statements of investigating and showing the place where the deceased was hit and also the places where the witnesses were at the time of the incident would not be admissible in evidence in view of the provisions of S. 162 of the Code of Criminal Procedure, for it is in effect nothing more than the statement of the Sub-Inspector that the eye-witnesses told him that the deceased was at such and such place at the time when he was hit. The sketch-map would be admissible so far as it indicates all that the Sub-Inspector saw himself at the spot; but any mark put on the sketch-map based on the statements made by the witnesses to the Sub-Inspector would be inadmissible in view of the clear provisions of S. 162 of the Code of Criminal Procedure as it will be no more than a statement made to the police during investigation. Therefore, such marks on the map cannot be used to found any argument as to the improbability of the deceased being hit on that part of the body where he was actually injured, if he was standing at the spot marked on the sketch-map."

In the the case reported in Abdul Aziz and another v. The State PLD 1985 Lah. 534 wherein it has been held that,

----Site plan---Evidentiary value of---Held: Unless corroborated from independent reliable source, reliance on evidence of interested witnesses to be unsafe.

The Hon'ble Supreme Court of Pakistan in the case reported as Sardar Khan and 3 others v. State 1998 SCMR 1823 has laid down that,

---Site plan-importance- of Site plans are prepared only to explain or to appreciate evidence on record--Site plan by itself is not a substantive piece of evidence so that it could contradict ocular account.

14. Since the inquest report and site plan are prepared and got prepared by the Investigating Officer in discharge of his investigative duty to be carried out under the provisions of Code of Civil Procedure and the Police Rules, therefore, if duly proved under the law, despite being not a substantive piece of evidence, it may be taken into consideration by a court, in order to appreciate the evidence on record.

15. In the category of the ocular account of Ghulam Nabi, complainant (PW-1.) and Allah Dad alias Butto (PW-2) have been produced, who have claimed that at the relevant time of occurrence, they were present in the dera but PW-1 when confronted by the learned defence counsel through the test of cross-examination, a real test to judge the veracity of a witness" he deposed as under:-

"My actual residence/permanent residence is in Mauza Jamalpur which is at a distance of about 1-1/2 km. from the place or occurrence. I have been residing in Mauza Jamalpur at my permanent residence from the last 8/10 years. Allah Dad PW is resident of Mauza Chodia which is at a distance of more than Jamalpur where I residing. I do not know about the permanent place of residence of Bashir Ahmad son of Shah Muhammad PW."

Said PW-1 further deposed as under:-

"that it is correct that from the place of occurrence i.e. Dera of Muhammad Aslam the other Dera of Muhammad Aslam is situated at a distance of three Acres. He further deposed that he do not know whether there was any written lease agreement between the Allah Dad PW and children of Mehar Muhammad Aslam, land lord of place of occurrence. He even did not know any entry in

revenue record in this respect. They did not produce any lease deed or the record of right i.e. Khasra Girdawari or Jamabandi to support their version regarding the lease of the land of Mehar Muhammad Aslam taken by Allah Dad, PW."

PW- 1 further stated that:-

"There was no bath room in the Dera, however, there was a fire place for cooking the food in the Dera but he can not said where that fire _place is located. They had not pointed out/ shown the place where Cholha/ fire place was present inside the Dera."

16. Similarly, PW-2 in his examination-in-chief deposed that he is resident of Mauza Chodia Tehsii Hasilpur and is agriculturist by profession, he while facing cross-examination, said PW-2 was duly confronted with his previous statement, which is to the following effect:-

"I had stated in my statement under section 161, Cr.P.C. that in other room Muhammad Ali deceased was sleeping with his wife Parveen, confronted with Ex.DA where it is not recorded. It is incorrect that I stated before the I/O, that Muhammad Ali was sleeping in the room confronted with Ex.DA where it is so recorded."

PW-2 further deposed in his cross-examination that:--

"My permanent residence is in Mauza Chedia which is at a distance of four k.m. from the place of occurrence. Where I resided with my family consisting of my three daughters and one son. My three brothers and father also reside with me there. I have taken four squares of land on lease from different persons."

PW-2 further deposed in his cross-examination that.-

"It is incorrect that Bashir Ahmad is resident of Mauza Muchrhan Tehsil Khanpur Tamewali which is situated at a distance of 5 k.m. the place of occurrence."

"The Dera of Muhammad Aslam consists of two rooms. The room situated on the eastern side is without shutter whereas the other

room in which Muhammad Ali was sleeping, was having a shutter."

17. The above quoted excerpts out of evidence of PW-1 (the complainant), PW-2 Allah Dad alias Bhutto and the evidence of PW-9 (Investigating Officer) All Akbar, SI who prepared inquest reports, Ex.PN and Ex.PK after inspecting the place of occurrence and examining the dead body of the deceased and the evidence of Shaukat Ali Patwari (PW-7) who prepared Ex.PQ and Ex.PQ/1, the scaled site plan and the evidence of Dr. Kalsoom Iqbal (PW-6) who while conducting the post mortem examination over the dead body of the deceased, affirmed the observations, referred above of PW-9 lead to the conclusions that the occurrence took place inside a room of the deserted dera as the prosecution has failed establish that the dera, located in the fields, distantly situated from the nearby village abadi, was being used for residential purposes. Since the occurrence had taken place during the odd and dark hours of the night, therefore, keeping in view the observations of the Investigating Officer regarding the state of affairs on his inspection of the crime scene, which he incorporated in column No.8 of Ex.PK and Ex.PW, the inquest report, duly affirmed by PW-6 Dr. Kalsoom Iqbal, who conducted the post mortem examination on 15.03.2011 observing the developed rigor mortis, the postmortem staining were present on the dependent parts of the body eyes opened, condition orifices, mouth semi opened containing nostrils, the occurrence remained un-witnessed.

18. Although, during the course of trial, the complainant has tried to bring on record that both the deceased were married to each other by producing in the court CW-1 Ali Muhammad, Secretary, Union Council No.27, City West, Mailsi who stated before the court as under:--

"I have brought the Pert No.4 of book No.514 regarding Nikah of Muhammad Ali son of Ghulam Nabi caste Arain, resident of Jamalpur Tehsil Hasilpur I.D. Card No.31202-5812349-1 with Mst. Parveen Bibi daughter of Haq Nawaz caste Mahu, resident of Muhammadpur Tehsil Hasilpur presently residing in Mohallah Siddique Akbar, Mailsi dated 27.9.2010. This solmn Nikah was

performed by Aabid Hussain Nikah Khawan/Nikah Registrar which is registered in Register of Nikah Khawan of Aabid Hussain maintained by Union Council No.27 of City Gharbi Mailsi. Said Nikah has been registered at Sr.253 on 11.10.2010, I present the original register and original Nikah."

But through the extensive cross-examination, it has come on record that there is an interpolation in his Register for showing the registration of marriage of both the deceased. It has also been noticed that while lodging the FIR, PW-1 had alleged that:-

"The motive behind this occurrence is that the accused had suspicion of illicit relations inter-se Muhammad Ali and Parveen Bibi. Prior to this occurrence the accused persons extended threats of dire consequences to the deceased.

19 The belated contradictory and nefarious attempt on the part of the complainant in order to show that both the deceased were married, is further falsified by column No.5 of inquest report Ex.PN/l wherein it is written that the deceased Mst. Parveen Bibi is daughter of Haq Nawaz. The dead body of Mst. Parveen Bibi was received by Mst. Lal Bibi wife of Ghulam Muhammad vide Ex.PV which also discloses the parentage of Mst. Parveen Bibi as Haq Nawaz. The post mortem report of Mst. Parveen Bibi Ex.PP also discloses the same fact, therefore, it is concluded that the prosecution has also failed in proving the motive.

20. For what has been discussed above, the doubtful presence of eye-witnesses at the place of occurrence at the relevant time, failure of the prosecution in proving the motive and recovery against the appellants accumulatively, we are of the view that the prosecution has miserably failed to prove its case against the appellants beyond any shadow of doubt. The benefit of doubt must accrue in favour of accused as the Hon'ble Supreme Court of Pakistan has held in case titled "Muhammad Khan and another v. State 1999 SCMR 1220 that it is axiomatic and universal recognized principle of law that conviction must be founded on unimpeachable evidence and certainty of guilt and hence any doubt that

arises in prosecution case must be resolved in favour of accused. Moreover it is cardinal principle of criminal jurisprudence that a single instance giving rise to a reasonable doubt in the mind of Court entitles the accused to the benefit of doubt not as a matter of grace but as a matter of right. Reliance is placed on case titled as "Muhammad Akram v. The State" (2009 SCMR 230) and "Tariq Pervaiz v. The State" (1995 SCMR 1345).

21. Consequently, we accept this appeal, set aside convictions and sentences of appellants Muhammad Gulzar and Muhammad Mumtaz, awarded by learned trial Court vide impugned judgment dated 07.03.2015 and acquit them of the charge by extending them the benefit of doubt. The appellant-Muhammad Mumtaz is on bail. His surety is discharged from his liability whereas the appellant Muhammad Gulzar is in custody, therefore, he (Muhammad Gulzar) be released forthwith, if not required in any other case. The death sentence awarded to appellant Muhammad Gnlzar is not confirmed and Murder Reference No.15 of 2015 is answered in negative.

22. For the reasons mentioned herein above, since while accepting the appeal against conviction, the appellants have been acquitted, hence, Criminal Revision No.64 of 2015 filed by complainant Ghulam Nabi for enhancement of sentence of the appellants is hereby dismissed, having lost its relevance.

JK/A-71/L **Appeal accepted.**

2021 M L D 880

[Lahore (Multan Bench)]

Before Anwaarul Haq Pannun, J

ZEESHAN ALI ZAFAR---Petitioner

Versus

S.H.O. and others---Respondents

Writ Petition No.13297 of 2020, decided on 14th October, 2020.

Muslim Family Laws Ordinance (VIII of 1961)---

----S.5(2A)---Criminal Procedure Code (V of 1898), S.491---Habeas Corpus---Nikahnama---Failure to fill each column---Petitioner husband sought recovery of his wife who contracted marriage without blessings of her parents--- Nikah Registrar instead of accurately filling the same with requisite / specific reply of bride or bridegroom opted to place single vertical line and also left some of the columns blank---Validity---Alleged detenue was sui-juris and major who contracted marriage with petitioner without blessings of her parents and other siblings--- In order to prove his bona fides that petitioner did not contract marriage with detenue merely as a result of his crush, momentous and impulsive passion arising out of her bodily and behavioural charm or he had contracted marriage sincerely with religious zeal and to forge a sense of security in monetary terms in the mind of detenue, petitioner with his volition reaffix amount of deferred dower of alleged detenue / his wife as Rs. 1,000,000/- (ten lac)---Nikah Registrar committed clear cut violation of directions issued by High Court in an earlier case and SOP issued by Directorate General LG & CD Punjab---High Court referred the matter to District authorities for initiation of penal proceedings against Nikah Registrar / delinquent after affording opportunity of hearing to him---Constitutional petition was allowed, in circumstances.

Mst. Tahira Bibi v. SHO and others PLD 2020 Lah. 811 rel.

Sh. Tanveer Ahmad for Petitioner.

Muhammad Ayyub Buzdar, Assistant Advocate General.

Muhammad Saleem Bashir and Rana Rizwan for Respondent No.3.

Abbas, ASI along with lady constable has produced the detenue Mst. Hamna Raheel.

ORDER

ANWAARUL HAQ PANNUN, J.----Through this petition under Article 199(b)(1) of the Constitution of Islamic Republic of Pakistan, 1973 read with Section 491, Cr.P.C, the petitioner seeks recovery of his wife (hereinafter to be called as the alleged detenue) namely Mst. Hamna Raheel, from the illegal and improper confinement of respondents Nos.2 and 3, so that she may be dealt with in accordance with law. According to the averments made in the petition, the detenue being sui-juris and major, with her own free will and consent but against the wishes of her parents and other siblings, contracted gretna green marriage with the petitioner on 17.07.2020 and started to perform her matrimonial obligations while living in his house. The private respondents being close relative of the detenue tried to interfere into their matrimonial life, constrained whereof, the detenue had to file a private complaint against them. While recording her cursory statement before the court in the private complaint, the alleged detenue categorically stated that nobody had abducted her and she has contracted marriage with her own free will and consent. The respondents, later-on, assured the spouses that they have purged their ill will against them. The detenue on 28.09.2020, accordingly went alongwith the respondents to see her other relatives. It was promised by the respondents that the detenue shall be sent back home within two days, but they failed in materializing their promise. The petitioner, when approached the private respondents for return of detenue/his wife, they instead of allowing her to join him, extended threats of dire consequences. The detenue however succeeded in establishing contact with the

petitioner. She told him that the private respondents along with others were hatching up a conspiracy to murder her and if she is not relieved from their clutches, the petitioner may not be able to find her alive. Hence, this petition.

2. Subject to deposit of Rs.20,000/- with D.R (Judicial) of this Court as security, this Court vide its order dated 07.10.2020 directed respondent No. 1/SHO that the alleged detenue after her recovery be produced before the Court. In compliance of aforesaid order, Abbas ASI accompanied by a lady constable, has produced the alleged detenue before the Court, after her recovery from the house of her parents/ respondents, who categorically states that she is sui-juris, major and has contracted marriage with the petitioner, with her own free will but without the blessings of her parents. She after affirming the above noted averments of the petition has shown her willingness to accompany with her husband i.e. the petitioner.

3. Since the alleged detenue being sui-juris and major has contracted marriage with the petitioner without the blessings of her parents and other siblings, therefore, with a view to examine the petitioner's bona fides as to whether he has contracted marriage with aforesaid detenue merely as a result of his crush, momentous and impulsive passion, arising out of her bodily and behavioral charm or he has contracted marriage sincerely with religious zeal, the petitioner being present before the Court, when quizzed, he in order to fortify his bona-fide as well as to forge a sense of security in monetary terms, in the mind of the detenue, with his volition reaffix the amount of deferred dower of the alleged detenue/his wife as Rs.10,00,000/-(ten lac) and submitted his sworn affidavit Mark "AA" in this context, which shall be considered as an integral part of Nikahnama.

4. It is observed here that considering rampant violations of the Provisions of the Child Marriage Restraint Act (XIX of 1929), Muslim Family Laws Ordinance (VIII of 1961), Family Courts Act, 1964 and The

Punjab Local Government Act, 2019, certain directions were issued by this Court in a case, reported as "Mst. Tahira Bibi v. SHO and others" (PLD 2020 Lahore 811), the relevant paragraphs are reproduced as under:-

"As referred in Para-5 of the judgment, Director Local Government and Community Development, Multan in view of his correspondence with Director General Local Government and Community Development, Lahore has issued some Standard Operating Procedure for taking punitive action against the Nikah Registrar violating the basic law to the following effect:-

"i. That section 5(2A) of MFLO, 1961 states that at the time of solemnization of marriage, the Nikah Registrar or the person who solemnizes a Nikah shall accurately fill all columns of the Nikahnama form with specific answers of the bride or the bridegroom. And in case of contravention, a punishment is prescribed under section 5(4)(i) of the said Ordinance i.e. if a person contravenes the provisions of subsection (2A), he shall be punished to simple imprisonment for a term which may extend to one month and fine of twenty five thousand rupees.

ii. Further, under rule 21 of the West Pakistan Rules under Muslim Family Law Ordinance, 1965 (hereinafter `rules'), no court shall take cognizance of any offence under the ordinance or the rules unless on a complaint in writing by the union council, stating the facts constituting the offence; therefore, ensure that every union council should lodge complaints soon after the receipt of Nikahnama forms columns of which are not accurately filled. Furthermore, prepare a report, on quarterly basis, containing the details about the complaints lodged during the quarter and furnish the same to DG office for information;

iii. That cancel/revoke, after giving show-cause notice, the license of Nikah Registrar who breaches any of the provisions of MFLO, 1961 or rules made thereunder or any of the condition of his license. [In view of condition No.5 of the Conditions of the License, these directions may be deemed to be part of the conditions of the license.]

iv. That ensure that no incomplete (not accurately filled) Nikahnama be registered in the UCs and if any Secretary UC or any other official registers the incomplete Nikahnama, he may, forthwith, be proceeded against under the PEEDA Act, 2006 and keep noted that no laxity in this regard shall be tolerated.

In addition to above, the following further directions are being issued

(1) All the Nikah Registrars or other persons, who solemnize marriages are under legal obligation to scrutinize the credentials at the time of Nikah as to whether the marriage is solemnized with the free will of the parties and no child is exposed to marriage. Mere submission of oral entries for the purpose of age should not be accepted unless any proof of age from the parties to the marriage preferably which should be in the shape of some authentic document either issued by the NADRA in the form of National Identity Card, B-Form or School Leaving Certificate, Medical Certificate based on ossification test issued by the competent authority and the Birth Certificate validly issued by the Union Council, etc. is produced.

(2) Furthermore, after perusing the record in compliance with SOP (ii) mentioned in para 17, in case the Authority fails to take the requisite action, it will be deemed that he himself has willfully failed to perform his function/duty amounting to negligence rendering himself liable for initiation of disciplinary proceedings against him under the relevant law.

5. It may further be appropriate to observe that although in compliance with the above noted directions issued by this Court, the Directorate General LG&CD Punjab, Lahore has issued SOPs vide Notification No.LG&CD/AD(CD)47/ 2020/Court Cases dated 27.08.2020, but still the violations of the above noted provisions, directions and SOPs are being made by the Nikah Khawan/Nikah Registrars and others. The Nikah Registrars instead of filling in, each column of the Nikahnama with specific reply/answer of the parties to the marriage, are still continuing with their practice of placing single vertical line against all or more than one column or leaving the columns blank in the Nikah Nama, rendering themselves liable for initiation of proceedings against them under the law. After perusing the Nikah-nama (Annexure-A) appended with the file, it evinces that against most of the columns of the Nikahnama, the Nikah Registrar has opted to place single vertical line and had also left some of the columns blank. He has not accurately fill in the same with requisite/specific reply of bride or the bridegroom, which is clear-cut violation of the aforesaid directions issued by this Court and the SOPs issued by the Directorate General LG and CD Punjab, Lahore. Therefore, the matter is referred to the Chief Officer, Burewala, District Vehari for initiation of penal proceedings against the Nikah Registrar/delinquent, after affording an opportunity of hearing to him and report thereof shall reach to this Court through D.R Judicial within a period of one month, after receipt of copy of this order.

6. In view of what has been discussed above, the instant petition is allowed, consequently, the detenue Mst. Hamna Raheel is set at liberty. She may accompany with her husband/petitioner. The security amount already deposited by the petitioner in compliance of order dated 07.10.2020 is however, ordered to be refunded to him. The office is directed to send the copies of this order and aforesaid affidavit (Mark-AA) to the Secretary, Union Council concerned, for its endorsement in the relevant column of the "Nikahnama", available with him/record.

MH/Z-2/L **Petition allowed.**

2021 M L D 947

[Lahore]

Before Anwaarul Haq Pannun, J

ZAHID MEHMOOD---Petitioner

Versus

ADDITIONAL SESSIONS JUDGE and others---Respondents

Criminal Miscellaneous No.12356-M of 2021, decided on 23rd February, 2021.

Penal Code (XLV of 1860)---

----S.489-F----Criminal Procedure Code (V of 1898), Ss. 345, 497 & 561-A---Dishonestly issuing a cheque---Bail, cancellation of---Compounding of offences---Compromise inter se parties without permission of court---Cancellation of bail on ground of breach of compromise terms----Scope---Accused was released on post-arrest bail after compromise between parties, however, subsequently on breach of compromise terms, upon application of complainant under S. 497(5) Cr.P.C., his bail was recalled---Contention of accused, inter alia, was that once bail was granted, it was not subject to any conditions ---Validity----Offence under S.489-F, P.P.C. was compoundable inter se the parties, without permission of court and concession of bail could be granted to accused after affirmative nod of complainant---Court, in such a case, was not legally bound to consider as to whether accused had made out his case on merits---Accused, if after entering into compromise, once again dishonours his commitment, then same would amount to dishonest act in continuation of earlier breach, rendering him disentitled to enjoy benefit of the compromise---Grant of bail in non-bailable offences was a concession and not a matter of right---Accused, in the present case,

had executed undertaking that upon his failure to honour commitment of payment within one month, the complainant had right to seek cancellation of bail, and presumption of truth was attached to judicial proceedings, and such undertaking---Bail of accused had therefore rightly been recalled / cancelled --- Application under S.561-A, Cr.P.C. was dismissed, in circumstances.

Jehanzeb Khan v. The State through A.G. Khyber Pakhtunkhwa and others 2020 SCMR 1268; Salman Khalid v. The State and others PLD 2020 Lah. 97 and Sami Ullah and another v. Laiq Zada and another 2020 SCMR 1115 ref.

Tariq Mehmood v. Naseer Ahmed and others PLD 2016 SC 347; Salman Khalid v. The State and others PLD 2020 Lah. 97 and Sami Ullah and another v. Laiq Zada and another 2020 SCMR 1115 rel.

Mian Riaz Hussain Jammu for Petitioner.

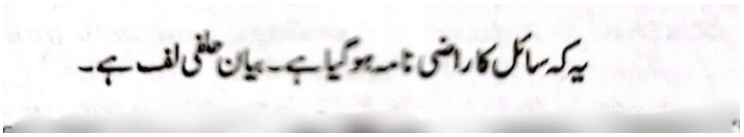
Haroon Rasheed, Deputy District Public Prosecutor on Court's call for Respondent.

ORDER

ANWAARUL HAQ PANNUN, J.----Through this application under Section 561-A, Cr.P.C, the petitioner has called in question the vires of order dated 12.01.2021, whereby the application of the complainant/respondent No.3 filed under Section 497(5), Cr.P.C. for recalling/setting aside the bail granting order dated 21.08.2020 was allowed by learned Senior Civil Judge (Criminal Division) and the order dated 10.02.2021 passed by learned Addl. Sessions Judge, Pakpattan Sharif, whereby the criminal revision petition filed by the petitioner was dismissed, in consequence whereof, the petitioner's post arrest bail

granted vide order dated 21.08.2020, on the basis of compromise, in case/FIR No.366, dated 02.07.2020, registered under Section 489-F, P.P.C. at Police Station Kalyana, Pakpattan Sharif had been cancelled.

2. Precisely, as per FIR, petitioner dishonestly had issued cheque No.PKUNIL-0109000223917796167 61-675 of amount of Rs.14,56,000/- of UBL Chowk Marley Branch to the complainant to repay/fulfil his financial obligation, without ensuring that the cheque upon its presentation before the concerned bank be honoured, the bank, on its presentation, on account of paucity of funds has dishonoured the cheque. The petitioner, after his arrest, submitted an application under Section 497, Cr.P.C., seeking his release on post-arrest bail through his counsel specifically pleading in paragraph No.4 thereof regarding his compromise with the complainant, before the learned trial Court, which in its verbatim is reproduced hereunder:-


یہ کہ سائل کا راضی نامہ ہو گیا ہے۔ بیان حلفی الف ہے۔

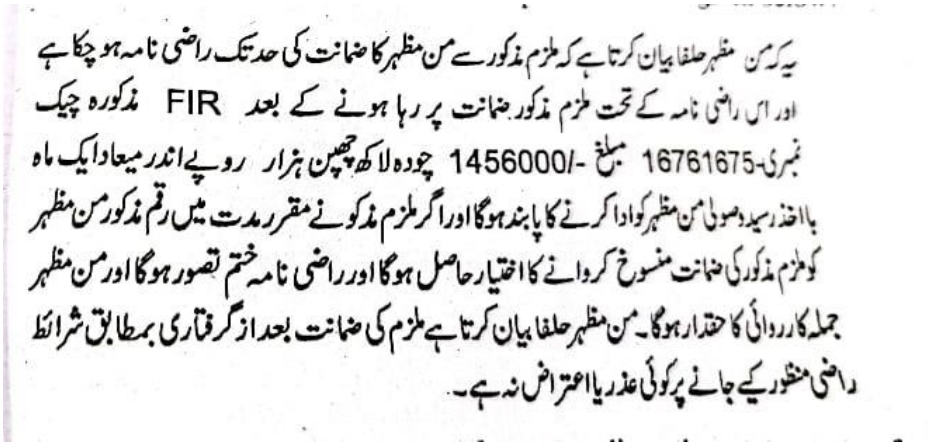
The bail petition was allowed by the Court of learned Senior Civil Judge (Criminal Division) Pakpattan Sharif, vide its order dated 21.08.2020. Being relevant, the paragraphs Nos.3 and 4 of the said order are reproduced hereunder:-

(3) Learned counsel for the petitioner/ accused has argued that compromise between the petitioner and complainant has been affected. In the last he has prayed that while accepting his application petitioner be directed to be released on bail.

On the other hand, learned counsel for the complainant has raised no objection upon acceptance of instant bail application and

complainant has recorded his statement regarding compromise with the petitioner/accused Muhammad Zahid as per terms and conditions of Mark-A and raised no objection upon acceptance of bail application and in this regard, statement of complainant has also been recorded on the back of his affidavit i.e. Mark-A.

The relevant portion out of the text of compromise/ agreement deed/affidavit Mark-A, annexed with the petition is also given below:-



یہ کہ من مظہر حلفاً بیان کرتا ہے کہ ملزم مذکور سے من مظہر کا ضمانت کی حد تک راضی نامہ ہو چکا ہے
اور اس راضی نامہ کے تحت ملزم مذکور ضمانت پر رہا ہونے کے بعد FIR مذکورہ چیک
نمبری-16761675 مبلغ -/1456000 چودہ لاکھ چھپن ہزار روپے اندر میعاد ایک ماہ
بااخذ رسید وصولی من مظہر کو ادا کرنے کا پابند ہوگا اور اگر ملزم مذکو نے مقررہ مدت میں رقم مذکور من مظہر
کو ملزم مذکور کی ضمانت منسوخ کروانے کا اختیار حاصل ہوگا اور راضی نامہ ختم تصور ہوگا اور من مظہر
جملہ کارروائی کا حقدار ہوگا۔ من مظہر حلفاً بیان کرتا ہے ملزم کی ضمانت بعد از گرفتاری بمطابق شرائط
راضی منظور کیے جانے پر کوئی عذر یا اعتراض نہ ہے۔

In continuation of the above, after recording the statement of the complainant, the petitioner was ordered to be released on bail from the judicial custody, vide its order dated 21.08.2020 by the Court. After his release on bail, however, the petitioner failed to honour the terms of the compromise and make payment of outstanding amount to the complainant/ respondent No.3, who moved an application under Section 497(5), Cr.P.C. for recalling/setting aside the bail granting order, which was allowed by the learned trial Court vide its order dated 12.01.2021. The petitioner, as aforesaid, moved to the Court of learned Addl. Sessions Judge, Pakpattan Sharif, whereby his revision petition was also dismissed vide its order dated 10.02.2021. Hence, this petition.

3. Learned counsel for the petitioner while relying upon the judgment reported as "Jehanzeb Khan v. The State through A.G. Khyber Pakhtunkhwa and others" (2020 SCMR 1268) contends that if an accused, on his making out of his case, is released on bail, such order cannot be subjected to any riders or conditions, the order of recalling of bail is not sustainable, the impugned orders, therefore, may be set aside and restoring the order dated 21.08.2020, the petitioner may be admitted to pre-arrest bail.

4. On the other hand, learned Prosecutor while taking exception to the above noted contention has opposed by arguing that learned Magistrate passed the order dated 21.08.2020 after examining the genuineness of compromise inter-se the parties only, which is evident from the grounds he urged through his application, contentions of learned counsel representing their respective parties and the operative part of the order dated 21.08.2020, therefore, the petitioner cannot be allowed to blow hot and cold in the same breath. He has relied upon case reported as "Salman Khalid v. The State and others" (PLD 2020 Lahore 97) besides Sami Ullah and another v. Laiq Zada and another" (2020 SCMR 1115) to contend that being guilty of misuse of concession of bail, the petitioner is not entitled to enjoy the concession of bail as such, the impugned orders being unexceptional, calls for no interference by this Court.

5. Arguments heard and record perused.

6. It may be observed that the alleged offence is compoundable in terms of Section 345, Cr.P.C. For ready reference, the provision of section 345, Cr.P.C. in its verbatim is reproduced as under:-

345. Compounding offences. (1) The offences punishable under the sections of the Pakistan Penal Code specified in the first two

columns of the table next following may be compounded by the persons mentioned in the third column of that table:

Offence	Sections of Pakistan Penal Code applicable.	Persons by whom offence may be compounded.
[Dishonestly issuing a cheque for repayment of loan of fulfillment of an obligation	489-F	The person in whose favour cheque issued.]

The provision of Section 345, Cr.P.C. vis-a-vis the compounding of offences is bifurcated into two categories i.e. with or without the permission of court. The august Supreme Court of Pakistan had expounded this legal preposition in the case titled "Tariq Mehmood v. Naseer Ahmed and others" (PLD 2016 SC 347) as under:-

"Section 345(1), Cr.P.C. enlisted the offences which may be compounded by the specified persons without intervention of any court---Compounding in such cases took effect from the moment the compromise was completely entered into by the parties, the relevant court which was to try the offence in issue was left with no jurisdiction to refuse to give effect to such a compromise and a party to such a compromise could not resile from the compromise at any subsequent stage of the case---On the other hand Section 345(2), Cr.P.C. dealt with cases in which the offences specified therein could be compounded only with the permission of the court and in all such cases any compromise arrived at between the

parties on their own at any stage was not to take effect at all unless the court permitted such compromise to be given effect to and the relevant court for the purpose was the court before which prosecution for the relevant offence was pending."

7. The offence under Section 489-F, P.P.C. is cognizable by the police, therefore, a person accused of committing such offence, if arrested has to move for his release on post arrest bail or apprehending his arrest, has to seek pre-arrest bail, from the competent Court. In offences which are compounable inter-se the parties without permission of the court, in case of a compromise, under the law, the Court is not legally bound to consider as to whether the accused has made out his case for his release on bail on merits. The Court while considering the compoundability of such offences and after examining the legality and genuineness of the compromise is bound only to give an affirmative nod to the wishes of the parties through its order.

8. It may be quite relevant to observe that voluntary issuance of a cheque for, repayment of loan or fulfilment of financial obligation, in-fact amounts to giving of an 'undertaking by the concerned person that on its presentation, the cheque shall be honoured/encashed. The dishonest intention of the person, issuing a cheque, becomes evident, the moment through its endorsement in writing, the bank refuses to honour it and simultaneously the commission of offence under Section 489-F, P.P.C. also takes place. The dishonouring of a cheque, in the above context also amounts to breach of commitment/undertaking by the accused which he makes with the payee. After registration of a criminal case under Section 489-F, P.P.C., against him, the accused if enters into a compromise with the person in whose favour, he had issued a cheque, the concession of

bail, can be granted to him on the affirmative nod of the complainant because the offence is compoundable inter-se the parties, without permission of the Court. It can safely be concluded that after entering into a compromise with the complainant for making payment of the amount either mentioned in the cheque or settled between the parties through compromise, the accused once again makes a commitment and if it is again dishonoured, it would amount to a dishonest act in continuation of his earlier breach of commitment, thus rendering him disentitled to further enjoyment and reaping the fruit of his misdeed, he earned, by way of compromise. The grant of bail in non-bailable offences is a concession/grace and cannot be claimed as of a right by the accused. There is a judicial consensus that the conduct of the accused is always considered important and relevant.

9. In view of above discussion, the role of the Court in dealing with the offences which are compoundable inter-se the parties, without permission of the court under Section 345(1), Cr.P.C. after examining the genuineness of the compromise, thus confines to finally giving an effect to such compromise by way of their termination in pending proceeding against the accused. It has also been observed that the accused gives an undertaking while entering into a compromise, in any of the form i.e. affidavit, compromise deed etc. normally in writing containing conditions or otherwise of it that in case, he is granted bail, he shall make payment of the amount or fulfil other conditions of the compromise, either mentioned in the cheque or agreed upon inter-se the parties and is tendered for seeking any relief during the pendency of proceedings before the Court. The accused, in this way, succeeds in earning his liberty and saves himself from facing the rigors of remaining in jail, thus such liberty is bartered with the complainant in lieu of his commitment by fulfilling

the conditions. The execution of such compromise deed unless and until, adjudged otherwise by a court of competent jurisdiction also amounts to a candid admission of his liability by the accused.

10. Considering the compoundability of the offence under Section 489-F as aforesaid and genuineness of the compromise between the parties, the learned trial Judge, being under no legal obligation to assess the incriminating material available on record to conclude that whether the accused had made out his case of his release on bail within the ambit of further inquiry, proceeded to grant post arrest bail to the petitioner, vide its order dated 21.08.2020, which reads as follows:-

> "At the very outset, Muhammad Amin complainant of the present case submitted before the court that he has affected compromise with the petitioner/accused Muhammad Zahid and due to which he has no objection upon acceptance of instant bail application and release of petitioner/accused on bail as per terms and conditions of affidavit i.e. Mark-A and as token of correctness to its statement, his thumb impression/signature along with his photo duly verified by his counsel namely Malik Muhammad Razzaq advocate have been taken over the margin of his statement. Since the offence levelled against the petitioner/accused is compoundable in nature. Hence, in view of the statement got recorded by the complainant, petitioner/ accused Muhammad Zahid is admitted to bail subject to furnishing surety bonds to the tune of Rs.1,00,000/- With one surety in the like amount to the satisfaction of this court.

11. Admittedly, the petitioner while executing settlement / compromise agreement (Mark-A) containing his undertaking had bound himself that after his release on bail, he will pay the amount of cheque No.16761675

i.e. Rs.14,56,000/- within a period of one month, and if he fails in honouring the terms of his compromise/agreement deed, in making payment of the outstanding amount within the requisite time period, the complainant shall have a right to seek cancellation of his bail. The petitioner was released from the jail on the strength of aforesaid order and has been enjoying his liberty. Despite being beneficiary of the compromise deed, the petitioner never raised any objection to the execution of the document Mark-A till the time respondent No.3 moved an application under Section 497(5), Cr.P.C. seeking cancellation / recalling of the bail granting order dated 21.08.2020 because of non-fulfilment of the conditions of compromise which had become part of the judicial record. Needles to observe that a presumption of truth is attached to the judicial proceedings, under the law. In the light of principles laid down in the case reported as "Salman Khalid v. The State and others" (PLD 2020 Lahore 97), wherein it has been held that:-

> "It can safely be concluded that after entering into a compromise with the complainant for making payment of the amount either mentioned in the cheque or settled between the parties at the time of their entering into compromise, the accused once again makes a commitment and as such in case he again dishonors his commitment, which will be deemed to be a repetition and in continuation of his earlier breach of commitment, thus rendering him disentitled to further enjoy and reap the fruit of his misdeed, he earned, by way of compromise."

The petitioner is held disentitled to further enjoy the concession of bail, which he earned by way of compromise. By non-adhering to or as a result of non-fulfilment of the conditions contained in the compromise deed, the

petitioner has in-fact misused the concession of bail. Needless to say that such concession was extended to the petitioner only and only after its execution, the compromise deed was also tendered in the Court as Mark-A, which has also become part of the bail granting order itself. The learned trial Judge while granting bail being under no legal obligation, as observed hereinabove had given no finding as to whether the petitioner had made out his case for his release on bail or not on merits, thus the case law relied upon by the learned counsel for the petitioner is not applicable to the facts and circumstances of the instant case. It is also exhumatic that there is hardly any uniformity and each and every criminal case rests normally upon distinguishable facts and circumstances. The august Supreme Court of Pakistan in case reported as "Sami Ullah and another v. Laiq Zada and another" (2020 SCMR 1115) while encapsulating the grounds for cancellation or recalling the bail has laid down the principles which for ready reference is reproduced as under:-

"i) If the bail granting order is patently illegal, erroneous, factually incorrect and has resulted into miscarriage of justice:

ii) That the accused has misused the concession of bail in any manner.

iii) That accused has tried to hamper prosecution evidence by persuading/pressurizing prosecution witnesses.

iv) That there is likelihood of absconsion of the accused beyond the jurisdiction of court.

v) That the accused has attempted to interfere with the smooth course of investigation.

vi) That accused misused his librty while indulging into similar offence.

vii) That some fresh facts and material has been collected during the course of investigation with tends to establish guilt of the accused."

12. In view of aforesaid grounds, it is observed that the petitioner has misused the concession of bail by way of non-fulfillment of the conditions of compromise deed Mark-A, by not honouring his commitment/undertaking, thus both the learned courts below have rightly passed the impugned orders, which call for no interference by this Court. Resultantly, the instant petition is dismissed in limine.

KMZ/Z-5/L **Petition dismissed.**

2021 M L D 1126

[Lahore]

Before Anwaarul Haq Pannun, J

MUHAMMAD NAWAZ---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.9464-B of 2021, decided on 19th March, 2021.

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

----Ss.497 & 382-B---Penal Code (XLV of 1860), S.322---Qatl-bis-sabab---Period of detention to be considered while awarding sentence of imprisonment---Bail, grant of---Scope---Accused, who was a doctor by profession, sought post-arrest bail in FIR wherein he was charged under S.322, P.P.C. and it was alleged that he committed qatl-bis-sabab of the son of complainant by showing negligence while conducting surgery on the deceased---Punishment for qatl-bis-sabab provided under S.322, P.P.C., was 'Diyat' only---Accused could be kept in confinement in case he committed default in payment of Diyat amount and S.382-B, Cr.P.C., did not apply in such like case, as such, incarceration of accused during trial would amount to punishment before his conviction as well as against the mandate of law vis-a-vis applicability of S.382-B, Cr.P.C.---Petition for grant of post-arrest bail was allowed.

Muhammad Shafi v. The State and another 2020 PCr.LJ 1530; Israr Hussain Shah v. The State and 2 others 2020 PCr.LJ 1164 and Shah Hussain v. The State PLD 2009 SC 460 rel.

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

----S.497---Bail---Scope---Accused was entitled to bail as of right in an offence which does not entail the punishment of imprisonment because if

he is refused bail the period as under trial prisoner would amount to a case of double jeopardy.

Ch. Tahir Nasrullah Warraich for Petitioner.

Ms. Noshe Malik, Deputy Prosecutor General for the State along with Ansar, S.I. with record.

Mudassar Hussain Butt for the Complainant.

ORDER

ANWAARUL HAQ PANNUN, J.----The petitioner, who is a doctor by profession, seeks post-arrest bail in case F.I.R No.302/2019 dated 29.04.2019, offence under Section 322, P.P.C., registered at Police Station Model Town, Gujranwala. He has been booked in this case with the accusation of committing qatl-bis-sabab of Muhammad Asim (son of the complainant) by showing his negligence while conducting surgery of the deceased.

2. Heard. Record perused.

3. It is straightway observed that punishment for qatl-bis-sabab provided under Section 322, P.P.C., is 'Diyat' only. According to Section 53, P.P.C., an offender, upon having been found guilty of the charge, may be imposed upon any one or more out of the punishments of Qisas, Diyat, Arsh, Daman, Death either as Qisas or Ta'zir, Imprisonment for Life, Forfeiture of Property and Fine by a Court of competent jurisdiction. Furthermore, under Section 299(e), Chapter XVI of P.P.C., Diyat has been defined as the compensation specified in Section 323, P.P.C., payable to the heirs of the victim and the value of Diyat has been defined in Section 323, P.P.C., as under:-

"(1) The Court shall, subject to the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah and keeping in view the financial position of the convict and the heirs of the victim, fix the value of

diyat which shall not be less than the value of thirty thousand, six hundred and thirty grams of silver.

(2) For the purposes of subsection (1), the Federal Government shall, by Notification in the official Gazette, declare the value of silver, on the first day of July each year or on such date as it may deem fit, which shall be the value payable during a financial year."

In the judgment reported as Muhammad Shafi v. The State and another (2020 PCr.LJ 1530), this Court has already observed that in such like cases it is for the learned trial Court to hold at the trial that whether the evidence adduced by the prosecution would bring the case of accused within the ambit of Section 322, P.P.C., or otherwise; no punishment of any period, except the payment of Diyat, has been provided under Section 322, P.P.C., and no express provision of law exists to show that punishment of Diyat attracts the prohibitory clause of Section 497 Cr.P.C. Furthermore, in the case of Israr Hussain Shah v. The State and 2 others (2020 PCr.LJ 1164), this Court has held that if a provision can be interpreted in two different manners then the one which favours the accused is to be adopted; an accused handed down guilty verdict under Section 322, P.P.C. can only be kept in confinement, if he makes a default to pay the Diyat amount as is evident from Section 331, P.P.C. The Hon'ble Supreme Court of Pakistan in the dictum reported as Shah Hussain v. The State (PLD 2009 SC 460) has held that after the use of word "shall" for the word "may" in Section 382-B, Cr.P.C, at the time of passing the sentence it is mandatory for the trial Court to take into consideration the pre-sentence custody period of the accused.

4. Keeping in view the above legal position, it can safely be held that if an accused charged under Section 322, P.P.C., upon pleading his guilty or after his trial, is convicted accordingly, he can only be kept in confinement in case he commits default in the payment of Diyat amount and the provision of Section 382-B, Cr.P.C does not apply in such like

case, which ordains that "Where a Court decides to pass a sentence of imprisonment on an accused for an offence, it shall take into consideration the period, if any, during which such accused was detained in custody for such offence". As such, incarceration of the petitioner during trial would amount to punishment before his conviction as well as against the mandate of law vis- -vis applicability of Section 382-B, Cr.P.C settled by the Hon'ble Supreme Court of Pakistan in the dictum supra. Moreover, it is settled law that in an offence which does not entail the punishment of imprisonment the accused shall be entitled to bail as of right because if he is refused bail the period as under trial prisoner would amount to a case of double jeopardy.

5. Keeping in view the above legal position, it can safely be held that incarceration of the petitioner as under trial prisoner is not justified as the same would not serve any useful purpose and even in case of his conviction such period cannot be compensated in any manner. Therefore, by allowing this petition the petitioner is admitted to post-arrest bail subject to his furnishing of bail bond in the sum of Rs.27,00,000/- (Rupees twenty seven hundred thousand only) with one surety in the like amount to the satisfaction of the learned trial Court/Area Magistrate.

SA/M-53/L **Bail granted.**

2021 M L D 1305

[Lahore]

Before Syed Shahbaz Ali Rizvi and Anwaarul Haq Pannun, JJ

ABDUL RAUF alias KALA---Appellant

Versus

The STATE---Respondent

Criminal Appeal No.258868-J of 2018 and Capital Sentence Reference No.14-T of 2018, heard on 16th February, 2021.

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

----Ss.302(b) 324 & 34---Anti-Terrorism Act (XXVII of 1997), S. 7---Qatl-i-amd, attempt to commit qatl-i-amd, common intention, act of terrorism---Appreciation of evidence---Delay of one and half hour in lodging the FIR---Scope---Accused were charged for committing the murder of four persons and injuring one person---Motive behind the occurrence was stated to be a criminal litigation pending between the parties---Distance between the police station and the place of occurrence was eight kilometres---Dead bodies of all the four deceased were transmitted to the hospital on the same night and the post-mortems were conducted within four hours---Importantly, injured was medically examined same day---First Information Report had been lodged with promptly, thus the chances of deliberation and consultation on the part of the complainant were ruled out---Circumstances established that the accused had acted in a callous and brutal manner and committed cold blooded murder of the four innocent persons and also caused serious firearm injuries to the injured witness, hence he deserved no leniency---Appeal against conviction was dismissed accordingly.

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

----Ss.302(b) 324 & 34---Anti-Terrorism Act (XXVII of 1997), S.7---Qatl-i-amd, attempt to commit qatl-i-amd, common intention, act of

terrorism---Appreciation of evidence---Ocular account corroborated by medical evidence---Scope---Accused were charged for committing murder of four persons and injuring one person of complainant party---Record showed that the ocular account in the case had been furnished by complainant and injured (close relatives of the deceased)---Both the eye-witnesses were residents of the same place where the occurrence took place and they had reasonably explained their presence at the place and time of occurrence---Fact that injured witness also sustained firearm injuries on his right leg and he was taken to the hospital by the complainant within one hour of the occurrence established that they both were present at the spot---Even otherwise, said witnesses remained consistent on all material points and evidence of the said witnesses could not be discarded merely on account of their inter-se relationship as well as their relationship with the deceased persons---Medical evidence fully corroborated with the ocular account and did not find any material contradiction qua the role of the accused---Plea taken on behalf of the accused that it was an unseen occurrence which was committed in the darkness of night and the accused had been substituted with the actual culprits, however, in view of the fact that the parties were known to each other and any mistake in identifying the accused by the witnesses could not arise, was farfetched thus, rejected---Substitution of accused by the complainant in such like murder case was not possible---Circumstances established that the accused had acted in a callous and brutal manner and committed cold blooded murder of the four innocent persons and also caused serious firearm injuries to the injured witness, hence he deserved no leniency---Appeal against conviction was dismissed accordingly.

Khalid Saif Ullah v. The State 2008 SCMR 688 and Irshad Ahmad and others v. The State and others PLD 1996 SC 138 rel.

(c) Criminal trial---

----Witness---Statements of related witnesses---Reliance---Scope---Mere relationship of the witnesses is not a ground itself to discredit their testimony.

Khizar Hayat v. The State 2011 SCMR 429 rel.

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

----Ss.302(b) 324 & 34---Anti-Terrorism Act (XXVII of 1997), S.7---Qatl-i-amd, attempt to commit qatl-i-amd, common intention, act of terrorism---Appreciation of evidence---Motive was proved---Scope---Accused were charged for committing murder of four persons and injuring one person of complainant party---Motive in the case had not been denied by the accused and he also did not produce any defence evidence to establish his alleged false involvement in the case---Circumstances established that the accused had acted in a callous and brutal manner and committed cold blooded murder of the four innocent persons and also caused serious firearm injuries to the injured witness, hence he deserved no leniency---Appeal against conviction was dismissed accordingly.

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

----Ss. 302(b) 324 & 34---Anti-Terrorism Act (XXVII of 1997), S. 7---Qatl-i-amd, attempt to commit qatl-i-amd, common intention, act of terrorism---Appreciation of evidence---Weapon of offence was recovered from the accused---Reliance---Scope---Accused were charged for committing murder of four persons and injuring one person of complainant party---Report of Forensic Science Agency showed that the weapon of offence recovered from the accused was found to be in mechanical operating condition with safety features functioning properly---Said corroborative piece of evidence fully established culpability of the accused---Circumstances established that the accused had acted in a callous and brutal manner and committed cold blooded murder of the four innocent persons and also caused serious firearm injuries to the injured

witness, hence he deserved no leniency---Appeal against conviction was dismissed accordingly.

(f) Anti-Terrorism Act (XXVII of 1997)---

----S. 6---Penal Code (XLV of 1860), Ss. 302(b) 324 & 34---Qatl-i-amd, attempt to commit qatl-i-amd, common intention---Appreciation of evidence---Terrorism---Scope---Accused were charged for committing murder of four persons and injuring one person of complainant party---For determining the issue whether the offence fell within the realm of Anti-Terrorism Act or not, the nature of offence was to be seen in the light of mode of occurrence---In the present case, a specific motive resulting into occurrence had been alleged, which was private and of personalized nature and had no nexus with S.6 of Anti-Terrorism Act, 1997; it could not be said that the same fell within the ambit of Anti-Terrorism Act, 1997---Motive for the occurrence in case was personal enmity inter-se the parties, as such S.7 of Anti-Terrorism Act, 1997 did not attract---Convictions and sentences of the accused under Anti-Terrorism Act, 1997 were set-aside, in circumstances.

Muhammad Bilal v. The State and others 2019 SCMR 1362 rel.

Abid Saqi for Appellant.

Muhammad Moeen Ali, Deputy Prosecutor General for the State.

Malik Matee Ullah for the Complainant.

Date of hearing: 16th February, 2021.

JUDGMENT

ANWAARUL HAQ PANNUN, J.----The appellant Abdul Rauf alias Kala was tried in a private complaint under Sections 302, 324, 148, 149, P.P.C. read with Section 7 of Anti-Terrorism Act, 1997, arising out of case FIR No.210/2014 dated 14.11.2004, Police Station Wan Bhachran District Mianwali. On conclusion of trial, the learned trial court/Judge, Anti-Terrorism Court, Sargodha, vide its judgment dated 31.10.2018, has convicted and sentenced the appellant as under:-

i) Under Section 302(b), P.P.C. death penalty by way of Tazir for committing Qatl-i-Amd of Muhammad Yusuf deceased with a compensation of Rs.2,00,000/- under Section 544-A, Cr.P.C. to the legal heirs of the deceased and in default of payment of compensation to further undergo six months S.I.

ii) Under Section 302(b), P.P.C. death penalty by way of Tazir for committing Qatl-i-Amd of Muhammad Khan deceased with a compensation of Rs.2,00,000/- under section 544-A, Cr.P.C to the legal heirs of the deceased and in default of payment of compensation to further undergo six months S.I.

iii) Under Section 302(b), P.P.C., death penalty by way of Tazir for committing Qatl-i-Amd of Muhammad Bakhsh deceased with a compensation of Rs.2,00,000/- under Section 544-A, Cr.P.C to the legal heirs of the deceased and in default of payment of compensation to further undergo six months S.I.

iv) Under Section 302(b), P.P.C. death penalty by way of Tazir for committing Qatl-i-Amd of Abdul Rehman deceased with a compensation of 16..2,00,000/- under Section 544-A Cr.P.C. to the legal heirs of the deceased and in default of payment of compensation to further undergo six months S.I.

v) Under Section 324, P.P.C., ten years R.I. for attempting to commit Qatl-i-Amd of Muhammad Feroze (injured PW) with fine of Rs.1,00,000/- and in default of payment of fine to further undergo four months S.I.

vi) Under Section 7(a) of ATA, 1997, death sentence for committing Qatl-i-Amd of four deceased name Muhammad Yusuf Muhammad Khan, Muhammad Bakhsh and Abdul Rehman with fine of Rs. 5,00,000/- and in default of payment of fine to further undergo six months S.I.

vii) Under Section 7(c) of ATA, 1997, ten years R.I. for attempting to commit Qatl-i-Amd of Muhammad Feroze (injured PFT9 with fine of Rs. 1,00,000/- and in default of payment of fine to further undergo four months S.I.

viii) Under Section 21-L, of ATA, 1997, ten years R.I. with fine of Rs.50,000/- and in default of payment of fine to further undergo two months S.I.

The sentences of imprisonment were ordered to run concurrently and benefit of Section 382-B, Cr.P.C has been extended to the convict/appellant.

Capital Sentence Reference No.14-T of 2018, for confirmation or otherwise of death sentence awarded to appellant Abdul Rauf alias Kala shall also be replied through this single judgment.

2. Briefly, the prosecution story as mentioned by complainant Muhammad Iqbal (PW-3) in a private complaint (Ex.PB) is that on 14.11.2004 at 6:30 p.m. he along with Muhammad Feroze, Muhammad Khan son of Muhammad Zaman, Muhammad Khan son of Muhammad Ramzan, Abdul Rehman, Muhammad Bakhsh and Muhammad Yousaf was sitting in the Baithak of Fateh Muhammad Chairman when all of a sudden the accused Abdul Rauf alias Kala while armed with Kalashnikov along with two unknown culprits and Ahmad Nawaz and Shaukat, all armed with Kalashnikovs, came there; accused Abdul Rauf alias Kala along with his two unknown accomplices while raising lalkara entered into the Baithak and made a burst with his Kalashnikov and the unknown accused also resorted to burst firing with their respective firearms, which resulted into death of Muhammad Bakhsh, Muhammad Khan son of Muhammad Ramzan, Muhammad Yusuf and Abdul Rehman and injuries to Muhammad Feroze. Motive behind the occurrence was stated to be a criminal litigation pending between the parties.

3. After necessary investigation the report under Section 173, Cr.P.C was submitted against the accused/appellant. After completing the procedural formalities the appellant was formally charge-sheeted by the learned trial court, to which he pleaded not guilty and claimed trial. The prosecution examined as many as eleven PWs and four CWs to prove charge against the accused. Dr. Salahuddin (PW-10) and Dr. Muhammad Ishfaq (PW-12) provided medical evidence; Muhammad Afzal, S.I (Rtd.) (CW-1) and Ziaullah Khan, Inspector (CW-4) conducted investigation in this case, whereas the complainant Muhammad Iqbal (PW-3) and Muhammad Feroze (PW-4) furnished the ocular account. Learned Deputy Prosecutor General after tendering in evidence report of the Chemical Examiner (Ex.PW) and report of the Punjab Forensic Science Agency (Ex.PX) closed the prosecution case.

4. The statement of the accused/appellant under Section 342, Cr.P.C was recorded, in which he refuted the allegations levelled against him and professed his innocence. While answering to question (Why this case is against you and why the witnesses have deposed against you?), the appellant replied as under:-

> "False case has been registered against me due to previous enmity. Firstly a false case under section 324, P.P.C. was registered against me and others on the allegation of causing firearm injuries to Muhammad Ramzan, chachazad of the complainant of this case. The complainant had involved me in this case falsely due to said grudge. The other private witnesses have deposed falsely due to their relationship with the complainant "

The accused/appellant neither produced any defence evidence nor opted to appear as his own witness under Section 340(2), Cr.P.C. However, after conclusion of trial the appellant has been convicted and sentenced by the learned trial court, as mentioned earlier.

5. We have heard the learned counsel for the parties at length, scanned the record with their able assistance besides giving our anxious consideration to their arguments.

6. The occurrence in this case took place on 14.11.2004 at 06:30 p.m. was reported to police by the complainant at 08:00 p.m. i.e. just after one and half hour of the occurrence. The distance between the police station and the place of occurrence was eight kilometers. The dead bodies of all the four deceased were transmitted to the hospital on the same night at 01:15 a.m. and the postmortems were conducted at 01:30 a.m., 02:30 a.m., 03:30 a.m. and 04:30 a.m. respectively. Importantly, the injured/PW-5 Muhammad Feroze was medically examined on 14.11.2004 at 07:30 p.m. Therefore, we are of the view that it is a case in which, the F.I.R has been lodged with possible prompt practically, thus the chances of deliberation and consultation on the part of the complainant are ruled out. The ocular account in this case has been furnished by PW-3 Muhammad Iqbal and PW-4 Muhammad Feroze (close relatives of the deceased). Both the eye-witnesses are residents of the same place where the occurrence took place and they have reasonably explained their presence at the place and time of occurrence. Moreover, the fact that PW-4 also sustained firearm injuries on his right leg and he was taken to the hospital by the complainant within one hour of the occurrence establishes that they both were present at the spot. Even otherwise, PW-3 and PW-4 remained consistent on all material points and evidence of the said witnesses cannot be discarded merely on account of their inter se relationship as well as their relationship with the deceased persons. It is well settled by now that mere relationship of the witnesses is not a ground itself to discredit their testimony. Reliance is placed on the dictum reported as Khizar Hayat v. The State (2011 SCMR 429), wherein the Hon'ble Supreme Court has observed as under:-

"The statement of the witness on account of being interested witness can only be discarded if it is proved that an interested witness has

ulterior motive on account of enmity or any other consideration. Essentially this proposition has been considered in number of cases and this Court had declined to give weight to it, in absence of any reason leading to show that for some ulterior motive or on account of enmity the statement has been falsely given. There is no rule of law that statement of interested witness cannot be taken into consideration without corroboration and even uncorroborated version can be relied upon if supported by the surrounding circumstances."

7. According to the postmortem reports, doctor has found nine firearm injuries on the body of Abdul Rehman deceased, ten firearm injuries on the body of Muhammad Yusuf deceased, seven firearm injuries on the body of Muhammad Khan deceased and five firearm injuries on the body of Muhammad Bakhsh deceased. The medical evidence furnished by PW-10 Dr. Salahuddin and PW-12 Dr. Muhammad Ishfaq fully corroborates with the ocular account and we do not find any material contradiction qua the role of the appellant. We have also observed that the plea taken on behalf of the appellant that it was an unseen occurrence which was committed in the darkness of night and the appellant had been substituted with the actual culprits, in view of the fact that the parties are known to each other and any mistake in identifying the accused by the PWs cannot arose, is farfetched and thus, rejected. Even otherwise, substitution of accused by the complainant in such like murder case is not possible. The law on the subject has been settled by the Hon'ble Supreme Court of Pakistan in the judgment reported as Khalid Saif Ullah v. The State (2008 SCMR 688) wherein it has been has observed as under:-

"Substitution is a phenomenon of a rare occurrence because even the interested witnesses would not normally allow real culprits for the murder of their relations let off by involving innocent persons. In this context, reference can usefully be made to the case of Irshad Ahmad and others v. The State and others PLD 1996 SC 138".

8. The motive in this case has not been denied by the accused/appellant and he also did not produce any defence evidence to establish his alleged false involvement in this case. The Investigating Officer/CW-1 in his cross-examination has clarified that inside walls of the room (place of occurrence) were badly damaged because of firing and crime empties were present at the spot. As per report of the Punjab Forensic Science Agency (Ex.PX) the weapon of offence recovered from the appellant was found to be in mechanical operating condition with safety features functioning properly, therefore, in presence of the substantive evidence this corroborative piece of evidence fully establishes culpability of the accused/appellant. However, we have observed that for determining the issue whether the offence falls within the realm of Anti-Terrorism Act or not, the nature of offence is to be seen in the light of mode of occurrence. In this case a specific motive resulting into this occurrence has been alleged, which is private and of personalized nature and has no nexus with Section 6 of Anti-Terrorism Act, 1997, thus it cannot be said that the same falls within the ambit of Anti-Terrorism Act. Thus, in our view, motive for the occurrence in this case is personal enmity inter-se the parties as such Section 7 of Anti-Terrorism Act, 1997 does not attract. In this context, reliance is placed on the judgment reported as Muhammad Bilal v. The State and others (2019 SCMR 1362). Therefore, the appellant's convictions and sentences under Sections 7(a), 7(c) and 21-L of Anti-Terrorism Act, 1997 are set aside.

9. In the light of all above, we are of the considered view that the appellant has acted in a callous and brutal manner and committed cold blooded murder of the four innocent persons and also caused serious firearm injuries to the injured PW, hence he deserves no leniency. No mitigating circumstance has occurred in this case and the learned trial court, after considering all pros and cons of the matter, has rightly convicted and sentenced the appellant under Sections 302(b) and 324, P.P.C., therefore, the same being based upon well-settled principles of

appreciation of evidence is upheld. Resultantly, this appeal (Criminal Appeal No.258868-J of 2018) being devoid of any force is hereby dismissed. Accordingly, death sentence of convict Abdul Rauf alias Kala is confirmed and Capital Sentence Reference No.14-T of 2018 is answered in the affirmative.

JK/A-21/L **Appeal dismissed.**

2021 P Cr. L J Note 11

[Lahore]

Before Aalia Neelum and Anwaarul Haq Pannun, JJ

RASHID ALI---Appellant

Versus

The STATE and others---Respondents

Criminal Appeal No. 55 of 2015, heard on 25th February, 2020.

Penal Code (XLV of 1860)---

----S. 365-A---Anti-Terrorism Act (XXVII of 1997), S. 7---Criminal Procedure Code (V of 1898), S. 103---Kidnapping for ransom---Appreciation of evidence---Recovery---Witnesses of locality, non-association of---Benefit of doubt---Accused was arrested for kidnapping for ransom---Trial Court convicted the accused and sentenced him to imprisonment for life---Validity---Investigating Officer did not join any person from the house or locality during recovery proceedings---Place wherefrom alleged ransom amount was recovered was not in the exclusive possession of accused, therefore, recovery of ransom amount was of no avail to prosecution---Prosecution's story was full of doubts, benefit of which was to be resolved in favour of accused---Single instance causing reasonable doubt in the mind of Court entitled accused to the benefit of doubt not as a matter of grace but as a matter of right---Prosecution failed to prove its case against accused beyond any shadow of doubt--- High Court set aside conviction and sentence awarded to accused by Trial Court and he was acquitted of the charge---Appeal was allowed, in circumstances.

Muhammad Khan and another v. State 1999 SCMR 1220; Muhammad Akram v. The State 2000 SCMR 230 and Tariq Pervaiz v. The State 1995 SCMR 1345 rel.

Rai Bashir Ahmad for Appellant.

Muhammad Nawaz Shahid, Deputy Prosecutor General for the State.

Rana Zulfiqar Ali for the Complainant.

Date of hearing: 25th February, 2020.

JUDGMENT

ANWAARUL HAQ PANNUN, J.---Through this criminal appeal filed under Section 25 of the Anti-Terrorism Act, 1997, the appellant Rashid Ali has called in question the vires of judgment dated 23.12.2014, passed on conclusion of the trial in case/FIR No.187, dated 11.07.2014, offence under section 365-A, P.P.C., registered at Police Station Mankera, District Bhakkar by the learned Special Judge, Anti-Terrorism Court, Sargodha, whereby he has been convicted and sentenced as under:-

(Under section 365-A, P.P.C.)

"to undergo imprisonment for life with forfeiture of his property. He shall pay a sum of Rs.1,00,000/- as compensation to the complainant Naubahar Shah, real father of the minor abductee, as envisaged under section 544-A, Cr.P.C, in default thereof, he shall also undergo three months' SI."

(Under section 7(e) of the Anti-Terrorism Act, 1997)

"to undergo imprisonment for life with forfeiture of his property."

"The sentence of imprisonment awarded to the accused for both the offences shall run concurrently and he shall also be entitled to benefit under section 382-B, Cr.P.C."

2. The prosecution's story unfolded through FIR (Ex.PA/1) lodged on the complaint (Exh.PA) of one Naubahar Shah (PW-6) is to the effect that during his posting as Principal at Government College Mankera, on 11.07.2014 at 10.18 a.m. while on duty, he received a call on his Cellular phone having SIM No.03334900797 from No. 03341725739, made by an

unknown person, demanding an amount of Rs.5,00,000/- as ransom for the release of his son Muhammad Zaryab, who was in the caller's captivity, while extending threats that in case of non-payment of ransom amount, till 12:00 Noon, the minor will be done to death or shall be sold.

3. Registration of the case, arrest of the accused, and after its usual investigation encapsulated into a report under section 173, Cr.P.C., duly submitted before the learned trial court, the appellant, after supplying him with the copies of incriminating material under section 265(c), Cr.P.C, the accused was charged sheeted to which he denied and pleaded not guilty, while professing his innocence, and claimed trial, the prosecution produced as many as 11 witnesses besides tendering, in evidence, report of Punjab Forensic Science Agency, Lahore (Exh.PP). When examined under section 342, Cr.P.C., the appellant denied every bit of incriminating material so produced. While replying the question that as to why this case against him and why the prosecution witnesses had deposed against him, he replied as follows:-

> "I belong to Pattoki and had been residing with my paternal uncle Ibrahim who had a land dispute with father of Khalid Zaman PW and also with Ahmad Hussain Ex-Chairman of Union Council Mankera and both said persons belong to the party of Ghazanfar Cheena. Madah PW had been driver of Ahmad Hassan and all these PWs were produced during investigation by Ghazanfar Cheena. Many other persons had been joined in investigation but they were let off at the instance of Ghazanfar Cheena and I was substituted to grab the land of my paternal uncle Ibrahim."

The appellant did not examine him as witness under section 340(2), Cr.P.C., however, produced Ibrahim (DW-1) in his defence. The learned trial court, on conclusion of the trial, proceeded to convict the appellant as aforesaid. Hence, the titled appeal.

4. Arguments heard. Record perused.

5. Normally reasonable prompt in reporting a crime presumably excludes the possibility of concoction and making up of a besuiting story etc., but at the same time, the over promptness casts suspicion not only about the story but all over the circumstances of the case set out by the prosecution. In the instant case, on 11.7.2014 at about 10.18 a.m., the complainant on his duty at Govt. College Mankera, received a phone call from an unknown person regarding abduction of his son Muhammad Zaryab, reported the occurrence within an hour, allegedly with great promptitude, to the police at 11.15 a.m. on the same day, vide zimini No.7. Naubahar Shah, the complainant (PW-6) nowhere has stated that the accused threatened him that in case he imparted the information about the occurrence to the police, the abductee will be done to death. Had there been any threat, given by the accused to the complainant, the story regarding making "arrangement" of private PWs, instead of police personnel, for identification of accused, at the time, the accused had allegedly picked the ransom amount, could have been believed, therefore, depositions of PW-6 and PW-7 create doubt about their genuineness. The contradictory depositions of the PWs are also generating the doubt about the un-natural flow of events, which the prosecution has tried to prove. Khalid Zaman (PW-5) did not disclose his relationship with the complainant (PW-6) as well as justification of his availability with the complainant at the relevant time. He deposed that "We remained at complainant's house till Asr time. In our presence, the complainant again received a call for ransom of Rs.500,000/- to be left at a berry tree on a "Katcha Path" ahead of Degree College and thereafter the child would be returned." Contrary to the above, the complainant (PW-6) deposed that "he arranged the ransom money of Rs.500,000/- and then informed the kidnapper on the same cell number asking him the place where I was supposed to bring the month." Khalid Zaman (PW-5) deposed that "the complainant asked me and Madah PW to remain concealed at the aforesaid place in order to identify the culprit whereupon we did so. After

sometime, the complainant came there on a motorbike and left the money wrapped in a black and yellow cloth/handkerchief under the aforesaid tree and left. After about 10/15 minutes accused Rashid, present in court, came there on a motorbike bearing No.LYC-1065 whom we knew before. He took the money and left. We informed the complainant on phone about this fact who asked us to stay concealed over there. After about 5 minutes, accused Rashid brought the minor abductee to the same tree and left him there. After about 10 minutes, the complainant came there. Thereafter, we all left from there and informed the police." Although Naubahar Shah, complainant (PW-6) had almost narrated the above story as stated by PW-5, but it is important to note that despite lodging the FIR relatively with over promptitude, astonishingly the complainant did not inform the police about the place of payment of ransom amount fixed between him and the accused, rather, he secured the services of Khalid Zaman (PW-5) and Maddah (given up PW) for the identification of the accused, while concealing their identity and presence, to witness the payment of ransom amount where-after, the abductee was to be set at liberty. It is also not understandable that why they have not either made any effort to overpower him or to make a noise seeking help from police or passerby, when the accused had set the abductee free, at the relevant place.

6. There is another important loophole in the prosecution's case. The prosecution has withheld the evidence of minor abductee by not producing him/ abductee before the Court enabling it to assess his capability and credibility for making the statement. The argument of learned counsel that due to the tender age of the abductee, he could not have been produced in the Court, cannot be entertained because it was the prerogative of the Court and not the prosecution, to determine capability of making statement due to his tender age. The minor should have been produced before the Court. According to PW-6, "my son would clearly tell if he is abducted by somebody .. The minor is competent enough to disclose whether he was maltreated or provided milk or kept in

confinement." As per Article 3 of Qanun-e-Shahadat Order, 1984, all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. So much so, neither the I.O recorded the statement of the minor abductee under section 161, Cr.P.C. nor cited him in the calendar of witnesses for the reasons best known to him. It is well settled that if best piece of evidence lying with the prosecution is withheld, then an adverse inference under Article 129(g) of Qanun-e-Shahadat Order, 1984 can be drawn against the party withholding such witness, that had such witness been produced, he would have not supported the prosecution's case. Thus the self-harming act of the complainant, for retaining its cards quite close to his chest had given rise to an occasion for drawing an adverse presumption against the prosecution's case, the benefit of which irresistibility has to be extended to the defence. The prosecution, as discussed above, is guilty of withholding the best available evidence, therefore, it is presumed that had the minor abductee been produced, he would have not supported the prosecution's version. The learned trial Court had also failed to exercise its power under section 540, Cr.P.C, such exercise of power could have been validly made in the circumstances of the instant case, in the larger interest of justice.

7. Last but not the least, perusal of complaint (Exh.PA) reveals that the accused made telephone call to the complainant from the mobile having SIM No.0334-1725739 (P-9). The said SIM number has not been issued in the name of the accused, rather it was in the name of one Mst. Naseem Bibi. The I.O (PW-11) during cross-examination admitted it to be correct that "during investigation it came on surface that SIM No.0334-1725739 is in the name of one Mst. Naseem Bibi." The said Mst. Naseem Bibi was found no connected with the occurrence of this case. The prosecution's

failure into establishing any nexus of the appellant with the said SIM, also creates doubt about the veracity of the prosecution's case.

8. So far as recoveries of motorcycle (P-10), pistol 30 bore (P-13) and cash amounting to Rs.5,00,000/-(P12/1-500) are concerned, these are of no avail to the prosecution for the reasons that motorcycle (P-10) did not belong to the accused/appellant and same was owned by one Muhammad Asif. The I.O (PW-11) during cross-examination deposed that "It is correct that the motorcycle alleged recovered from accused Rashid had belonged to one Asif". The I.O did not associate said Asif during investigation to ascertain the factual position as to whether said motorcycle remained under the use of the accused Rashid or not at the time of the alleged occurrence. The recovery of Pistol .30 bore (P-13) is nothing but a robe, it was allegedly recovered from an open place, easily accessible to all and sundry. Coming to the recovery of cash amount (P12/1-500) allegedly recovered on pointing out the appellant, the I.O (PW-11) deposed that the accused Rashid Ali after making disclosure got recovered Rs.500,000/- (P12/1-500) as a ransom money which were wrapped in a polythene bag and also in a black and yellow colour handkerchief, from the shed of drawing room of his house situated in Mankera, which was taken into possession vide recovery memo (Exh.PI). Riaz Hussain SI/SHO/recovery witness (PW-7) deposed that "the owner of the house, from which the ransom amount was allegedly recovered, is Ibrahim Bhatti". The I.O (PW-11) stated during cross-examination that "the owner of said house is Ibrahim. The said Ibrahim was not present at the time of recovery proceedings but he had joined the investigation." The I.O did not join any person from the house or the locality during the recovery proceedings. The place wherefrom the alleged ransom amount was recovered is not in exclusive possession of the appellant, therefore, the recovery of ransom amount (P12/1-500) is of no avail to the prosecution.

9. The nutshell of the above discussion is that the prosecution's case is full of doubts, benefit of which must resolve in favour of the accused as the Hon'ble Supreme Court of Pakistan has held in case titled "Muhammad Khan and another v. State" (1999 SCMR 1230) that "it is axiomatic and universal recognized principle of law that conviction must be founded on unimpeachable evidence and certainty of guilt and hence any doubt that arises in prosecution case must be resolved in favour of accused". Moreover it is cardinal principle of criminal jurisprudence that a single instance caused a reasonable doubt in the mind of Court entitles the accused to the benefit of doubt not as a matter of grace but as a matter of right. Reliance is placed on case law titled as "Muhammad Akram v. The State" (2009 SCMR 230). Reliance is also placed upon the case titled "Tariq Pervaiz v. The State" (1995 SCMR 1345).

10. For what has been discussed above, the prosecution has failed to prove its case against the appellant beyond any shadow of doubt. Resultantly, the instant appeal is allowed, the conviction and sentence of the appellant Rashid Ali, awarded by learned trial Court vide impugned judgment dated 23.12.2014 is set aside and he is acquitted of the charge by extending him the benefit of doubt. The appellant Rashid Ali is directed to be released forthwith, if not required in any other case.

MH/R-9/L **Appeal allowed.**

2021 P Cr. L J Note 53

[Lahore (Multan Bench)]

Before Anwaarul Haq Pannun, J

ZAHIDA PERVEEN---Appellant

Versus

The STATE and others---Respondents

Criminal Appeal No. 1232 of 2017, decided on 19th October, 2020.

Criminal Procedure Code (V of 1898)---

----S. 426---Penal Code (XLV of 1860), Ss. 302, 364, 201 & 34---Qatl-i-amd, kidnapping or abducting in order to murder, causing disappearance of evidence of offence and common intention---Suspension of sentence pending appeal---Scope---Accused sought suspension of her sentence pending appeal---Accused was convicted and sentenced on the basis of circumstantial evidence---Accused lady was behind the bars along with her suckling baby and as such she had undergone sentence of more than 04 years and the disposal of appeal in the near future was bleak due to rush of work---Three co-accused persons on the basis of same evidence had been acquitted by the Trial Court and on that score she was also entitled for suspension of her sentence---Ground of statutory delay, in view of S. 426(1-A), Cr.P.C. was also available to the petitioner---High Court observed that petitioner was neither hardened nor desperate criminal---If after suffering the incarceration in jail, the petitioner was ultimately acquitted, there will be no compensation for her incarceration---Application for suspension of sentence was accepted, in circumstances.

Soba Khan v. The State and another 2016 SCMR 1325 and Maqsood Ahmad v. The State 2017 SCMR 397 ref.

Prince Rehan Iftikhar Sheikh for Appellant.

Malik Modassar Ali, D.P.G. for the State.

Khalid Ibn-e-Aziz for the Complainant.

ORDER

Criminal Miscellaneous No. 1 of 2019

ANWAARUL HAQ PANNUN, J.---Through this Criminal Miscellaneous Petition filed under section 426, Cr.P.C. petitioner namely Mst. Zahida Perveen has sought her release on bail by way of suspension of her sentence by pending disposal of the above-mentioned criminal appeal.

2. Being involved in a complaint titled Sajjad Hussain v. Ahmad Raza and others under sections 302, 364, 201, 34, P.P.C. of Police Station Harappa, Sahiwal, the petitioner was tried by the learned Additional Sessions Judge, Sahiwal who vide judgment dated 31.05.2017, convicted and sentenced the petitioner as under:-

i) Under section 302(b), P.P.C., and sentenced to undergo life imprisonment with compensation of Rs.10,00,000/- as envisaged under section 544-A, Cr.P.C. payable to the legal heirs of the deceased Mst. Meerab Fatima and in default to further undergo SI for six months.

He was also extended the benefit of section 382-B, Cr.P.C.

3. Arguments advanced pro and contra have been heard. Record perused.

4. Admittedly, the petitioner was convicted and sentenced on the basis of circumstances evidence. There is no denial to this fact that the petitioner is behind the bars since her arrest i.e. 24.03.2016 and she was awarded life imprisonment vide judgment dated 31.05.2017 and since her arrest she is incessantly behind the bars along with her suckling baby and as such so far she has undergone sentence more than 04 years and the disposal of instant appeal is bleak in the near future due to rush of work, hence I am constrained to observe that liberty of a person being precious right, which is also safeguarded/guaranteed under the Constitution of Islamic Republic of Pakistan, 1973. Moreover, on the basis of same evidence, her three co-accused persons have been acquitted by the learned trial court and on this score she is also entitled for suspension of her sentence. In this context, reliance is placed upon case titled Soba Khan v. The State and another (2016 SCMR 1325) and case titled Maqsood Ahmad v. The State and others (2017 SCMR 397). She is having a suckling baby, in her lap who is also confined with her in jail. Even otherwise, in view of section 426(1-A), Cr.P.C., amendment made in the Code of Criminal Procedure (Amendment) Act, 2011; the ground of statutory delay is also available to the petitioner. More so, the petitioner is neither hardened nor desperate criminal, hence, this Court is constrained to observe that if after suffering the incarceration in jail, the petitioner is ultimately acquitted, there will be no compensation for his incarceration, therefore, while accepting instant application, the above mentioned sentence is suspended till the final decision of the titled appeal, the

petitioner is directed to be released on bail subject to her furnishing bail bonds in the sum of Rs.1,00,000/- (one lac) with one surety in the like amount to the satisfaction of DR (J) of this Bench. The petitioner shall ceaselessly appear before this court till final decision of instant criminal appeal.

SA/Z-10/L **Sentence suspended.**

2021 P Cr. L J 93

[Lahore (Multan Bench)]

Before Anwaarul Haq Pannun, J

LAL SHER---Appellant

Versus

The STATE and another---Respondents

Criminal Appeal No. 1023 of 2010, heard on 10th June, 2020.

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

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Benefit of doubt---Prosecution case was that the accused and co-accused (since dead) made firing upon the brother of the complainant, he fell down on the ground and died---Motive behind the occurrence was stated to be the previous litigation between the complainant and co-accused over horse breeding grant of land---Record showed that initially the FIR was lodged by the complainant against two nominated and one unknown accused person---Co-accused(since dead) had been attributed the effective role of inflicting firearm injuries on the person of deceased, which as per opinion of the Medical Officer who conducted the post-mortem examination over the dead body of the deceased were ante-mortem in their nature leading to his death---Remaining two accused including the appellant had not been ascribed any role and it had been alleged that they were accompanying the real culprit at the time of alleged occurrence---Accused/appellant was not alleged to be carrying any weapon at the time of the occurrence---Record transpired that it was a broad day light occurrence but no specific features of the accused i.e. stature, height, complexion, shape of the face including face cuts, colour of clothes etc. were mentioned in the FIR, no specific features were

available with the prosecution which could be made basis for confirmation of identity of the accused persons at the time of test identification parade---Circumstances established that the case was replete with doubts, the benefit of which would favour the accused---Appeal against conviction was allowed, in circumstances.

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

----Ss. 302(b) & 34---Qanun-e-Shahadat (10 of 1984), Art. 22---Qatl-i-amd, common intention--- Appreciation of evidence---Delay in conducting test identification parade---Effect---Prosecution case was that the accused and co-accused (since dead), made firing upon the brother of the complainant, he fell down on the ground and died---Record showed that the accused was arrested after nine months of the registration of FIR and for identifying him, his test identification parade was conducted after 13 days of the arrest under the supervision of Judicial Magistrate---Accused was identified without assigning him respective role in the occurrence by the complainant and the witnesses during the identification parade---In absence of description of features in the FIR and the statements under S. 161, Cr.P.C., the accused could not be incriminated on the basis of conclusion of test identification parade---Ocular account furnished by the prosecution against the accused was devoid of credence and was not reliable---Appeal against conviction was allowed, in circumstances.

(c) Criminal trial---

----Medical evidence---Scope---Purpose of post-mortem examination was to ascertain the cause of death, number and locale of injuries, kind of weapon used in the crime and duration between injuries and death as well as death and post mortem---Medical evidence by itself did not raise finger towards any specific culprit.

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

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Recovery of motorcycle on the pointation of accused---Scope---Prosecution case was that the accused with his co-accused (since dead), made firing upon the brother of the complainant, he fell down on the ground and died---Record showed that during investigation, motorcycle was recovered by the Investigating Officer on his pointation---Said recovery was inconsequential as no colour, model and registration number of the said motorcycle had been mentioned in the FIR---Moreover, when the prosecution had failed to establish its ocular version beyond shadow of reasonable doubt mere recovery need not to be discussed elaborately being corroboratory piece of evidence---Appeal against conviction was allowed, in circumstances.

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

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Appreciation of evidence---Motive was not proved---Scope---Prosecution case was that the accused with his co-accused (since dead), made firing upon the brother of the complainant, he fell down on the ground and died---Motive behind the occurrence, as mentioned in the FIR, was litigation between the complainant and co-accused over grant of horse breeding land---Accused, in circumstances, had no motive to commit the alleged offence---Appeal against conviction was allowed, in circumstances.

(f) Criminal trial---

----Benefit of doubt---Principle---Benefit of reasonable shadow of doubt would always favour the accused as a matter of right and not as of grace.

Muhammad Akram v. The State 2009 SCMR 230 rel.

Prince Rehan Iftikhar Sheikh for Appellant.

Nemo for the Complainant.

Malik Mudassir Ali, Deputy Prosecutor General for the State.

Date of hearing: 10th June, 2020.

JUDGMENT

ANWAARUL HAQ PANNUN, J.---Through the titled appeal under section 410, Cr.P.C., appellant Lal Sher has challenged the vires of judgment dated 17.04.2010 passed, on the conclusion of trial, in case FIR No.318/2000, dated 30.05.2000 for offences under sections 302 and 34, P.P.C., registered at Police Station Noor Shah, District Sahiwal by the learned Additional Sessions Judge, Sahiwal whereby he has been convicted and sentenced as under:-

Under section 302(b), P.P.C.

Imprisonment for life and compensation of Rs.50,000/- payable to legal heirs of deceased under section 544-A, Cr.P.C. to be recovered as land revenue payable to the legal heirs of deceased and in case of non-payment of the same, to undergo six months' S.I.

Benefit of section 382-B, Cr.P.C. was extended to the appellant.

2. The prosecution's story, as unfolded through the FIR (Exh.PH/1) registered on the basis of complaint (Exh.PH) of complainant Noor Ahmad (PW-11) is to the effect that on 30.05.2000 at about 7:30 a.m., complainant along with his brothers, namely, Zahoor Ahmad (deceased) and Manzoor Hussain (PW-13) were going on motorcycle from their Chak No.66/4-R to attend the court of Magistrate at Sahiwal; the complainant and Zahoor Ahmad were sitting on the back of motorcycle while Manzoor Hussain was driving the same, when they reached near Chak No.55/GD at

Noor Shah Road, at about 07:45 a.m., co-accused Saeed Akhtar (since dead) along with unknown person (appellant) who was driving the motorcycle came from their rear, accused Saeed Akhtar made three carbine fire shots which hit Zahoor Ahmad on left side of his neck as a result whereof, smeared with blood, he fell down on the ground and succumbed to the injuries while reaching at the hospital.

3. Motive behind the occurrence was stated to be the previous litigation between the complainant and co-accused Ghulam Murtaza over horse breeding grant of land.

4. Registration of the case and usual investigation encapsulated into report under section 173, Cr.P.C. against the appellant, eventuating into its submission before the court, which on taking cognizance, after supplying copies of the incriminating statements, charged sheeted him and upon his denial, professing his innocence and claiming trial, directed the prosecution to produce evidence for proving the charge.

5. The prosecution has produced as many as 16-witnesses besides tendering, in evidence, reports of Chemical Examiner (Exh.PT) and Serologist (Exh.PT/1).

6. After the alleged occurrence, injured/deceased Zahoor Ahmad was taken to DHQ Hospital, Sahiwal where he was medically examined by Dr. Munir Ahmad Hayat (PW-12) on 30.05.2010 at 08:15 a.m., who noted the following injury on his person:-

1. Fire arm wound with inverted margins measuring .5 cm x 1 cm on left side of neck x deep going.

2. Fire arm wound with inverted margin and measuring about 1 x 1 cm. on left side of neck x deep going.

3. Fire arm wound with inverted margin and measuring about 1 x 1 cm on left side of neck x deep going.

All the injuries were kept under observations for surgeon opinion. The patient was in shock. After the death of the injured on 30.05.2010, Dr. Muhammad Zahid, Medical Officer DHQ Hospital, Sahiwal (PW-9) conducted the post-mortem examination over the body of deceased on the same day at 5:00 p.m., and observed the following injuries:-

1. A stitched wound 5 cm on left side of neck.

2. Stitched wound of 7 cm on left side of neck in the lower part.

3. Stitched wound 3 cm on the left side of neck above.

4. Lacerated wound 1 cm x 1 cm deep going on left side of neck, close to wound No.3.

5. Lacerated wound 1 cm x 1 cm deep going 2 cm below injury No.4.

Injuries Nos.1 and 2 were surgical intervention whereas injuries Nos.3 to 5 were firearm injuries. In his opinion, injuries Nos. 3, 4 and 5 were ante-mortem and caused by firearm weapons.

The time between injuries and death was hospital death whereas between death and post mortem was about eight hours.

7. The ocular account in this case has been furnished by Noor Ahmad/complainant (PW-11) and eye-witness Manzoor Hussain (PW - 13). The matter was investigated by Manzoor Hussain Inspector PW-14), Sarfraz ASI and Aftab Ahmad DSP (Investigation) (CW-2). Rest of the witnesses are formal in nature.

8. When examined under section 342, Cr.P.C., appellant denied every bit of incriminating material so produced. While replying the question

that as to why this case against him and why the prosecution witnesses had deposed against him, he replied as follows:-

"I am innocent. This is a false case against me. I have been involved in this case due to previous litigation and enmity. In fact it was a blind occurrence. The deceased was taken to the DHQ hospital while passer by in car in injured and unconscious condition. The police got him medically examined. I was roped in this case with mala fide intention and personal motive. I was declared innocent during investigation."

9. The appellant neither opted to appear under section 340(2), Cr.P.C. nor have produced any defence evidence.

10. Learned trial court, on conclusion of the trial, proceeded to convict the appellant as aforesaid. Hence, the titled appeal.

11. Arguments heard. Record perused.

12. It has been observed that initially the FIR was lodged by the complainant against two nominated and one unknown accused person. Accused Saeed Akhtar (since dead) has been attributed the effective role of inflicting firearm injuries on the person of deceased, which as per opinion of the Medical Officer (PW-9) who conducted the post-mortem examination over the dead body of the deceased were ante-mortem in their nature leading to his death. Remaining two accused including the appellant have not been ascribed any role and it had been alleged that they were accompanying the real culprit at the time of alleged occurrence. Moreover, it is also not alleged that the appellant was having any weapon at the time of alleged occurrence. It was a broad day light occurrence but no specific features of the appellant i.e. stature, height, complexion, shape of the face including face cuts, colour of clothes etc. were mentioned in

the FIR, meaning thereby that no specific features were available with the prosecution which could be made basis for confirmation of identity of the accused persons at the time of test identification parade. The appellant was arrested after nine months of the registration of FIR on 06.04.2001 and thereafter on 19.04.2001, for identifying him, his test identification parade was conducted under the supervision of learned Magistrate 1st Class, Sahiwal. Although the appellant was identified without assigning his respective role in the occurrence by the complainant and the witnesses during the identification parade, therefore, in absence of description of features in the FIR and the statements under section 161, Cr.P.C., the appellant cannot be incriminated on the basis of conclusion of test identification parade, therefore, ocular account furnished by the prosecution against the appellant is devoid of credence and is not reliable. Had the complainant and the witnesses seen the appellant in the company of real culprit of the occurrence at the relevant time, specific features regarding his height and face etc., could have been mentioned in the FIR and subsequent statements under section 161, Cr.P.C. and in absence thereof, conclusion cannot be drawn about the guilt of participation of the accused in the occurrence as alleged by the prosecution.

13. So far as the medical evidence is concerned, as per prosecution's own version, neither the appellant was armed with any kind of weapon at the time of alleged occurrence nor caused any fire-arm injuries on the person of the deceased and all the firearm injuries, as aforementioned, had alleged been inflicted by his co-accused. Moreover, the purpose of post mortem examination is always to ascertain the cause of death, number and locale of injuries, kind of weapon used in the crime and duration between injuries and death as well as death and post mortem but the medical evidence by itself does not raise finger towards any specific culprit. The

ocular account has already been discarded by this Court and, thus, the medical evidence lends no support to the ocular version.

14. The appellant was arrested in this case on 06.04.2001 and sent to jail for conducting identification parade, which was done under the supervision of learned Magistrate. Thereafter, during investigation, motorcycle Yamaha No.4144/SLH was recovered by the investigating officer on his pointing out, which was taken into possession vide recovery memo Ex.PK but the same is inconsequential as no colour, model and registration number of the same has been mentioned by the complainant in the FIR. Moreover, when the prosecution has failed to establish its ocular version beyond shadow of reasonable doubt mere recovery needs not to be discussed elaborately being corroboratory piece of evidence.

15. The motive behind the occurrence, as mentioned in the FIR, was litigation between the complainant and co-accused Ghulam Murtaza over horse breeding grant, thus, it is clear that the appellant had no motive to commit the alleged offence.

16. Having scanned the entire prosecution evidence and material available on record, I am of the view that the case in hand is replete with doubts and the benefit of reasonable shadow of doubt would always favour the accused as a matter of right and not of grace. Reliance is placed on the case reported as "Muhammad Akram v. The State" (2009 SCMR 230) wherein, it has been held as under:-

> "It is an axiomatic principle of law that in case of doubt, the benefit of thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervaiz v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which

created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

17. For what has been discussed above, this appeal is allowed, the conviction and sentence of appellant Lal Sher son of Noora is set aside and he is acquitted of the charge by extending the benefit of doubt to him. He is directed to be released forthwith, if not required in any other case.

JK/L-5/L **Appeal allowed.**

2021 P Cr. L J 682

[Lahore]

Before Anwaarul Haq Pannun, J

TAHIRA NASEEM---Petitioner

Versus

ARSHAD MEHMOOD and others---Respondents

C.M. No. 48-M of 2019 in C.M. Diary No. 46946 of 2019 in Criminal P.S.L.A. Diary No. 35884 of 2010, decided on 5th December, 2019.

Criminal Procedure Code (V of 1898)---

----S. 417(2)---High Court (Lahore) Rules and Orders, Vol.V, Chapt.-I, Pt.-A, Rr. 9 & 9-A---Penal Code (XLV of 1860), Ss. 302 & 109---Qatl-i-amd---Special Petition for Leave to Appeal---Judicial business---Office objection---Failure to fix time to remove office objection---Administrative Judge, jurisdiction of---Appeal against acquittal under S. 417(2), Cr.P.C. filed by applicant after its scrutiny was returned by office requiring filing of certain documents but without specifying any time for making pointed out deficiency of documents good---Matter was straightaway placed before Administrative Judge in list of motion cases---None was present on behalf of applicant to contest office objection and the same was sustained vide order dated 22-5-2015---Applicant sought restoration of his appeal against acquittal---Validity---Proceedings before Administrative Judge were not judicial rather the same were administrative in their nature---Provisions of Limitation Act, 1908, were not applicable to such proceedings---If some memorandum of appeal etc. was resubmitted after its return beyond period mentioned in memorandum in office, same was not to be treated as barred by limitation---In view of R. 9(i) of Volume-V, Chapt-I, Pt.-A of High Court (Lahore) Rules and Orders, applicant should have been given opportunity while specifying time to make up the pointed out deficiencies by providing required

documents at the first instance and thereafter Administrative Judge while passing order of sustaining objection in the interest of justice---High Court restored Appeal against acquittal as office objection was unsustainable---High Court directed office to fix the same for its hearing on administrative side---Application was allowed in circumstances.

Rana Naveed Ahmad Khan v. Province of Punjab through Secretary LG & CD PLD 2014 Lah. 436; Employees Management Group, Pak-Saudi Fertilizer Limited through Authorized Representative v. Government of Pakistan, Ministry of Privatization (Privatization Commission) 2002 YLR 1487; Farman Ali v. Muhammad Ishaq and others PLD 2013 SC 392; Muhammad Boota v. Basharat Ali 2014 CLD 63; 2006 YLR 650; PLD 1991 SC 973 and Noor Badsha v. United Bank Limited through President and 3 others 2015 PLC (C.S.) 646 ref.

Asghar Ali Gill for Petitioner.

ORDER

ANWAARUL HAQ PANNUN, J.---Briefly, the factual matrix of the instant matter, as gleaned from the record, is to the effect that Arshad Mahmood, Rashid and Muhammad Shafique, were accused in case FIR No.513, dated 09.09.2008, in respect of offences under sections 302 and 109, P.P.C., registered at Police Station Dijkot Faisalabad, after a thorough trial by the court of learned Additional Sessions Judge, Faisalabad they were acquitted of the charge vide judgment dated 30.03.2010. Aggrieved of the acquittal judgment, the applicant/complainant, namely, Tahira Naseem filed criminal appeal under section 417(2), Cr.P.C. in this Court. The Judicial Branch (hereinafter to be called as "the office") formally received the memorandum of appeal vide Diary No.35884 of 2010. After scrutiny of the memorandum of appeal, the office, while pointing out certain deficiencies in it but without specifying time within which such deficiencies were to be made good, required "One more file cover and

spare copies be filed. 3 spare copies (complete)" from the appellant and "please implead complainant as party".

Due to non-making up of the above pointed out deficiency either by the advocate or by the party, the matter was fixed before a learned Singe Judge nominated by the Hon'ble Chief Justice as an Administrative Judge, who sustained the same vide his order dated 22.05.2015 which is reproduced hereunder:-

> "Despite repeated calls no one has entered appearance on behalf of the appellant or the learned counsel for the appellant to contest the office objections. The office objections are sustained. File be consigned to record."

The petitioner, after coming out of a deep slumber, proceeded to file an application under section 561-A, Cr.P.C. [supplementing it with an application under Section 5 of the Limitation Act, 1908] bearing Diary No.46946/19, seeking restoration/revival of appeal, by way of recalling order dated 22.05.2015. The office fixed once again the application questioning its maintainability as an objection case before the Administrative Judge which was also dismissed for non-prosecution vide order dated 25.11.2019, which is reproduced hereunder:-

> "Despite repeated calls, none has appeared on behalf of the petitioner. Name of the learned counsel for the petitioner reflects in the cause list but there is no intimation regarding his absence. Dismissed for non-prosecution."

The applicant has moved yet another application (instant) bearing Diary No.47144/2019 with the following prayer:-

> "It is, therefore, most humbly and respectfully prayed that instant application may kindly be accepted and application vide diary No.46946/2019 for restoration of main objection case may kindly be restored in the larger interest of justice."

The office, while raising the objection qua the maintainability of the application, fixed the same before the Administrative Judge. The office objection was over-ruled vide order dated 29.11.2019, which reads as under:-

"Office objection shall be taken up on judicial side, thus, over ruled."

3. Arguments Heard.

4. Under Article 202 of the Constitution of Islamic Republic of Pakistan 1973, the High Court has been empowered to make its rules, which, for convenience of reference, is reproduced as follows:-

"202. Rules of Procedure. Subject to the Constitution and law, a High Court may make rules regulating the practice and procedure of the Court or of any court subordinate to it."

The High Court Rules and Orders are primarily a collection of such instructions in summarized form which explain and interprets the laws that are frequently referred to in the courts of law. These rules have been saved and continued through 'saving clauses' of successive constitutions (See Article 244 of Constitution 1956, 225 of Constitution 1962 and 268(1) of the Constitution 1973).

Pursuant to the above provision of the Constitution, Chapter-I titled "Judicial Business" Part-A(a), Volume-V of High Court Rules and Orders, deals with "the Presentation and Reception of Appeals, Revisions, Applications for Review and others/Petitions.

According to Rules 9 and 9-A, Part-A of Chapter-I of Volume V of the Rules and Orders of the Lahore High Court, (Revised Edition, 2010), the Deputy Registrar (Judl.) is authorized to raise objection(s) and return memorandum of any suit, appeal, or petition, or application to make up the deficiency and remove the objection. The relevant rules, for better comprehension, is reproduced hereunder:-

9. (i) The Deputy Registrar (Judicial) is authorized to return memorandum of any suit, appeal, or petition, or application, etc,-

a) if it is not maintainable under any law; or

b) if it is not properly constituted; or

c) if it contains scandalous or objectionable language or material; or

d) if it is not drawn up in conformity with the foregoing directions; or

e) for amendment, making up of the deficiency or for filing requisite documents, within the time to be specified in the Objection Memorandum Appendix 1(a), 1(b) and 1(c).

(ii) The order of the Deputy Registrar (Judicial) returning the memorandum of any suit, appeal, petition or application may be challenged before the Chief Justice or Judge nominated by the Chief Justice on administrative side whose decision shall be final and shall not be assailed in any other proceeding before the High Court.

9-A. A list of petitions, appeals, etc., ordered to be returned shall be notified on the Notice Board and petitions, appeals, etc., not received back within seven days of the publication of the list shall be placed before a Judge of the High Court for orders on a date to be notified by including such petition in a motion cause list. It is made clear that any delay in placing such petition before the Court or issuing the list shall not furnish any justification for non-receipt of the returned petition in time and non-compliance of the objection taken within time specified by Deputy Registrar (Judl.)"

For convenience, it is clarified that Appendix 1(a), 1(b) and 1(c) deals with Civil, Writ and Criminal matters respectively.

5. A minute perusal of the afore reproduced Rule indicates that upon institution of any suit, appeal, petition etc, as the case may be, the Deputy Registrar (Judl.) while pointing out any of the deficiencies, i.e., being not

maintainable, having not been properly constituted or containing scandalous/objectionable language, or having not been drawn up in conformity with the afore-going direction, amendment or for filing requisite documents, for making up the deficiency within the time period specified in the relevant appendix, is authorized to return the memorandum. Such order is commonly known as 'Office Objection'. Upon making the pointed out deficiencies good within the time specified in the relevant Appendix, the matter is placed, for its determination, on judicial side. Needless to observe here that the above-noted proceedings are not judicial rather ministerial in their nature. Sub-Rule (i) of Rule 9, clearly admits in its interpretation that the party, instead of complying with the order of return of memorandum, may challenge it before Hon'ble Chief Justice or the Judge nominated by him in this regard on Administrative side. Apart from above, (iii) Rule 9-A requires that a list of petitions, appeals, etc., ordered to be returned which have not been received back within seven days of the publication of the list, notified on the 'Notice Board' shall be placed in a motion cause list before a Judge of the High Court for passing of his orders [Motion case. Motion cases are those where there is no urgency. No bail or stay matter, etc, is involved and no separate form to treat the case as urgent is attached]. The Rule further states, for the sake of clarity, that any delay, in placing such matter before the court or issuing the list shall not furnish any justification for non-receipt of the returned petition in time. The decision made on the Administrative Side shall be final and shall not be assailed in any other proceedings before the High Court. Reliance in this regard is placed on cases reported as Rana Naveed Ahmad Khan v. Province of Punjab through Secretary LG & CD (PLD 2014 Lahore 436) and Employees Management Group, Pak-Saudi Fertilizer Limited through Authorized Representative v. Government of Pakistan, Ministry of Privatization (Privatization Commission) (2002 YLR 1487). The proceedings before the learned Administrative Judge are not judicial

rather the same are administrative in their nature, hence the provisions of Limitation Act, 1908 are not applicable in these proceedings. In case some memorandum of appeal etc., is resubmitted after its return beyond the period mentioned in the memorandum in the office, same shall not be treated as barred by limitation. The question of belated filing of petition etc., has been considered and decided authoritatively in the case reported as Farman Ali v. Muhammad Ishaq and others (PLD 2013 SC 392) wherein it has been held that "this rule however does not empower the Deputy Registrar to refuse to entertain (note the expression understood in its legal sense) the petition or in other words to dismiss the petition as having not been validly instituted." Also see Muhammad Boota v. Basharat Ali (2014 CLD 63).

6. It may be reiterated that in case of making good the pointed out deficiency by way of compliance of the order of return either by the party or his counsel or due to over-ruling of the office objection, as it known in general parlance, by the Administrative Judge, the office assigns to the matter a number, according to its category and the case is fixed before the Court for the determination of the cause by application of judicial mind while assigning reasons in accordance with law. Normally, while sustaining the office objections, a reasonable time for their removal is granted to enable the party to make up the pointed out deficiency even by the learned Administrative Judge so that without being circumvented by the technicalities the decision of the cause may be made after due application of mind in accordance with law on its merits by a Court. The question arises that if the office objection is ordered to be sustained without considering their nature and due to non-prosecution or without assigning any reason or without affording reasonable time to the party for making up the pointed out deficiency, what remedy shall be available to the aggrieved party against such order. It is needless to observe here that the entire amount of discussion made so far, has led this Court to draw the conclusion that the matter before entering into the judicial realm remains

within the administrative orbit and any orders passed under Rule 9(ii) or 9-A is an Administrative order, therefore, I am tempted to refer, being relevant, to the provision of section 24-A of the General Clauses Act, 1857 which is reproduced hereunder:-

"24-A. Exercise of power under enactment. (1) Where, by or under any enactment, a power to make any order or give any direction is conferred on any authority, office or person such power shall be exercised reasonably, fairly, justly and for the advancement of the purposes of the enactment.

(2) The authority, office or person making any order or issuing any direction under the power conferred by or under any enactment shall, so far as necessary or appropriate, give reason for making the order or, as the case may be, for issuing the direction and shall provide a copy of the order or, as the case may be, the direction to the person affected prejudicially."

7. The situation in the light of what has been noticed above, appropriately demands that a reference of Section 21 of the General Clauses Act may also be made here which provides that the authority competent to pass an order even in absence of an express provision can also revoke, rescind or recall the same until the decisive step is taken but this cannot be done where a right in favour of a third party has been created as a result of original order so passed. This view has consistently been followed by the superior Courts of the country in the cases reported as 2006 YLR 650 and PLD 1991 SC 973.

8. Applying the above principle deduced from the already referred provisions of law, in the facts and circumstances reproduced hereinabove in their chronology, it is observed that the memorandum of appeal under section 417(2), Cr.P.C. filed by the petitioner after its scrutiny was returned by the office requiring filing of certain documents but without specifying any time for making the pointed out deficiency of documents

good and the matter was straightway placed before the learned Administrative Judge in the list of motion cases.

None was present on behalf of the applicant to contest the office objection, consequently, it was sustained vide order dated 22.05.2015 the perusal whereof shows that neither it had been noticed that, contrary to the requirement to the Rule 9(i) of the Rules, the Deputy Registrar (Judl.) had failed to specify in the relevant Appendix the time requiring the party to make the deficiency nor the nature of objection had been considered. The petitioner, due to passing of aforesaid order, has been denuded of her statutory right of appeal. The Deputy Registrar (Judl.), while questioning the petitioner's application bearing Diary No.46946/19, placed it before the learned Administrative Judge but on 25.11.2019 it was also dismissed due to non-prosecution, therefore, the question of maintainability of the same could not be decided. If the instant application of the petitioner seeking revival/restoration of her application for restoration of appeal is not entertained, it would amount to denying her the right of access to justice on the basis of technicalities emerging out of the ministerial proceedings which had culminated into an administrative order. Rule 9 ibid infers that the power of Deputy Registrar (Judi.) to return a memorandum etc., questioning its maintainability is not absolute. This power is only for a very limited purpose which is reflected through the prism of remaining grounds mentioned in the rules. In this regard, a reference can be made to the law laid down to in the judgment reported as Noor Badsha v. United Bank Limited through President and 03 others (2015 PLC (C.S.) 646) wherein it has been held as under:-

> "As far as the arguments of learned counsel for the petitioner that office objection regarding maintainability of writ petition has already been over-ruled by this Court, therefore, same cannot be raised again, suffice it to say that learned Single Judge while hearing an objection case performed an administrative function. It is settled law that only after office objection is over-ruled, the case

matures for adjudication on the judicial side and formally enters the arena of "Original Civil Jurisdiction" or the "Constitutional Jurisdiction" as the case may be. Accordingly, in the present case, the office objection decided by the learned Single Judge was in administrative jurisdiction and does not preclude this Court to determine the question of maintainability of these petitions, after hearing learned counsel for the parties on judicial side in constitutional jurisdiction."

9. In view of rule 9(i) of the Rules, it is observed that the applicant should have been given an opportunity while specifying the time to make up the pointed out deficiencies by providing the required documents at the first instance and thereafter the learned Administrative Judge while passing the order of sustaining the objection in the interest of justice.

10. For what has been discussed above, I hold the office objection to be unsustainable and the instant application maintainable. Resultantly, the same is allowed and the application bearing Diary No.46946 of 2019 is restored. The office is directed to fix the same for its hearing on administrative side.

MH/T-1/L **Application allowed.**

PLJ 2021 Cr.C. 1442

[Lahore High Court, Lahore]

Present: **ANWAARUL HAQ PANNUN, J.**

RAB NAWAZ--Petitioner

versus

STATE etc.--Respondents

Crl. Misc. No. 3917-B of 2021, decided on 23.2.2021.

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

----S. 497--Control of Narcotic Substances Act, (XXV of 1997), S. 9(c)--Post-arrest bail, grant of--Allegation of--Recovery of charas--Perusal of report further reflects that petitioner is suffering from old fire-arm injury left femur operated from Hospital with metallic open fixation, which was removed after about one year--Thereafter external plastic leg support applied--Thus, in such backdrop, case against petitioner has, at least, become to be one for his release on bail due to physical hazards, he is confined in jail--Moreover, till time, accused is found guilty, he is presumed to be innocent--Even otherwise, report of Chemical Examiner has not been received so far--Investigation of this case has already been completed--Law Officer affirms that petitioner is previous non-record holder--Bail was allowed. [P. 1443] A

2019 SCMR 1651.

Mr. Nasir Mehboob Tiwana, Advocate for Petitioner.

Mr. Haroon Rasheed, DPG. for State.

Date of hearing: 23.2.2021.

ORDER

Having been fizzled out in obtaining the relief of post-arrest bail from the learned Court below, the petitioner by means of instant petition has prayed for same in a case registered *vide* FIR No. 326, dated 23.10.2020, offence under Section 9(c) of the Control of Narcotic Substances Act, 1997, with P.S. Shorkot Cantt, District Jhang, facing the allegation that on the aforesaid date, his car was intercepted by the police contingents and on search of the car, underneath the front seat, Charas weighing 3290 grams was allegedly recovered. Hence, this case was registered.

2. Arguments heard. Record perused.

3. Bare perusal of the crime report reflects that allegedly the petitioner was captured while he was driving the car but as per stance of the learned counsel for the petitioner that the story of occurrence, has been concocted, that petitioner is suffering from physical disability and as such he is unable to drive the car. In response to order dated 04.02.2021 whereby a report from the Superintendent, District Jail, Jhang was requisitioned, the report bearing memo No. 1626 dated 12.02.21 discloses in its last para that:

> *"..... At present admitted in jail Hospital with external support, Cellulites developed. Examined by orthopedic surgeon from DHQ Hospital, Jhang is on medication and daily dressing. He cannot walk without any support and left leg remains always straight due to absence of knee joint removal during operation."*

Perusal of the report further reflects that petitioner is suffering from old fire-arm injury left femur operated from Allied Hospital Faisalabad on 28.02.2019 with metallic open fixation, which was removed after about one year. Thereafter external plastic leg support applied. Thus, in such backdrop, case against the petitioner has, at least, become to be one for his release on bail due to physical hazards, he is confined in jail. Moreover, till the time, the accused is found guilty, he is presumed to be innocent. Even otherwise, the report of Chemical Examiner has not been received so far. The investigation of this case has already been completed. Learned Law Officer affirms that the petitioner is previous non-record holder.

4. In view of above, while relying upon case titled *Hussain Ullah v. State and another* (2019 SCMR 1651) the petition in hand is allowed and the petitioner is admitted to post arrest bail subject to his furnishing bail bonds in the sum of Rs. 100,000/- (rupees one lac) with one surety in the like amount to the satisfaction of learned trial Court. The above observations are tentative in nature and would not be taken as conclusive, have been made in view of circumstances of this case and the available record. The learned trial Court shall have the privilege to personally watch the accused and shall decide the case in accordance with law.

(A.A.K.) **Petition allowed.**

PLJ 2021 Lahore 112 (DB)
[Multan Bench Multan]

***Present*: ANWAARUL HAQ PANNUN AND SADIQ MAHMUD KHURRRAM, JJ.**

MANZOOR AHMAD--Petitioner

versus

NATIONAL ACCOUNTABILITY BUREAU (NAB) through Chairman, Islamabad and 2 others--Respondents

W.P. No. 2461 of 2019, decided on 19.3.2019.

Constitution of Pakistan, 1973--

----Art. 199--National Accountability Ordinance, (XVIII of 1999), S. 9--Post-arrest bail of grant of--Allegations of misuse of authority and corrupt practice--Grant of extension of time for payment--Completion of evidence--Determination--Initiation of inquiry--Anonymous complaint--Violation of rules--Rule of consistency--It was case of prosecution/NAB authorities that work was no completed within stipulated period which was extended for one year and amount at rate of 5% for execution of work was paid to contractors instead of imposing penalty--It is worth noticing that inquiry was initiated by NAB authorities on anonymous complain--Project, otherwise, was completed in all respects within extended time by competent authority--Petitioners were not alleged to have gained financial benefit;' from amount paid from national exchequer and they were only blamed with misuse of authority and violating rules on subject--Amount of loss calculated allegedly paid to contractor was fully secured and could be adjusted from amount already deposited--It was observed that case against accused was based on entirely documentary evidence which was in possession of prosecution and there was no possibility of tempering of same, hence bail was granted to accused/petitioner--Rule of consistency is also applicable in this case--We feel that case of petitioners is identical to case of co-accused, therefore, they are entitled to equal treatment in eyes

of law, following rule of consistency--Petition was allowed. [Pp. 115 & 116] A, B & C

2002 SCMR 282 and 2008 SCMR 173 *ref.*

M/s. Abdul Qayyum Rao, Amjad Mushtaq and *Ehsan Ali Gill,* Advocates for Petitioner.

Mr. Muhammad Akram Rao, Special Prosecutor NAB, Rao Abdul Khaliq, ADI/NAB.

Date of hearing: 19.3.2019.

ORDER

Through this single order, we intend to decide Writ Petition No 2461 of 2019 *(Manzoor Ahmad vs. NAB,* etc. Writ Petition No. 2376 of 2019 *(Riaz Hussain son of Naseer Ahmad (Patwari) vs. NAB, etc.)*, Writ Petition No. 2466 of 2019 *(Riaz Hussain vs. NAB, etc.)* and Writ Petition 2218 of 2019 *(Gulzar Hussain vs. NAB, etc.)*, as all these petitions have arisen out of the same case being investigated by NAB authorities on the charges of misuse of authority, corrupt practices and financial loss to the public exchequer in connection with Multan Metro Product. All the petitioners have prayed for grant of post arrest bail who were arrested by NAB authorities and presently are confined in jail.

2. Allegation against petitioner Manzoor Ahmad (W.P No. 2461 of 2019) is that in the capacity of Sub-Divisional Officer, Multan Development Authority (MDA) of package III and package iv of Multan Metro Bus misused his authority and committed offence of corruption and corrupt practices punishable under Section 9(a) of National Accountability Ordinance, 1999 read with the offences mentioned in the schedule to the ordinance by preparing/processing TS detail estimate on basis of NHA Templates instant of Market Rate Schedule (MRS) of Punjab Government. It was further alleged that Manzoor Ahmad, petitioner granted extension of' time after lapse of more than 350 days and allowed payment of speedy

execution, at the rate of 5% of contract price instead of imposing penalty as required under clause 39 of the contract agreement.

3. Likewise, it was alleged against petitioner Riaz Hussain (W.P No. 2466 of 2019) that he in the capacity of Executive Engineer-II, Multan Development Authority (MDA) misused his authority and committed offence of corruption and corrupt practices punishable under Section 9(a) of National Accountability Ordinance, 1999 read with the offences mentioned in the schedule to the ordinance by preparing/processing TS detail estimate on basis of NHA Templates instant of Market Rate Schedule (MRS) of Punjab Government. It was further alleged that Riaz Hussain, petitioner granted extension of time after lapse of more than 350 days and allowed payment of speedly execution at the rate of 5% of contract price instead of imposing penalty as required under clause 39 of the contract agreement.

4. Riaz Hussain son of Naseer Ahmad (patwari) (W.P No. 2376 of 2019) allegedly committed offence of corruption and corrupt practices in the capacity of being a patwari of Multan Development Authority by preparing and forwarding reports regarding illegal payment of Rs. 10,009,743/- on account of change in category of land and also by forwarding the reports regarding illegal payment of Rs. 19,440,000/- on account of disturbance allowance to "ghost" tenants and hence aided/abetted and failed to perform his duties which resulted into loss to national exchequer to the tune of millions of rupees in connivance with his. co-accused.

5. Gulzar Hussain, petitioner (W.P No. 2218 of 2019) was accused of committing offence of corruption by processing and verifying the reports of patwaries about the category of land and making the payments in his capacity as Qanoongo land acquisition branch of Multan Development Authority.

6. M/s. Abdul Qayyum Rao, Amjad Mushtaq and Ehsan Ali Gill, Advocates representing petitioners contended that project was completed to the entire satisfaction of the employer; much after completion of project in

all respects NAB authorities started an inquiry in January 2018 on anonymous complaint alleging corruption and corrupt practices during award and execution of contract by officials of Punjab Mass Transit authority; that consultants, contractor and others were involved in approval and execution of the contract; that alleged loss to the public exchequer if any, was well secured by the amout of security/bank guarantee which was deposited with Multan Development Authority (MDA); that collection of evidence has already been done by NAB authorises in this case and that admittedly project was completed in all respects and extension was granted under the Rules as such irregularity was committed. They further argued that allegations of violation of Rules are baseless as quality of work done was never questioned by any authority and till today no such allegation as to work being substandard has come forth and that simple allegation of violation of Rules without illegal gain on the part of present petitioners would be a question to be determined after recording evidence and that the petitioners have already joined the investigation and remained on physical remand with NAB authorities during which process of collection of evidence has been completed and their incarceration in jail would not serve any useful purpose. Learned counsel has placed reliance on the cases reported as *Muhammad Saeed Mehdi vs. The State and 2 others* (2002 SCMR 282), *Wahid Bakhsh Baloch vs. The State* (2014 SCMR 985), *Saeed Ahmad vs. The State* (1996 SCMR 1132).

7. Learned Special Prosecutor for NAB opposed the petitions on the grounds that petitioners were involved in malpractices and misuse of authority which resulted in huge loss to the public exchequer.

8. We have heard the learned counsel for the petitioners and learned Deputy Prosecutor General for NAB at length.

9. During arguments, it has been admitted by learned Special Prosecutor for NAB that the amount of security was still lying with Multan Development Authority (MDA) and the loss alleged by the NAB authorities

can be made good by adjusting the amount. It has further been admitted that Chairman NAB has also approved adjustment of the amount from security amount already lying with the Multan Development Authority (MDA). We have noticed that the quality of work done at the spot has not been questioned in this case. It was not allegation against the petitioners that substandard work was done due to which loss was caused to national exchequer; rather it was case of prosecution/NAB authorities that work was not completed within stipulated period which was extended for one year and the amount at the rate of 5% for execution of work was paid to the contractors instead of imposing penalty. It is worth noticing that inquiry was initiated by NAB authorities on anonymous complain. The project, otherwise, was completed in all respects within extended time by competent authority. Petitioners were not alleged to have gained financial benefit from the amount paid from national exchequer and they were only blamed with misuse of authority and violating the rules on the subject. As noted above, the amount of loss calculated allegedly paid to the contractor was fully secured and could be adjusted from the amount already deposited. In reported case Muhammad *Saeed Mehdi vs. The State and 2 others* (2002 SCMR 282), it was observed that bail cannot be withheld as punishment in cases of non-bailable offence against accused and that basic idea was to enable the accused to answer the criminal prosecution against him rather than to rot him behind the bars. In the same case, the apex Court observed that truth or otherwise of allegation could only be determined at the trial after analysis of evidence that might be adduced by the parties and object of National Accountability Bureau Ordinance 1999 in its preamble provided for expeditious trial within shortest possible time. In another case reported as *Saeed Ahmad vs. The State* (1996 SCMR 1132) a case of corruption, it was observed that case against accused was based on entirely documentary evidence which was in possession of the prosecution and there was no possibility of tempering of the same, hence bail was granted to the accused/petitioner. The allegations of misuse of authority and illegal gain are

yet to be proved by the prosecution in this case. The loss calculated by the prosecution can also be made good from the amount of security already deposited by the co-accused Syed Masood Hussain. Moreover already the co-accused namely Syed Masood Hussain, Rana Waseem, Farhan Haider, Munem Saeed, Sabir Khan and Amanat Ali have been admitted to post arrest bail by this Court. The rule of consistency is also applicable in this case. We feel that the case of the petitioners is identical to the case of co-accused, therefore, they are entitled to equal treatment in the eyes of law, following the rule of consistency. Reliance is placed on the case of *Muhammad Baud and another versus The State and another* (2008 SCMR 173).

10. For the reasons recorded above, we are of the view that petitioners are entitled to the grant of post arrest bail. Consequently, all the above referred petitions are accepted; petitioners shall be released subject to furnishing bail bonds in the sum of Rs, 1,000,000/-(Rupees ten lacs only) each with two sureties each in the like amount to the satisfaction of learned trial Court, if not required in any other case.

(Y.A.) **Petition allowed.**

PLJ 2021 Lahore 234

[Multan Banch, Multan]

Present: **ANWAARUL HAQ PANNUN, J.**

MUHAMMAD WASEEM--Petitioner

versus

STATE etc.--Respondents

W.P. No. 16900 of 2019, decided on 20.11.2019.

Constitution of Pakistan, 1973--

----Art. 199--Pakistan Penal Code, (XLV of 1860), Ss. 324, 336, 337-F(iii), 337-F(i) & 417(2-A)--Request for physical remand--Declined--Revision petition--Dismissed--Maintainability--Challenge to--On analogy of Section 417(2-AJ Cr.P.C, petitioner is an aggrieved person and after dismissal of revision petition by Additional Sessions judge filed by State, has *locus standi* to file instant petition before this Court, thus, objection raised by counsel for respondent regarding maintainability of this petition, is not tenable in view of law laid down by Superior Courts on subject--It is observed that respondent remained on physical remand with investigating officer for nine days for purpose of recovery of weapon of offence, *i.e*. pistol but during this period, no substantial progress has been made by him in this regard--Magistrate, in impugned order has rightly observed that investigating officer was seeking physical remand of accused in stereo-type manner and had not made any hectic effort to conclude investigation despite availing nine; days physical remand of accused--Magistrate was not under obligation to grant full fourteen days physical remand of accused-respondent at whims and wishes, of complainant or investigating officer--Due to efflux of time, there is hardly any possibility of effecting recovery of weapon of offence on pointing out of respondent in case this petition is allowed and physical remand of respondent for further five days is granted to investigating officer--For

what has been discussed above, no perversity, illegality and material irregularity has been found in impugned order/judgment passed by both Courts below--Petition was dismissed. [Pp. 236 & 237] A, B, C & D

Malik Muhammad Siddique Kamboh, Advocate for Petitioner.

Mr. Zulfiqar Ali Sidhu, Assistant Advocate General for State.

Rao Shakeel Ahmad, Advocate for Respondent No. 5.

Date of hearing: 20.11.2019.

ORDER

Through the instant writ petition in terms of Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner has called-in-question the vires of order dated 02.09.2019 passed by learned Magistrate Section-30, Shujabad, whereby request of the investigating officer for granting five days physical remand of Talha alias Talli/Respondent No. 5 (hereinafter to be referred as 'the respondent) accused of case FIR No. 03/19 dated 02.01.2019, registered against him in respect of offences under Sections 324, 336, 337-F(iiii) &337-F[i] PPC, at Police Station City Shujabad, District Multan has been declined and judgment dated 10.10.2019 passed by learned Additional Sessions Judge, Shujabad whereby revision petition filed against the aforesaid order has been dismissed.

2. Brief facts of the case are that the petitioner lodged the aforesaid criminal case against the respondent, who was arrested by the police and produced before the learned Area Magistrate for physical remand for the recovery of pistol .30-bore but the learned Magistrate, while not acceding to the request of the police, proceeded to send him to judicial lock up *vide* impugned order dated 02.09.2019. Feeling aggrieved, the petitioner filed criminal revision before the learned Additional Sessions Judge, Shujabad which also failed as the same has been dismissed, *vide* impugned judgment dated 10.10.2019, hence this writ petition.

3. At the outset, learned counsel for the respondent, while relying upon the case reported as *"Mirza Sardar Baig v. M. Akmal Paul and 6 others"* (2017 P.Cr.LJ 691), has raised objection regarding the maintainability of this petition and submits that the petitioner has no locus-standi to challenge the impugned judgment rather the investigating officer is competent to challenge the same before this Court.

4. While responding the above query and relying upon the dictum laid down in case reported as *"Riaz ul Haq and another v. Muhammcd Naveed and another"* (2005 YLR 805), learned counsel for the petitioner, submits that in view of dictum laid down in the referred case, the petitioner being an aggrieved person, is competent to file the instant writ petition hence, the objection raised by learned counsel for the respondent is liable to be discarded.

5. Arguments heard. Record perused.

6. Firstly, taking up the objection raised by learned counsel for the petitioner. After hearing learned counsel for to parties and going through the case-law cited at the bar, I am of the view that on the analogy of Section 417(2-A) Cr.P.C, the petitioner is an aggrieved person and after dismissal of revision petition by the learned Additional Sessions judge filed by the State, has locus standi to file the instant petition before this Court, thus, the objection raised by learned counsel for the respondent regarding maintainability of this petitior, is not tenable in view of law laid down by the Superior Courts on the subject.

7. Now, coming to the merits of the case. It is observed that the respondent remained on physical remand with the investigating officer for nine days for the purpose of recovery of weapon of offence, *i.e*. pistol but during this period, no substantial progress has been made by him in this regard. Learned Magistrate, in the impugned order has rightly observed that the investigating officer was seeking physical remand of the accused in stereo-type manner and had not made any hectic effort to conclude the

investigation despite availing nine days physical remand of the accused. The Magistrate was not under obligation to grant full fourteen days physical remand of the accused-respondent at the whims and wishes, of the complainant or the investigating officer. So far as the argument of learned counsel for the petitioner that as criminal case has already been registered against the first investigating officer of the aforesaid case for conducting defective investigation, there was sufficient reason for setting aside the impugned order/judgment considering the element of *mala fide* of the investigating officer causing prejudice to the petitioner" case, is concerned, the same is repelled for the simple reason that accused remained on physical remand for nine days and the investigating officer had made request to the learned Magistrate for his further physical remand for five days which was declined by assigning valid reasons. It is also noticed that the FIR has been registered for causing injuries on the person of the injured/PW at the hands of the respondent, thus, sufficient incriminating material in the shape of medical evidence is already available to the petitioner to prove his case against the respondent. Even otherwise, due to efflux of time, there is hardly any possibility of effecting recovery of weapon of offence on pointing out of the respondent in case this petition is allowed and physical remand of the respondent for further five days is granted to the investigating officer.

8. For what has been discussed above, no perversity, illegality and material irregularity has been found in the impugned order/judgment passed by both the Courts below. The instant petition is without merits, thus, the same stands dismissed.

(Y.A.) **Petition dismissed.**

PLJ 2021 Lahore 645

[Multan Bench, Multan]

Present: **ANWAARUL HAQ PANNUN, J.**

Mst. **AMNA SHAHEEN--Petitioner**

versus

STATE, etc.--Respondents

W.P. No. 6084 of 2021, decided on 19.5.2021.

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

----S. 164--Jurisdiction of magistrate--Petitioner contracted marriage with her free will and consent against wishes of her parents--Her mother got registered a criminal case at Rawalpindi against her husband etc.--Petitioner filed application before judicial magistrate at Multan for recording her statement u/S. 164, Cr.P.C. which is dismissed with observation to approach competent Court at Rawalpindi--It is not imperative that magistrate receiving or recording a confession or statement should be a magistrate having jurisdiction--Any aggrieved person may ask for recording statement u/S. 164, Cr.P.C. to magistrate--Petition is allowed and judicial magistrate is directed to record statement of petitioner u/S. 164, Cr.P.C. [Pp. 646 & 647] A, B, C, D & E

Syed Imran Abbas Kazmi, Advocate for Petitioner.

Malik Shoukat Mehmood Marha, AAG. for State.

Date of hearing: 19.5.2021.

ORDER

Through the instant constitutional petition under Art. 199 of the Constitution of Islamic Republic of Pakistan, 1973, following prayer has been made by the petitioner:

> *"Under these circumstances, it is most respectfully prayed that instant petition may kindly be accepted and impugned order dated 13.04.2021 passed by the Respondent No. 2 may very kindly be set aside while declaring the same as illegal, void, ab initio corrum non-judice, against the law and facts and in consequence thereof learned Senior Civil Judge Criminal Division, Multan/Respondent No. 2 may very kindly be directed to record the statement of the petitioner u/S. 164 Cr.P.C. in the instant case/FIR by allowing the application filed by the petitioner, in the supreme interest of justice.*
>
> *Any other relief which this Hon'ble Court deems fit and necessary may also be awarded to the petitioner".*

2. The promo of facts necessary for the disposal of instant petition are that petitioner with her own free will and consent, however, against the wishes of her parents contracted Nikah/marriage with one Ahtasham Azam alias Chahat Azam, Caste Arain, R/o Basti Khudadad, Sher Shah Road, Multan *vide* Nikahnama dated 16.02.2021 and her mother/Respondent No. 3 got registered FIR No. 125/2021, dated 16.02.2021 under Section 365-B, PPC at P.S. Race Course, District Rawalpindi against her husband and others about her abduction whereas it has been mentioned that she has never been abducted by any person. On account of danger to her life in District Rawalpindi, she filed an application before learned Sessions Judge, Multan to mark application to any Judicial Magistrate for recording her statement

u/S. 164 Cr.P.C in the aforesaid FIR and the same was dismissed by Senior Civil Judge, Criminal Division, Multan *vide* order dated 13.04.2021 with the observation that the petitioner is at liberty to approach the Court/Magistrate of competent jurisdiction at Rawalpindi. Hence, instant petition.

3. Arguments heard. Record.

4. In order to answer the question involved in this case, Rule 4(f) of Chapter 13 of Volume-III of Lahore High Court Rules and Orders in which important features of Section 164 Cr.P.C. are mentioned which for convenience is reproduced infra:

> 4. Some important features of Section 164 as it stands, now are:-
>
> (f) It is not necessary that the Magistrate receiving or recording a confession or statement should be Magistrate having jurisdiction in the case.

Bare perusal of aforesaid Rule, it is crystal clear that it is not imperative that the Magistrate receiving or recording a confession or statement should be a Magistrate having jurisdiction in the case. So, in view of above, it is crystal clear that learned Magistrate/Senior Civil Judge (Criminal Division), Multan has jurisdiction to record statement of the petitioner under Section 164, Cr.P.C. and there is no bar to record her statement as mentioned op-cit. Other question that who can make request for recording statement under Section 164, Cr.P.C. It is well settled that any aggrieved person may ask for recording his statement under Section 164, Cr.P.C. to the Magistrate. Thus, order of learned Magistrate is contrary to law as mentioned op-cit. Reliance is placed upon unreported order of this Court dated 04.03.2021 passed by this Court in constitutional petition bearing W.P. No. 2335 of 2021 titled *Mst. Asma Bibi v. State, etc.*

5. For what has been discussed above, while **allowing** instant petition, impugned order date 13.04.2021 is set aside and SCJ, Criminal Division, Multan/Respondent No. 2 is directed to record statement of the petitioner under Section 164, Cr.P.C. in the aforesaid FIR quite in accordance with law.

(K.Q.B.) **Petition allowed.**

PLJ 2021 Cr.C. (Note) 46

[Lahore High Court, Multan Bench]

***Present*: ANWAARUL HAQ PANNUN AND FAROOQ HAIDER, JJ.**

MUHAMMAD TARIQ--Petitioner

versus

STATE etc--Respondents

Crl. Appeal No. 655 of 2018, decided on 28.11.2018.

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

----S. 426--Control of Narcotic Substances Act, (XXV of 1997), S. 9(c)--Petition--Suspension of sentence--Medical ground--Petitioner is suffering from hepatitis which is life threatening disease and can affect other inmates of jail--According to report submitted by Senior Medical Officer, Central Prison, Sahiwal, petitioner was initially diagnosed HIV--He was also examined by Medical Specialist of DHQ Hospital, Sahiwal who advised his further investigations from Jinnah Hospital, Lahore to decide his treatment plan, therefore, persuaded to suspend sentence of petitioner solely on medical ground--Application was allowed. [Para 5] A

Prince Rehan Iftikhar Sheikh, Advocate for Petitioner.

Mr. Muhammad Ali Shahab, Deputy Prosecutor General for State.

Date of hearing: 28.11.2018.

ORDER

Crl. Misc. No. 1/2018

Through this petition under Section 426, Cr.P.C. petitioner Muhammad Tariq son of Muhammad Saleem has sought suspension of sentence in case FIR No. 241/2017 dated 17.06.2017, offence under Section 9(c) The of Control of Narootic Substances Act, 1997 registered at Police Station City Chichawatni whereby he was convicted under Section 9(c) of

The Control of Narcotic Substances Act, 1997 and sentenced him to R.I. 02 years 06 months with fine of Rs. 20,000/- and in default of payment, he shall further undergo 06 months SI. The petitioner was held entitled to the benefit of Section 382-B, Cr.P.C.

2. The sole ground urged by the learned counsel for the petitioner is that the petitioner is suffering from Aids and Hepatits-C and his treatment is not possible in the jail hospital. Adds that the petitioner is behind the bars since 17.06.2017 and he has served out his substantial portion of his sentence in the jail.

3. Learned Law Officer has half-heartedly opposed the contentions of the learned counsel for the petitioner.

4. Heard. Record perused.

5. We have observed that the petitioner is suffering from hepatitis which is life threatening disease and can affect the other inmates of the jail. According to the report submitted by the Senior Medical Officer, Central Prison, Sahiwal, petitioner Muhammad Tariq was initially diagnosed HIV. He was also examined by the Medical Specialist of DHQ Hospital, Sahiwal who advised his further investigations from Jinnah Hospital, Lahore to decide his treatment plan, we are, therefore, persuaded to suspend the sentence of the petitioner solely on medical ground subject to furnishing his bail bonds in the sum of Rs. 1,00,000 (Rupees one lac only) with one surety in the like amount to the satisfaction of the Deputy Registrar (Judl.) of this Court.

(A.A.K.) **Application allowed.**

PLJ 2021 Cr.C. (Lahore) 130

Present: **ANWAARUL HAQ PANNUN, J.**

YASIR RAUF--Appellant

versus

STATE etc.--Respondents.

Crl. A. No. 1737 of 2015, decided on 20.6.2019.

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

----S. 426(1-A)(c)--Suspension of sentence--Petitioner/appellant was convicted and sentenced as stated above--He filed appeal against said judgment on 29.09.2015--Since petitioner is behind bars for more than three years and 09 months--Petitioner has earned statutory right for his release on bail, pending appeal, under Section 426(1-A)(e), Cr.P.C--Injury attributed to petitioner, is not cause of death, co-accused saddled with case, for causing fatal injury-had been acquitted, therefore, even on merits, petitioner, has successfully made out, his case, for his release on .bail through suspension of his sentence--Petition .is allowed, sentence awarded to appellant/petitioner is suspended. [P. 131] A

M/s. Kazim Ali Malik and *Nasir Mehboob Tiwana*, Advocate for Petitioner/Appellant.

Mr. Kamran Akbar Hashmi, Advocate for Complainant.

Mr. Imdad Hussain Chatha, Deputy Prosecutor General for State.

Date of hearing: 20.6.2019.

ORDER

Crl. Misc. No. 2 of 2018

Through this, Crl. Miscellaneous, the convict/petitioner. Yasir Rauf seeks suspension of his sentence awarded by learned Sessions Judge, Bhakkar, *vide* judgment dated 19.09.2015 on the conclusion of his trial in case/FIR No. 63 dated 29.02.2012, offence under Sections 302/324/337-D/337-F(iii)/337-F(v)/148/149, PPC, at Police Station City Bhakkar. The learned trial Court while acquitting the co-accused Ishtiaq Ahmad, Shahid

Rauf and Tanveer Ahmad, convicted and sentenced the petitioner/appellant through the impugned judgment as under:

Under Section/302(b),PPC

"Imprisonment for life alongwith compensation Rs. 3,00,000/- payable to the legal heirs of the deceased as required under Section 544-A, Cr.P.C. and in case of default, the convict shall undergo further imprisonment for six (06) months. The convict is also given benefit of Section 382-B, Cr.P.C.

2. Arguments heard and record perused.

3. After hearing learned counsel for the parties, Deputy Prosecutor General for the state and going through the record it is observed that the petitioner/appellant was convicted and sentenced as stated above. He filed appeal against the said judgment on 29.09.2015. Since the petitioner is behind the bars for more than three years and 09 months. The petitioner has earned statutory right for his release on bail, pending appeal, under Section 426(1-A)(e), Cr.P.C. It has also been noticed that injury attributed to the petitioner, is not cause of death, The co-accused saddled with the case, for causing fatal injury-had been acquitted, therefore, even on merits, the petitioner, has successfully made out, his case, for his release on bail through suspension of his sentence. Resultantly, the instant-petition is allowed, sentence awarded to the appellant/petitioner Yasir Rauf is suspended and he is ordered to be released on bail, subject to his furnishing bail bonds in the sum of Rs. 2,00,000/-(Rupees two lac only) with one surety in the like amount to the satisfaction of Deputy Registrar (Judicial). He be directed to appear before this Court on each and every date of hearing till the final decision of main appeal.

Main Case

4. Relist.

(A.A.K.) **Petition allowed.**

PLJ 2021 Cr.C. (Lahore) 187

[Multan Bench, Multan]

Present: **ANWAARUL HAQ PANNUN, J.**

GHULAM JILANI--Appellant

versus

STATE etc.--Respondents.

Crl. Misc. No. 1917-B of 2019, decided on 10.4.2019.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), S. 489-F--Post-arrest, bail, grant of--Allegation of--Dishonoured of cheque--After hearing counsel for parties as well as law officer appearing for State and going through documents appended with this petition, it is straightaway observed that since offence does not fall within ambit of prohibitory clause of Section 497, Cr.P.C., hence in absence of any material bringing case of petitioner into an exception justifying refusal of concession of bail to him, he is deemed to be entitled to prayed for relief--Bail was allowed. [Pp. 187 & 188] A

Malik Muhammad Siddique Kamboh, Advocate for Petitioner.

Mr. Abdul Wadood, Deputy Prosecutor General for State.

Complainant in person.

Date of hearing: 10.4.2019.

ORDER

Ghulam Jilani, the petitioner has sought post arrest bail in case-FIR No. 612 dated 13.12.2018, registered at Police Station Fatehpur District Layyah, for an offence under Section 489-F, PPC.

2. Precise allegation against the petitioner is that he issued a cheque amounting to Rs. 8,50,000/- in favour of the complainant which were dishonoured on is presentation before the concerned Bank. Hence, this case.

3. After hearing learned counsel for the parties as well as learned law officer appearing for the State and going through the documents appended with this petition, it is straightaway observed that since the offence does not fall within the ambit of prohibitory clause of Section 497, Cr.P.C., hence in absence of any material bringing the case of the petitioner into an exception justifying the refusal of concession of bail to him, he is deemed to be entitled to the prayed for relief.

4. In view of above, the petition in hand is **allowed** and the petitioner is admitted to bail subject to his furnishing bail bonds in the sum of **Rs. 100,000/-** (rupees one lac) with one surety in the like amount to the satisfaction of learned trial Court.

5. Before parting with this order, learned trial Court is directed to conclude the trial of the instant case within five months, positively.

(A.A.K.) **Bail allowed.**

PLJ 2021 Cr.C. (Lahore) 202

[Multan Bench, Multan]

Present: **ANWAARUL HAQ PANNUN, J.**

MAHER MUHAMMAD ALTAF TRAGGAR --Petitioner

versus

STATE and 3 others--Respondents.

Crl. Rev. No. 345 of 2016, decided on 2.4.2019.

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

----Ss. 435 & 439--Criminal revision--A llegation against petitioner is that he--alongwith proforma respondent, misappropriated licensed pistol .30 bore belonging to Respondent No 3--Respondent No. 3 further alleged that a criminal case *vide* FIR No. 98/2015, offence under Section 13(2)(a) of Pakistan Amis Ordinance XX of 1965, Police Station Raja Ram, was registered against him illegally--He applied for securing pistol on Superdari before illaqa Magistrate, on perusal of report so filed by police, it transpired that his pistol has been misappropriated and another pistol has been planted against him--Thereupon Respondent No3 herein moved to Court of Justice ‘ of Peace for registration of case and got passed tie impugned order dated 09.02.2016--Today, counsel for petitioner has presented a copy of order dated 15.03.2017, passed by Magistrate Section 30, Shujabad, disclosing that Respondent No 3, upon his confessional statement has been convicted) and sentenced with fine of Rs. 1,000/-. Copy be placed on record--Therefore, he states that in view of above position, when said Respondent No. 3 himself confessed his guilt, allegation against petitioner automatically stands falsified.

[P. 203] A & B

Malik Muhammad Siddique Kamboh, Advocate for Petitioner.

Mr. Abdul Wadood, Deputy Prosecutor General for State.

Sheikh Muhammad Raheem, Advocate for Respondent No. 3.

Date of hearing: 2.4.2019.

ORDER

Through this criminal revision petition, the petitioner has impugned the orders dated 09.02.2016, passed by the learned Addl. Sessions Judge, Shujabad, whereby SHO Police Station Raja Ram was directed to record version of the petitioner (Respondent No. 3) provided cognizable offence is made out.

2. Precisely the facts necessary for disposal of is in hand are that Muhammad Jameel filed an application under Sections 22-A/22-B, Cr.P.C. for registration of case against the petitioner and others before the learned Ex-officio Justice of Peace, upon which order dated 09.02.2016 was passed wherein learned Ex-officio Justice of Peace, issued direction to the SHO Police Station Raja Ram to record version of said Muhamad Jameel provided cognizable offence is made out. The said order was challenged by the present petitioner by filing Writ Petition No. 5501 of 2016, which was dismissed by this Court *vide* order dated 05.05.2016. Again, the petitioner has challenged the same order by means of instant criminal revision petition wherein the operation of the impugned order was suspended *vide* order dated 09.05.2016. The matter remained pending till today.

3. Arguments heard and record perused.

4. The allegation against the petitioner is that he along with proforma respondent, misappropriated licensed pistol .30 bore `belonging to Respondent No 3 Muhammad Jameel. Respondent No. 3 further alleged that a criminal case *vide* FIR No. 98/2015, offence under Section 13(2)(a) of the Pakistan Arms Ordinance XX of 1965, Police Station Raja Ram, Shujabad was registered against him illegally. He applied for securing the pistol on Superdari before the learned illaqa Magistrate, on perusal of report so filed by the police, it transpired that his pistol has been misappropriated and another pistol has been planted against him. Thereupon Muhammad Jameel, Respondent No. 3 herein moved to the Court of Justice of Peace for registration of case and got passed the impugned order dated 09.02.2016.

5. Today, learned counsel for the petitioner has presented a copy of order dated 15.03.2017, passed by learned Magistrate Section 30, Shujabad, disclosing that Muhammad Jameel, Respondent No. 3, upon his confessional statement has been convicted and sentenced with fine of Rs. 1,000/-. Copy be placed on record. Therefore, he states that in view of above position, when the said Respondent No. 3 Muhammad Jameel himself confessed his guilt, the allegation against the petitioner automatically stands falsified.

6. Keeping in view the above position, this petition appears to have borne fruit as Respondent No. 3 Muhammad Jameel after having been fined Rs. 1,000/- in the above-said case, is not in a position to allege that his pistol has been misappropriated rather he had confessed his guilt regarding the pistol recovered.

7. For what has been discussed above, the instant criminal revision petition is allowed and order dated 09.2.2016, passed by learned Ex-officio Justice of Peace, Shujabad is set aside.

(A.A.K.) **Revision allowed.**

PLJ 2021 Cr.C. (Lahore) 577
[Multan Bench, Multan]

***Present*: ANWAARUL HAQ PANNUN, J.**

***Hafiz* MUHAMMAD IQBAL--Petitioner**

versus

STATE and another--Respondents

Crl. Misc. No. 5455-B of 2020, decided on 30.9.2020.

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

----S. 498--Pakistan Penal Code, (XLV of 1860), Ss. 380, 354, 337-F(v), 337A(i), 337-L(ii) & 34--Bail before arrest, confirmed--Delay of 6 days--Case of petitioner is not distinctly different from co-accused--Such circumstances make case against the, petitioner to be one of further inquiry falling within ambit of Section 497(2), Cr.P.C--More so, offence under Sections 337-A(i), 337-L(2), 354, PPC, are bailable whereas remaining offence do not fall within prohibitory clause of Section 497(1), Cr.P.C--Liberty of a person is a precious right guaranteed by constitution of Islamic Republic of Pakistan, 1973--In such peculiar circumstances sending petitioner behind bars would serve no useful purpose--However, culpability of petitioner would be determined by learned trial Court after recording of prosecution evidence, therefore, instant petition is allowed, ad-interim bail already granted to petitioner in terms of order is hereby confirmed. [P. 578] A

Mr. Rizwan Ahmad Khan, Advocate for Petitioner.

Mr. Muhammad Abdul Wadood, Addl. P.G. for State.

Mehar Mumtaz Ali Khan, Advocate for Complainant.

Date of hearing: 30.9.2020.

ORDER

After having been fizzled out in obtaining the relief of pre-arrest bail from the learned subordinate Court, the petitioner apprehending his arrest at

the hands of police, by means of instant petition has prayed for the same in case FIR No. 294, dated 15.05.2020, offences under Sections 380, 354, 337-F(v), 337-A(i), 337-L(2), 34, PPC, registered with Police Station Gaggo, District Vehari.

2. Concisely, the allegation against the petitioner as per contents of the crime report is that on 09.05.2020 he along with his co-accused while armed with their respective weapons entered into the house of the complainant and beat wife and daughter of complainant, outraged their modesty and also caused injuries to his wife.

3. Arguments heard. Record perused.

4. It is straightaway observed that there is unexplained delay of 06 days in lodging the FIR. Further Injury No. 2 has been attributed to two accused persons. Moreover, pre-arrest bail of Iqbal co-accused of the petitioner has been confirmed by learned ASJ *vide* order dated 20.06.2020. The case of the petitioner is not distinctly different from his co-accused. Such circumstances make the case against the, petitioner to be one of further inquiry falling within the ambit of Section 497(2), Cr.P.C. More so, offence under Sections 337-A(i), 337-L(2), 354, PPC, are bailable whereas remaining offence do not fall within the prohibitory clause of Section 497(1), Cr.P.C. Liberty of a person is a precious right guaranteed by the constitution of Islamic Republic of Pakistan, 1973. In such peculiar circumstances sending the petitioner behind the bars would serve no useful purpose. However, culpability of the petitioner would be determined by the learned trial Court after recording of prosecution evidence, therefore, instant petition is allowed, ad-interim bail already granted to the petitioner in terms of order dated 17.09.2020 is hereby **confirmed** subject to his furnishing fresh bail bonds in the sum of Rs. 100, 000/- with one surety in the like amount to the satisfaction of learned trial Court. The above observations are tentative in nature and would not be taken as conclusive.

(R.A.) **Bail confirmed.**

PLJ 2021 Cr.C. (Lahore) 725

[Multan Bench Multan]

Present: **ANWAARUL HAQ PANNUN, J.**

MUHAMMAD EHSAN--Petitioner

versus

STATE etc.--Respondents

Crl. Misc. No. 6391-B of 2020, decided on 22.10.2020.

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

----S. 497--Control of Narcotic Substances Act, (XXV of 1997), S. 9(c)--Post-arrest bail, grant of--Charas weighing 1160 grams--There is nothing on record to suggest that the contraband material recovered from the petitioner was put on the scale with or without wrapper and removal thereof might have reduced its actual weight---Bail was allowed. [P. 726] A

PLJ 2018 SC 812 *ref.*

Kh. Qaiser Butt, Advocate for Petitioner.

Mr. M. Abdul Wadood, Addl. P.G. for State.

Date of hearing: 22.10.2020.

JUDGMENT

After having been fizzled out in obtaining the relief of post-arrest bail from the learned Court below, the petitioner by means of instant petition has prayed for same in a case registered *vide* FIR No. 41082, dated 07.10.2020, offence under Section 9(c) of the Control of Narcotic Substances Act, 1997, facing the allegation that on the aforesaid, he was captured by the police contingents and on his personal search, 1160 grams Charas was allegedly recovered from his possession. Hence, this case was registered.

2. Arguments heard. Record perused.

3. Allegedly, Charas weighing 1160 grams was recovered from the possession of petitioner at the time of his arrest by the police which, as per prosecution's version, is marginally above the upper limit of Section 9(b) of the Control of Narcotic Substances Act, 1997 but there is nothing on record to suggest that the contraband material recovered from the petitioner was put on the scale with or without wrapper and removal thereof might have reduced its actual weight. The report of Chemical Examiner has not been received so far. The investigation of this case has already been completed; the petitioner is behind the bars since his arrest and is no more required for further investigation. In an identical case reported as *Saeed Ahmad vs. State through P.G Punjab and another* (PLJ 2018 SC 812), the Hon'ble Supreme Court of Pakistan, has observed as under:

> *"The record reveals that the petitioner has been found in possession of 1350 grams of charas. Since the substance recovered marginally exceeds 1 kg. we doubt petitioner could be awarded maximum sentence provided by the statute. The fact that he has been in jail for more than seven months and his trial is not likely to be concluded in the near future would also tilt in favour of grant of bail rather than refusal."*

Even otherwise when confronted, learned Law Officer states that petitioner is previous non-convict.

4. In view of above, the petition in hand is allowed and the petitioner is admitted to post arrest bail subject to his furnishing bail bonds in the sum of Rs. 100,000/- (rupees one lac) with one surety in the like amount to the satisfaction of learned trial Court.

(M.A.B.) **Bail allowed.**

PLJ 2021 Cr.C. (Lahore) 818

Present: **ANWAARUL HAQ PANNUN, J.**

ABDUL RAZZAQ etc.--Petitioners

versus

ADDITIONAL SESSIONS JUDGE, LAHORE etc.--Respondents

Crl. Misc. Nos. 74267-M, 74755-M of 2019,
decided on 30.3.2021.

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

----S. 202--Scope of--Evidence at preliminary inquiry--Summoning order--It is settled principle of law that evidence at preliminary inquiry within scope of Section 202, Cr.P.C. cannot be appreciated with yardstick, it is done on conclusion of a trial by Court, burden of proof during preliminary inquiry, for issuance of process is quite lighter on complainant as compared to burden to prove its case beyond reasonable doubt on prosecution at trial of an offence, Court seized with matter at preliminary stage is not expected to examine material minutely whereas at stage of trial, it has to appraise evidence thoroughly. [Pp. 820 & 821] A

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

----Ss. 403 & 561-A--Pakistan Penal Code, (V of 1860), Ss. 302, 324, 427, 506, 148, 149 & 34--Demolished building--Reappraisal cursory evidence and provision of law maintained of summoning order of trial Court--Abuse of process of Court and law may be appreciated--Petitioners may if so desires file a proper application alongwith relevant documents to seek prayed for relief before trial Court, which shall be decided after considering documents and facts of case in accordance with law--Trial Court shall also examine all other ancillary questions *qua* maintainability of proceedings--No legal infirmity or jurisdictional defects could have been pointed out in impugned orders, calling for interference by High

Court, resultantly, both petitions having no force are hereby dismissed.

[P. 821] B

M/s. Muhammad Ahsan Bhoon and *Ms. Saima Jehan*, Advocates for Petitioners.

Mrs. Tahira Parveen, Additional Prosecutor General.

Mr. Muhammad Zubair Khalid, Advocate for Respondents.

Date of hearing: 30.3.2021.

ORDER

By this single order, I intend to decide the above titled criminal miscellaneous petitions as both have arisen out of the orders dated 27.02.2018 and 01.11.2019 passed by learned Courts below.

2. In a private complaint under Sections 302/324/427/506/ 148/149/34, PPC filed by Respondent No. 3 (the detailed story of the prosecution has already been given in the impugned orders), the learned Magistrate Section-30, Model Town, Lahore, through the impugned order dated 27.02.2018 has summoned the petitioners/ proposed accused to face the trial under Sections 324/427/506/ 148/149/34, PPC. The said order was assailed by the petitioners through a revision petition, which has been dismissed by learned Additional Sessions Judge, Lahore, on 01.11.2019. Hence, this petition.

3. Heard. Record perused.

4. Allegedly, the petitioners alongwith others on 22.9.2011 at 1.00 p.m., started demolishing the wall, despite they were shown a copy of a stay order as well as sanctioned site-plan and also threatened to demolish the building of Respondent No. 3. Thereafter on the same day at about 6.00 p.m. the petitioners alongwith others including 20/25 officials of LDA department brought machinery at the site and started demolishing the building till 2.00

a.m of 23.9.2011. Again on 23.09.2011 at 8.00 a.m., the petitioners alongwith 10 officials of LDA department again started to demolish the building, as a result of which the building collapsed at once, causing death of four labourers and injuries to many persons. On the basis of cursory evidence recorded as CW-1 to CW-4, coupled with the documentary evidence, the complainant/Respondent No. 3 has been able to make out a *prima facie* case against the accused/petitioners and the learned Magistrate Section 30, Model Town, Lahore *vide* impugned order dated 27.02.2018 observed that the offence under Section 302, PPC is not made out and *prima facie* the offence under Sections 324/427/506/148/ 149/34, PPC are made out against the proposed accused/petitioners. The learned Revisional Court after reappraisal the cursory evidence and relevant provisions of law maintained the summoning order of trial Court through the impugned order dated 01.11.2019 with the following observations:

> *"the petitioners in this revision petition at para (i) of ground portion mentioned that the complainant concealed with mala fide intention the fact of acquittal of the petitioner from a Court of competent jurisdiction. So by taking this contention of the petitioner it is observed that at the time of passing of impugned order as such no material was before the learned trial Court to adjudicate upon the fact of earlier acquittal of the petitioner rather material available before the learned trial Court was on that which was produced by the respondent in cursory evidence. It has been held by the superior Courts that while passing an order under Section 204, Cr.P.C on a private complaint the learned trial Court has only to take into consideration the material available before it and in case prima facie any connection is made out then a process can be issued by virtue of Section 204, Cr.P.C. In this regard reliance is placed on the case law PLD 2007 S.C Page 9. So after examining the record it is observed that the learned trial Court passed the impugned order on the basis of cursory evidence available before it. Since question of double jeopardy was not discussed or agitated before the learned trial Court therefore, it is still open for the petitioners to agitate this ground before the learned trial Court by filing an application u/S. 249-A, Cr.P.C. if so advised and in that scenario the learned trial Court shall adjudicate upon the same in accordance with law."*

It is further observed in the aforesaid impugned order that:

> *"No time limit is provided under the law within which the private complaint is to be filed. However, if the private complaint is filed with long delay the learned trial Court may while deciding it finally adjudicate upon its worth and at the stage of summoning of persons complained against under Section 204, Cr.P.C as such the delay of the private complaint cannot be made sole basis for its dismissal. Reliance is placed upon PLD 2008 Lahore 441 titled as "Imtiaz Rubani alias Bilu vs. The State and others".*

5. It is settled principle of law that the evidence at preliminary inquiry within the scope of Section 202, Cr.P.C. cannot be appreciated with the yardstick, it is done on conclusion of a trial by the Court, the burden of proof during preliminary inquiry, for the issuance of process is quite lighter on the complainant as compared to burden to prove its case beyond reasonable doubt on prosecution at trial of an offence, the Court seized with the matter at preliminary stage is not expected to examine the material minutely whereas at the stage of trial, it has to appraise the evidence thoroughly. So far the argument of the learned counsel that since the petitioners had been acquitted of the charge earlier, in pursuance of the summoning order, if put to trial in a complaint case, it would be hit by Article 13 of the Constitution of Islamic Republic of Pakistan, 1973 and Section 403 of Cr.P.C and would amount to abuse of process of Court and law may be appreciated while exercising powers under Section 561-A, Cr.P.C, suffice it will be to observe that the propriety demands that at the first instance, trial Court is the proper forum. The petitioners may if so desires file a proper application alongwith the relevant documents to seek the prayed for relief before the trial Court, which shall be decided after considering the documents and facts of the case in accordance with law. The learned trial Court shall also examine all other ancillary questions *qua* maintainability of the proceedings. No legal infirmity or jurisdictional defects could have been pointed out in the impugned orders,

calling for interference by this Court, resultantly, both the petitions having no force are hereby dismissed.

(R.A.) **Petitions dismissed.**

PLJ 2021 Cr.C (Lahore) 821 (DB)

[Multan Bench Multan]

Present: **TARIQ SALEEM SHEIKH AND ANWAARUL HAQ PANNUN, JJ.**

STATE--Appellant

versus

SHAHZADA FAHEEM IRSHAD etc.--Respondents

Crl. A. No. 368 of 2020, decided on 14.12.2020.

Control of Narcotic Substances Act, 1997 (XXV of 1997)--

----S. 48--Criminal Procedure Code, 1898, Ss. 510 & 540--Application for summoning of forensic scientist/analyst--Dismissal of-- Tendering of chemical analysis report is evidence--Non raising of objection by defence regarding submission of reports--Chemical analysis reports issued by office of (NIH), have already been tendered in evidence as--No objection about admissibility of these reports in evidence has been raised accused--These reports are per se admissible in evidence, therefore, there is no need to summon analyst--Such permission will amount to giving an opportunity to prosecution to rebuild its case, which may amount to cause prejudice to accused particularly when as no objection has been raised by defence upon exhibiting reports--High Court do not find any illegality or infirmity in impugned order and same being based upon proper appreciation of law and facts calls for no interference by High Court--Appeal dismissed. [P. 822] A, B & C

Mr. Khalid Ibn-i-Aziz, Special Prosecutor for ANF/Appellant.

Ch. Muhammad Saeed, Advocate for Respondents.

Date of hearing: 14.12.2020.

ORDER

Through this appeal under Section 48 of the Control of Narcotic Substances Act, 1997, the appellant/State has assailed the order dated

24.08.2020 passed by the learned Additional Sessions Judge, Multan, whereby its application under Section 540, Cr.P.C read with Section 510, Cr.P.C for summoning of Forensic Scientist/ Analyst as witness to prove test protocols applied for compiling/ issuance of the analysis reports submitted in this case, has been dismissed.

2. Heard. Record perused.

3. The chemical analysis reports issued by office of National Institute of Health (NIH), Islamabad have already been tendered in evidence as Ex.PG to Ex.PG/2 and Ex.PH & Ex.PH/1. No objection about the admissibility of these reports in evidence has been raised to the accused. These reports are per se admissible in evidence, therefore, there is no need to summon the Analyst. The appellant/State seeks permission to summon the Analyst to clarify as to what kind of chemical tests/analysis/protocols were applied to carry out the result. We are afraid sucry permission will amount to giving an opportunity to the prosecution to rebuild its case, which may amount to cause prejudice to the accused particularly when as aforesaid no objection has been raised by the defence upon exhibiting the reports. Therefore, the learned trial Court has rightly dismissed the application of the appellant/State in the light of the judgment of the Hon'ble Supreme Court of Pakistan reported as *Khair-ul-Bashar vs. The State* (2019 SCMR 930). We do not find any illegality or infirmity in the impugned order and the same being based upon proper appreciation of law and facts calls for no interference by this Court. Resultantly, this appeal being devoid of any force is **dismissed.**

(Y.A.) **Appeal dismissed.**

PLJ 2021 Cr.C. 1115

[Lahore High Court Multan Bench]

***Present*: ANWAARUL HAQ PANNUN, J.**

MUTEEB ALI--Petitioner

versus

STATE etc.--Respondents

Crl. Misc. No. 2619-B of 2021, decided on 24.5.2021.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 302, 109 & 34--Bail, dismissal of--Raised Lalkara--Identification Parade--Petitioner's identity is established through identification parade, coupled with recovery of motor cycle on his pointation--Petitioner's found connected with commission of offence during course of investigation--Bail was dismissed. [P. 1116] A

Malik Ghulam Muhammad Langarial, Advocate for Petitioner.

Malik Mudassir Ali, Deputy Prosecutor General for State.

Khawaja Qaiser Butt, Advocate for Complainant.

Date of hearing: 24.5.2021.

ORDER

Through this petition, the petitioner Muteeb Ali seeks post arrest bail in case/FIR No. 507 dated 30.11.2020, offence under Sections 302/109/34, PPC, registered at Police Station City, District Vehari.

2. As per FIR, two unknown accused persons, armed with pistols, while boarding on motorcycle, raised lalkara for killing Asif and thereafter, the person who boarded behind the driver, made fire hitting on backside of head of Asif, who fell down from the motorcycle and succumbed to the fire-arm injury.

3. Arguments heard and record perused.

4. Although the petitioner is not nominated in the FIR yet his implication through supplementary statement followed by establishment of his identity as a culprit through identification parade, coupled with recovery of motorcycle on his pointing out and particularly when he has been found connected with the commission of offence during the course of investigation, are sufficient for holding that reasonable grounds exist for believing that the petitioner
had committed the offence, failing within the prohibitory clause of Section 497, Cr.P.C., resultantly the instant petition is dismissed.

(M.A.B.) **Bail dismissed.**

PLJ 2021 Cr.C. 1148

[Lahore High Court, Multan Bench]

***Present*: ANWAARUL HAQ PANNUN, J.**

EJAZ ULLAH--Petitioner

versus

STATE, etc.--Respondents

Crl. Misc. No. 1021-B of 2021, decided on 11.3.2021.

Control of Narcotics Substances Act, 1997 (XXV of 1997)--

----S. 497--Bail, grant of--Charas 94.500 Kilograms--Petitioner was not driving the car nor any narcotics was recovered from his exclusive possession rather he was sitting on the front seat of the Dala/vehicle--There is nothing on the record to connect the petitioner with the Dala in question--Investigation of this case has already been completed--Bail was Allowed. [P. 1149] A, B & C

2019 SCMR 1651 *ref.*

Khan Irfan Ahmad Khan, Advocate for Petitioner.

Mr. M. Abdul Wadood, Addl. P.G. for State.

Mr. Muhammad Baqir Dafadar, BMP with record.

Date of hearing: 11.3.2021.

ORDER

Having been fizzled out in obtaining the relief of post-arrest bail from the learned Court below, the petitioner by means of instant petition has prayed for same in a case registered *vide* FIR No. 01, dated 09.01.2021, offence under Section 9(c) of the Control of Narcotic Substances Act, 1997, at P.S. BMP Rakhi Garg, District D.G. Khan.

2. The promo of prosecution story as contained in the crime report is that on 09.01.2021 at 11.30 AM, the police posse of BMP while checking

intercepted Mazda Dalla bearing No. ll3/NAD driven by Abdul Shakoor and on its front seat, the petitioner was sitting and from the body of Mazda 105 packets of Charas wrapped in shopping bags each weighing 900 grams total 94.500 kilograms Charas was recovered. Hence, this case was registered.

3. Arguments heard. Record perused.

3. It has been observed that when the petitioner was arrested by the Border Military Police (BMP),; he was not driving the car nor any narcotics was recovered from his exclusive possession rather he was sitting on the front seat of the Dala/vehicle. Learned Law officer under instructions of the police officer present in the Court states that there is nothing on the record to connect the petitioner with the Dala in question. In these circumstances, the case of the petitioner becomes one of further inquiry falling within the ambit of Section 497, Cr.P.C. In this context reliance is placed upon case titled *Hussain Ullah v. State and another* (2019 SCMR 1651). The investigation of this case has already been completed; the petitioner is behind the bars since his arrest and is no more required for further investigation. In such backdrop, by keeping him behind the bars for an indefinite period would serve no useful purpose. Even otherwise when confronted, learned Law Officer states that petitioner is previous non-convict.

4. In view of above, the petition in hand is **allowed** subject to furnishing bail bonds by the petitioner in the sum of **Rs. 5,00,000/-** (five lac) with one surety in the like amount to the satisfaction of learned trial Court and he is admitted to post arrest bail.

(K.Q.B.) **Bail allowed.**

PLJ 2021 Cr.C. 1341

[Lahore High Court, Multan Bench]

Present: **ANWAARUL HAQ PANNUN, J.**

MUHAMMAD RASHID--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 2966-B of 2021, decided on 24.5.2021.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 302, 324, 148 & 149--Bail after arrest, grant of--Allegation of--Committed murder--As per FIR, no overt act is attributed to petitioner and he has only made aerial firing at spot--Culpability of petitioner coupled with question of vicarious liability would be determined by trial Court after recording prosecution's evidence--Petitioner being previous non-convict is behind bars and no more required to police for purpose of investigation--These factors accumulatively render petitioner's case within realm of further inquiry--Bail petition is allowed/and petitioner is admitted to post-arrest. [P. 1342] A

Sardar Muhammad Ashfaq Baloch, Advocate for Petitioner.

Malik Mudassir Ali, D.P.G for State.

Malik Muhammad Majid Shehbaz Khokhar, Advocate for Complainant.

Date of hearing: 24.5.2021.

ORDER

Through this petition, the petitioner Muhammad Rashid seeks his release on post arrest bail in case/FIR No. 289 dated 02.08.2020, offence

under Sections 302/324/148/149, PPC, registered at Police Station Muhammad Pur, District Rajanpur.

2. Precisely, the allegation against the petitioner is that he alongwith his co-accused in prosecution of their common object, while armed with their respective weapons, committed murder of Muhammad Nasir and also caused injuries to the injured PWs by making fire-arm injuries.

3. Arguments heard and record perused.

4. As per FIR, no overt act is attributed to the petitioner and he has only made aerial firing at the spot. The culpability of the petitioner coupled with question of vicarious liability would be determined by learned trial Court after recording prosecution's evidence. The petitioner being previous non-convict is behind the bars and no more required to the police for the purpose of investigation. These factors accumulatively render the petitioner's case within the realm of further inquiry. Resultantly, the instant bail petition is allowed and the petitioner is .admitted to post-arrest bail, subject to his furnishing bail bonds in the sum of Rs. 1,00,000/- (Rupees one hundred thousand only), with one surety, in the like amount to the satisfaction of learned trial Court.

(A.A.K.) **Bail allowed.**

PLJ 2021 Cr.C. 1401 (DB)

[Lahore High Court, Multan Bench]

Present: **TARIQ SALEEM SHEIKH AND ANWAARUL HAQ PANNUN, JJ.**

MUHAMMAD SHAHZAD *alias* TIKKA--Appellant

versus

STATE etc.--Respondents

Crl. A. No. 379 of 2015, heard on 27.10.2020.

Control of Narcotic Substances Act, 1997 (XXV of 1997)--

----S. 9(c)--Conviction and sentence--Challenge to--Recovery of charas--Benefit of doubt--In narcotic cases it prime duty of prosecution to establish, by producing on record a confirmatory report issued by Chemical Examiner, compiled by following requisite tests in line with Rule 6 of Control of Narcotic Substances (Government Analysts) Rules, 2001, that alleged recovered material was in fact contraband--In instant case report issued by Chemical Examiner, Government of Punjab, has not been prepared by following Rule 6 ibid--Prosecution has miserably failed to bring home charge against appellant--**Held:** It is well settled principle of law that a single instance causing a reasonable doubt in mind of Court entities accused to benefit of doubt not as a matter of grace but "matter of right--Appeal was allowed with benefit of doubt.

[Pp. 1402 & 1403] A & B

2018 SCMR 2039, PLD 2020 SC 57, 2009 SCMR 230 and 2014 SCMR 749.

Mr. Ghulam Abbas Tarar, Advocate for Appellant.

Mr. Shahid Aleem, Additional Prosecutor General for State.

Date of hearing: 27.10.2020.

JUDGMENT

Anwaarul Haq Pannun, J.--The appellant Muhammad Shahzad *alias* Tikka was tried in case F.I.R No. 267/2013 dated 06.05.2013 under Section 9(c) of the Control of Narcotic Substances Act, 1997, registered at Police Station Mumtazabad, Multan, as allegedly recovery of heroin weighing 2077 grams along with sale money of Rs. 2830/- was effected from his possession at the time of his arrest by the police party. On conclusion of trial, the learned trial Court, *vide* its judgment dated 02.07.2015, has convicted the appellant under Section 9(c) of C.N.S.A, 1997 and sentenced him to Six Years R.I. with a fine of Rs. 800,000/- and in default thereof to further undergo six months S.I. Benefit of Section 382-B, Cr.P.C. has been given to the appellant.

2. After framing of formal charge against the accused/ appellant, to which he pleaded not guilty and claimed trial, the prosecution examined five witnesses to prove charge against the appellant. PW-1 Muhammad Kamran No. 1069/C deposited the sealed parcel said to contain heroin in the office of Chemical Examiner. PW-2 Khadim Hussain, ASI, chalked out the formal FIR in this case. PW-3 Zia Akhtar, SI, is complainant of this case. PW-4 Ghulam Muhammad, SI, is recovery witness of the recovery memo of heroin and sale money (Ex.PB) and PW-5 Haider Ali, Inspector, is Investigating Officer of this case. Statement of the accused under Section 342, Cr.P.C. was recorded, wherein he while professing his innocence and false involvement in this case, had refuted all the allegations levelled against him. The accused/appellant did not opt to appear as his own witness under Section 340(2), Cr.P.C., however, in his defence he has produced DW-1 Bashir Ahmad and DW-2 Muhammad Nawaz and also tendered the documents (Mark-A to Mark-D).

3. Arguments heard. Record perused.

4. Leaving aside the verbosity revolving around the demeanor of statements of the PWs, it is straightaway observed that in narcotic cases it is the prime duty of the prosecution to establish, by producing on record a

confirmatory report issued by the Chemical Examiner, compiled by following the requisite tests in line with Rule 6 of the Control of Narcotic Substances (Government Analysts) Rules, 2001, that the alleged recovered material was in fact the contraband. We have noticed that in the instant case the report (Ex.PD) issued by the Chemical Examiner, Government of the Punjab, Multan has not been prepared by following Rule 6 ibid. The Hon'ble Supreme Court of Pakistan in the dictum reported as *The State through Regional Director ANF vs. Imam Bakhsh and others* (2018 SCMR 2039) has held as under:

> *"Non-compliance of Rule 6 can frustrate the purpose and object of the Act, i.e. control of production, processing and trafficking of narcotic drugs and psychotropic substances, as conviction cannot be sustained on a Report that is inconclusive or unreliable. The evidentiary assumption attached to a Report of the Government Analyst under Section 36(2) of the Act underlines the statutory significance of the Report, therefore details of the test and analysis in the shape of the protocols applied for the test become fundamental and go to the root of the statutory scheme. Rule 6 is, therefore, in the public interest and safeguards the rights of the parties. Any Report (Form-II) failing to give details of the full protocols of the test applied will be inconclusive, unreliable, suspicious and untrustworthy and will not meet the evidentiary assumption attached to a Report of the Government Analyst under Section 36(2), "*

The above view of the Apex Court has been reiterated in a recently delivered judgment reported as *Qaiser Javed Khan vs. The State through Prosecutor General Punjab, Lahore and another* (PLD 2020 SC 57).

5. Thus, following the law laid down by the Hon'ble Supreme Court of Pakistan in the dictums supra, which is binding on all Courts, we are of the view that prosecution has miserably failed to bring home charge against the appellant. It is well settled principle of law that a single instance

causing a reasonable doubt in the mind of the Court entities the accused to the benefit of doubt not as a matter of grace but as a matter of right. Reliance in this regard is placed upon the judgments reported as *Muhammad Akram vs. The State* (2009 SCMR 230) and *Muhammad Zaman v. The State and others* (2014 SCMR 749).

6. Resultantly, this appeal is allowed, the conviction and sentence recorded by the learned trial Court against the appellant through the impugned judgment dated 02.07.2015 is set aside and he is acquitted of the charge. The appellant is on bail, so his surety is discharged from the liability of bail bond.

(A.A.K.) **Appeal allowed.**

PLJ 2021 Cr.C. 1427 (DB)

[Lahore High Court, Multan Bench]

Present: **TARIQ SALEEM SHEIKH AND ANWAARUL HAQ PANNUN, JJ.**

ISHFAQ HUSSAIN *alias* SHAHQA--Appellant

versus

STATE etc.--Respondents

Crl. A. No. 184 of 2014, heard on 1.10.2020.

Control of Narcotic Substances Act, 1997 (XXV of 1997)--

----S. 9(c)--Conviction and sentence--Challenge to--Benefit of doubt--Recovery of charas--Leaving aside verbosity revolving around demeanor of statements of PWs, it is straightaway observed that in narcotic cases it is prime duty of prosecution to establish, by producing on record a confirmatory report issued by Chemical Examiner compiled by fallowing-the requisite tests in line with Rule 6 of Control of Narcotic Substances (Government Analysts) Rules, 2001, that alleged recovered material was in fact contraband--instant case report issued by Chemical Examiner, Government of Punjab, Multan has not been prepared by following Rule 6 ibid--Prosecution has miserably failed to bring home charge against appellant--**Held:** It is well settled principle of law that a single instance causing a reasonable doubt in mind of Court entitles accused to benefit of doubt not as a matter of grace but as a matter of right--Appeal was allowed. [Pp. 1428 & 1429] A & B

2018 SCMR 2039, PLD 2020 SC 75, 2009 SCMR 230 and
2014 SCMR 749.

Mr. Ghulam Abbas Tarar, Advocate for Appellant.

Mr. Shahid Aleem, Additional Prosecutor General for State.

Date of hearing: 1.10.2020.

JUDGMENT

Anwaarul Haq Pannun, J.--This Criminal Appeal has been preferred by appellant Ishfaq Hussain *alias* Shahqa, who was tried in case F.I.R. No. 60/2010 dated 28.1.2010 under Section 9(c) of the Control of Narcotic Substances Act, 1997, registered at Police Station Karor District Layyah, as allegedly recovery of charas weighing 1020 grams and the sale money of Rs. 450/- was effected from his possession at the time of his arrest by the police party. On conclusion of trial, the learned trial Court, *vide* its judgment dated 17.4.2014, has convicted the appellant under Section 9(c) of C.N.S.A, 1997 and sentenced him to One Year R.I, with a fine of Rs. 10,000/- and in default thereof to further Undergo two months S.I. Benefit of Section 382-B, Cr.P.C. has been given to the appellant.

2. After framing of formal charge against the accused/ appellant, to which he pleaded not guilty and claimed trial, the prosecution examined six witnesses to prove charge against the appellant. PW-1 Muhammad Shahid Tanveer No. 558/C kept the case property in Malkhana for safe custody and on 01.02.2010 he handed over the sealed parcel of charas to Muhammad Boota No. 690/C for onward transmission to the office of Chemical Examiner. PW-2 Muhammad Boota No. 690/C deposited sealed parcel said to contain charas on 02.02.2010 in the office of Chemical Examiner. PW-3 Muhammad Sharif, ASI, chalked out the formal F.I.R in this case. PW-4 Muhammad Riaz, S.I. is complainant of this case. PW-5 Faiz Muhammad, S:I. conducted investigation of this case and PW-6 Muhammad Aslam, ASI is recovery witness of recovery memo (Ex.PB). Statement of the accused/appellant under Section 342, Cr.P.C. was recorded, wherein he while professing his innocence and false involvement in this case, had refuted all the allegations levelled against him. He did not opt to appear as his own witness under Section 340(2), Cr.P.C., however, in his defence he had produced Zafar Iqbal (DW-1) and Syed Hassan Ali (DW-2) and also tendered the documents Mark-A to Mark-F.

3. Arguments heard. Record perused.

4. Leaving aside the verbosity revolving around the demeanor of statements of the PWs, it is straightaway observed that in narcotic cases it is the prime duty of the prosecution to establish, by producing on record a confirmatory report issued by the Chemical Examiner compiled by fallowing-the requisite tests in line with Rule 6 of the Control of Narcotic Substances (Government Analysts) Rules, 2001, that the alleged recovered material was in fact the contraband. We have noticed that in the instant case the report (Ex.PE) issued by the Chemical Examiner, Government of the Punjab, Multan has not been prepared by following Rule 6 ibid. The Hon'ble Supreme Court of Pakistan in the dictum reported as *The State through Regional Director ANF vs. Imam Bakhsh and others* (2018 SCMR 2039) has held as under:

> *"Non-compliance of Rule 6 can frustrate the purpose and object of the Act, i.e. control of production, processing and trafficking of narcotic drugs and psychotropic substances, as conviction cannot be sustained on a Report that is inconclusive or unreliable. The evidentiary assumption attached to a Report of the Government Analyst under Section 36(2) of the Act underlines the statutory significance of the Report, therefore details of the test and analysis in the shape of the protocols applied for the test become fundamental and go to the root of the statutory scheme. Rule 6 is, therefore, in the public interest and safeguards the rights of the parties. Any Report (Form-II) failing to give details of the full protocols of the test applied will be inconclusive, unreliable, suspicious and untrustworthy and will not meet the evidentiary assumption attached to a Report of the Government Analyst under Section 36(2)."*

The above view of the Apex Court has been reiterated in a recently delivered judgment reported as *Qaiser Javed Khan vs. The State through Prosecutor General Punjab, Lahore and another* (PLD 2020 SC 57).

5. Thus, following the law laid down by the Hon'ble Supreme Court of Pakistan in the dictums supra, which is binding on all Courts, we are of the view that prosecution has miserably failed to bring home charge against the appellant. It is well settled principle of law that a single instance causing a reasonable doubt in the mind of the Court entitles the accused to the benefit of doubt not as a matter of grace but as a matter of right. Reliance in this regard is placed upon the judgments reported as *Muhammad Akram vs. The State* (2009 SCMR 230) and *Muhammad Zaman v. The State and others* (2014 SCMR 749).

6. Resultantly, this appeal is **allowed,** the conviction and sentence recorded by the learned trial Court against the appellant through the impugned judgment dated 17.4.2014 is set aside and he is acquitted of the charge in this case.

(A.A.K.) **Appeal allowed.**

PLJ 2021 Cr.C. 1443

[Lahore High Court, Multan Bench]

Present: **ANWAARUL HAQ PANNUN, J.**

ALI RAZA--Petitioner

versus

STATE etc.--Respondents

Crl. Rev. No. 100-J of 2021, decided on 17.5.2021.

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

----Ss. 435 & 439--Criminal revision--Conviction and sentence--Normal punishment to be awarded to an offender for offences mentioned in Chapter XVI, PPC, is payment of Arsh or Daman and optional/additional punishment of imprisonment as Ta'zir provided for relevant offence could only be awarded to an offender if he is a *"previous convict, habitual or hardened, desperate or dangerous criminal or offence has been committed by him in name or on pretext of honour"*--In case of such an offender sentence of imprisonment as Ta'zir would be governed by proviso to subsection (2) of Section 337-N, PPC, which would not be less than one third (1/3rd) of maximum imprisonment provided for hurt caused--Factors which may be considered for awarding punishment as Ta'zir are nature of injury/hurt caused, weapon used, brutality or shocking manner of occurrence has been committed being outrageous to public conscience, or adversely effecting harmony among different Sections of people--Both Courts below have failed to attend to this fact of case--Admittedly, petitioner is a first offender, not repeated fire shot and no issue of honour was involved in commission of present offence--In such

circumstances, in view of Section 337-N(2), PPC, he could not be burned with additional punishment by way of Tazir--Petitioner is in jail--He is directed to be released in this ease if not liable to be detained in any other case subject to his depositing of half of Daman amount with trial Court, besides submitting security bonds equivalent to remaining Daman amount with one surety in like amount to satisfaction of trial Court--He shall also deposit remaining amount of Daman within two months from today, failing which he shall be taken into custody and shall be "dealt with in accordance with law. [Pp. 1446 & 1447] A & C

Pakistan Penal Code, 1860 (XLV of 1860)--

----S. 324--Sentence of three years u/S. 324, PPC as awarded by trial Court and upheld by Appellate Court, do not commensurate with intention contained in Section 337-N, PPC and as such in interest of justice, same is accordingly reduced to period which petitioner/convict has already undergone so far including the-sentence in lieu of fine, but Daman amount Rs. 50,000/- u/S. 337F(iii), PPC passed against petitioner payable to injured PWM recorded by trial Court and upheld by Appellate Court, to meet ends of justice, is enhanced from Rs. 50,000/- to Rs. 75,000/-.

[P. 1446] B

2019 SCMR 516.

Malik Muhammad Siddique Kamboh, Advocate for Petitioner/ Convict.

Sardar Ashfaq Ahmad, Advocate for Respondent/ Complainant.

Mr. M. Abdul Wadood, Addl. P.G for State.

Date of hearing: 17.5.2021.

JUDGMENT

Crl. Misc. No. 1 of 2020.

At the very outset, in lieu of fixation of titled revision petition for today, learned counsel for the petitioner does not press this petition. Disposed of as such. Office to fix the titled revision petition for today.

MAIN CASE

2. Through the instant criminal revision petition in terms of Section 435/439, Cr.P.C., the petitioner Ali Raza has challenged the legality and propriety of the judgment dated 25.11.2020 passed on the conclusion of a thorough trial by learned trial Court/SCJ (Criminal Division)/Magistrate Section-30, Sahiwal whereby the petitioner was convicted and sentenced as mentioned below and the judgment of learned lower Appellate Court/Additional Sessions Judge, Sahiwal dated 23.12.2020 dismissing criminal appeal u/S. 408, Cr.P.C. while upholding the sentencing judgment of the learned trial Court passed in case FIR No. 794/2018 dated 06.12.2018, under Sections 324, 337-F(iii), 34, PPC, registered at P.S. Ghalla Mandi, Sahiwal:--

i) Three years R.I. u/S. 324, PPC alongwith fine of Rs. 30,000/- and in default whereof to further undergo SI for one month.

ii) To pay Daman Rs. 50,000/- to the injured PW Muzaffar Hussain.

His sentence in instant case as well as connected case FIR No. 185/2019, u/S. 13(2)(a) of the Punjab Arms (amended)

Ordinance, 2015 was also ordered to run concurrently. He was also extended the benefit of Section 382-B, Cr.P.C.

3. With specificity the role attributed to the petitioner is that he while armed with pistol made a fire shot hitting Mozaffar Hussain on left side of his buttock.

4. As stated above, after exhausting remedy of appeal before learned Appellate Court, the petitioner through this petition has invoked revisional jurisdiction of this Court.

5. Incipiently, without contesting conviction, learned counsel for the petitioner submits that petitioner has undergone substantial portion of his sentence, therefore, in view of the fact that he did not repeat the fire shot; neither he is a hardened & desperate criminal nor a previous convict, hence, he deserve leniency in the quantum of sentence and has thus impetrated that sentence of imprisonment which the petitioner has already undergone as well as sentence of Daman amount may be deemed sufficient to meet the ends of justice.

6. Learned Addl. P.G. as well as learned counsel for the complainant has not opposed the defence counsel's above noted contention in view of the fact that conviction is being maintained.

7. Heard. Record perused.

8. The above noted prayer made by learned counsel for the petitioner/convict is fair one. The normal punishment to be awarded to an offender for offences mentioned in Chapter XVI, PPC, is payment of Arsh or Daman and the optional/additional punishment of imprisonment as Ta'zir provided for the relevant offence could only be awarded to an offender if he is a *"previous convict, habitual or hardened, desperate or dangerous*

criminal or the offence has been committed by him in the name or on the pretext of honour". In the case of such an offender the sentence of imprisonment as Ta'zir would be governed by the proviso to sub-section (2) of Section 337-N, PPC, which would not be less than one third (1/3rd) of the maximum imprisonment provided for the hurt caused. The factors which may be considered for awarding punishment as Ta'zir are the nature of the injury/hurt caused, the weapon used, the brutality or the shocking manner of the occurrence has been committed being outrageous to the public conscience, or adversely effecting harmony among different sections of the people. Both the Courts below have failed to attend to this fact of the case. Admittedly, the petitioner is a first offender, not repeated the fire shot and no issue of honour was involved in commission of the present offence. In such circumstances, in view of Section 337-N(2), PPC, he could not be burned with additional punishment by way of Tazir. In this context, reliance is placed upon case titled *Abdul Wahab and others v, the State and others* (2019 SCMR 516). Sentence of three years u/S. 324, PPC as awarded by learned trial Court and upheld by the learned Appellate Court, do not commensurate with the intention contained in Section 337-N, PPC and as such in the interest of justice, the same is accordingly reduced to the period which the petitioner/convict has already undergone so far including the-sentence in lieu of fine, but the Daman amount Rs. 50,000/- u/S. 337-F(iii), PPC passed against the petitioner payable to the injured PW recorded by learned trial Court and upheld by the learned Appellate Court, to meet the ends of justice, is enhanced from Rs. 50,000/- to Rs. 75,000/-. The petitioner is in jail. He is directed to be released in this case if not liable to be detained in any other case subject to his depositing of half of the Daman amount with the learned trial Court, besides submitting security bonds equivalent to the

remaining Daman amount with one surety in the like amount to the satisfaction of learned trial Court. He shall also deposit the remaining amount of Daman within two months from today, failing which he shall be taken into custody and shall be dealt with in accordance with law.

9. For what has been discussed above, instant revision petition stands **dismissed** in the above terms.

(A.A.K.) **Revision dismissed.**

2021 Y L R Note 59

[Lahore (Multan Bench)]

Before Anwaarul Haq Pannun, J

MUHAMMAD NAWAZ and others---Petitioners

Versus

The STATE and others---Respondents/Appellants

Criminal Appeal No. 550 of 2016 and Criminal Miscellaneous No. 1 of 2019, decided on 29th September, 2020.

Criminal Procedure Code (V of 1898)---

----S. 426---Penal Code (XLV of 1860), Ss. 302, 324 & 34---Qatl-i-amd, attempt to commit qatl-i-amd and common intention---Suspension of sentence pending appeal---Rule of consistency---Scope---Accused sought suspension of his sentence---Accused had served out period of more than six years and eleven months, therefore, he had earned statutory right of his release on bail, pending appeal, under S.426(1-A)(c), Cr.P.C.---Sentence of the co-accused had already been suspended by the court, as such, the petitioner was also entitled to be released on bail on the rule of consistency---Petition was allowed, in circumstances. [Para. 3 of the judgment]

Prince Rehan Iftikhar Sheikh for Petitioners/Appellants.

Muhammad Abdul Wadood, Deputy Prosecutor General for the State.

ORDER

Cr1. Misc. No. 1 of 2019

ANWAARUL HAQ PANNUN, J.---Through this Crl. Miscellaneous, the convict/petitioner Muhammad Niwaz seeks suspension of his sentence awarded by learned Addl. Sessions Judge, Sahiwal, vide judgment dated 28.05.2016, on the conclusion of his trial in case FIR No.328/10 for offences under sections 302, 324, 34, P.P.C. registered at Police Station Harappa, District Sahiwal. The learned trial Court convicted and

sentenced the present petitioner through the impugned judgment as under:--

Under section 302(b) read with 34, P.P.C.

"Imprisonment for life as Ta'zir along with fine of Rs.3,00,000/-. In case of default of payment of fine the accused shall further undergo six months simple imprisonment (S.I). The accused Nawaz shall also liable to pay Rs.200,000/- (Two Lac rupees) as compensation under section 544-A, Cr.P.C. to the legal heirs of deceased which will be recovered from the accused as arrears of land revenue. The benefit of section 382-B, Cr.P.C. was however extended.

2. Arguments heard and record perused.

3. It is observed that the petitioner along with co-accused filed appeal against the aforesaid judgment in the year 2016. The petitioner is behind the bars since 27.11.2013 and after pronouncement of judgment, he has also served out period of more than six years and eleven months, therefore, he has earned statutory right for his release on bail, pending appeal, under section 426(1-A)(c), Cr.P.C. Moreover, sentence of the co-accused Umar Daraz alias Umar Hayyat has been suspended by this Court vide order dated 30.04.2018, as such, petitioner is also entitled to be released on bail on the rule of consistency. Resultantly, the instant petition is allowed, sentence awarded to the appellant/petitioner Muhammad Niwaz is suspended and he is ordered to be released on bail, subject to his furnishing bail bonds in the sum of Rs.5,00,000/- (Rupees five lac only) with one surety in the like amount to the satisfaction of Deputy Registrar (Judicial). He be directed to appear before this Court on each and every date of hearing till the final decision of main appeal.

SA/M-178/L **Sentence suspended.**

2021 Y L R Note 91

[Lahore (Multan Bench)]

Before Anwaarul Haq Pannun, J

MODASSAR---Petitioner/Appellant

Versus

The STATE and others---Respondents

Criminal Miscellaneous No. 1 of 2019 in Criminal Appeal No. 755 of 2018, decided on 22nd December, 2020.

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

----S. 426---Penal Code (XLV of 1860), Ss. 302 & 324---Qatl-i-amd, attempt to commit qatl-i-amd---Suspension of sentence---Scope---Petitioner convicted under S. 302(b), P.P.C. and sentenced to life imprisonment had sought suspension of his sentence---Validity---Record showed that since his arrest petitioner was behind the bars and chances of disposal of his appeal in the near future were bleak due to rush of work---Liberty of a person being precious right, was safeguarded/guaranteed under the Constitution---Petitioner was neither hardened nor desperate criminal---If after suffering the incarceration in jail, the petitioner was ultimately acquitted, there would be no compensation for his incarceration---While accepting the petition, sentence of the petitioner was suspended till the final decision of his appeal and he was released on bail. [Para. 4 of the judgment]

(b) Appeal---

----Scope---Appeal is continuation of trial. [Para. 4 of the judgment]

Soba Khan v. The State and another 2016 SCMR 1325 rel.

Prince Rehan Iftikhar Sheikh for Petitioner/appellant.

Malik Modassar Ali, D.P.G.

ORDER

Crl.Misc.No.1 of 2019.

ANWAARUL HAQ PANNUN, J.---Through this criminal miscellaneous petition filed under section 426, Cr.P.C. petitioner namely Modassar has sought his release on bail by way of suspension of his sentence pending disposal of the above-mentioned criminal appeal.

2. Allegedly involved in case FIR No.123/2016, dated 29.03.2016, offence under sections 302, 324, P.P.C. registered at Police Station Harappa, Sahiwal,

the petitioner was tried by the learned Addl. Sessions Judge/Juvenile Court, Sahiwal and vide judgment dated 10.05.2018, he has been convicted and sentenced as under:--

i) Under section 302(b), P.P.C. and sentenced to undergo life imprisonment by way of Tazir with compensation of Rs.2,00,000/- as envisaged under section 544-A, Cr.P.C. payable to the legal heirs of the deceased and in default to further undergo SI for six months.

ii) Under section 452, P.P.C. and sentenced to undergo three years S.I. with fine of Rs.20,000/- and in default whereof to further undergo S.I. for three months.

All the sentences were ordered to run concurrently. He was also extended the benefit of section 382-B, Cr.P.C.

3. Arguments advanced pro and contra have been heard. Record perused.

4. The petitioner after his trial as juvenile was convicted and sentenced vide judgment dated 10.05.2018 and since his arrest he is incessantly behind the bars and chances of disposal of instant appeal are bleak in near future due to rush of work, hence I am constrained to observe that liberty of a person being precious right, which is also safeguarded/ guaranteed under the Constitution of Islamic Republic of Pakistan, 1973. In view of amendment made in the Code of Criminal Procedure (Amendment) Act, 2011, dated 18th April 2011; the ground of statutory delay is available to the petitioner. Further, during the course of arguments, the Court was apprised that the petitioner has been enjoying the premium of bail during the course of trial which fact also finds mentioned in the impugned judgment. There is no second cavil to this proposition that the appeal is continuation of trial. In this context reliance is placed upon case titled Soba Khan v. The State and another (2016 SCMR 1325). Even otherwise the petitioner is neither hardened nor desperate criminals, hence, this Court is constrained to observe that if after suffering the incarceration in jail, the petitioner is ultimately acquitted, there will be no compensation for his incarceration, therefore, while accepting instant application, the above mentioned sentence is suspended till the final decision of the titled appeal, the petitioner is directed to be released on bail subject to his furnishing bail bonds in the sum of Rs.1,00,000/- (one lac) with one surety in the like amount to the satisfaction of DR(J) of this Bench. The petitioner shall ceaselessly appear before this court till final decision of instant criminal appeal.

JK/M-7/L **Petition accepted.**

2021 Y L R 443

[Lahore (Multan Bench)]

Before Tariq Saleem Sheikh and Anwaarul Haq Pannun, JJ

RASHID alias JHORI---Appellant

Versus

The STATE and others---Respondents

Criminal Appeal No. 972 of 2016, heard on 5th October, 2020.

(a) Control of Narcotic Substances Act (XXV of 1997)---

----S. 9(c)---Possession of narcotics---Appreciation of evidence---Benefit of doubt---Safe custody---Scope---Accused was alleged to have been found in possession of 15 kilograms of "doday of poast"---Sample-bearer had kept the sample parcel in his possession for one day---Date of submission of sample in the Forensic Laboratory given by sample-bearer was contradicted by the Forensic Laboratory---Safe custody of the sample parcel could not be said to have been proved, rendering the prosecution's case to be doubtful and under the law, the doubt was always resolved in favour of the accused---Appeal against conviction was allowed, in circumstances.

The State through Regional Director ANF v. Imam Bakhsh and others 2013 SCMR 2039 rel.

(b) Criminal trial---

----Benefit of doubt---Scope---Accused is not obliged to establish a number of circumstances, creating reasonable doubts for earning an acquittal but even a single circumstance, creating reasonable doubt in the

prudent mind is sufficient to extend him the benefit of doubt, in the shape of his acquittal.

Muhammad Ashraf and others v. The State and others PLD 2015 Lah. 1 and Muhammad Zaman v. The State and others 2014 SCMR 749 ref.

Prince Rehan Iftikhar Sheikh and Ch. Ahsan Ali Gill for Appellant.

Shahid Aleem, Additional Prosecutor General for the State.

Date of hearing: 5th October, 2020.

JUDGMENT

ANWAARUL HAQ PANNUN, J.---Through this appeal under Section 48 of The Control of Narcotic Substances Act, 1997 (CNSA, 1997), the appellant Rashid alias Bhori has challenged his conviction and sentence awarded to him, vide judgment dated 30.06.2016, passed in case/FIR No.452, dated 27.11.2014, offence under Section 9(c) of CNSA, 1997, registered at Police Station Sarwar Shaheed, District Muzaffargarh, passed by learned Addl. Sessions Judge/Special Judge (CNS), Kot Addu, whereby the appellant has been convicted and sentenced as under:-

Under Section 9(c) of CNSA, 1997

> "to undergo imprisonment for life with fine of Rs.30,000/- and in default, he shall further undergo 01 year and 04 months simple imprisonment. The benefit of Section 382-B, Cr.P.C. was extended to the convict."

2. The prosecution's version as contained in the FIR (Exh.PC), lodged on the complaint of Muhammad Ilyas ASI (Exh.PB) is that on 27.11.2014 at about 2.40 p.m., on receipt of spy information, the complainant along with other police officials conducted raid at Street Haroon Wali, apprehended the accused/appellant along with while colour bag/gatto. On

checking of the bag/gatto, 15 K.G "Doday of Poast" were recovered, out of which, 500-grams were sealed as a sample parcel and both were taken into possession vide recovery memo Exh.PA.

3. After investigation and on receiving the report under section 173, Cr.P.C., the learned trial Judge took the cognizance, supplied the requisite copies under Section 265(c), Cr.P.C. to the appellant, framed the charge, to which, he pleaded not guilty, proceeded to record the evidence of the prosecution witnesses (PW-1 to PW-6). The learned Prosecutor gave up Muhammad Imran 1632/C being unnecessary and while tendering positive report of Punjab Forensic Science Agency, Lahore (Exh.PE) closed the evidence of the prosecution. The appellant when examined under Section 342, Cr.P.C., refuted the prosecution evidence and while replying to the question "why this case and why the PWs deposed against him", replied as under:-

"In fact the local police entered into the house of accused brothers namely Nasir, Kashif and Asif. The house of accused is adjacent to the house of his brothers. Only scuffle took place between the police and my brothers. I was present at that time. The local police in order to take revenge registered false FIR No.47/14 under sections 9-C, 324, 325, 353, 186 and 34, P.P.C. The local police also registered instant false case on the asking of Muhammad Saleem SI complainant of FIR No.47/14 just to teach lesson. I produce copy of FIR No. 47/14 as Mark-A."

"All the PWs are police officials and are also subordinate of the I.O. On the asking of I.O., this case and on the asking of Muhammad Saleem SI, they have deposed falsely against me in the Court."

Neither the appellant opted to record his statement under Section 340(2), Cr.P.C. nor produced any evidence in his defence. On the conclusion of trial, the learned trial Judge had convicted and sentenced the appellant through the impugned judgment as alluded to in para. No.1 of the instant judgment. Hence, this appeal.

4. Arguments heard. Record perused.

5. Muhammad Asif 1923/HC (PW-1) kept the case property and sample parcel in the malkhana for safe custody and on 07.12.2014 he handed over the sample parcel to Shahid Feroz 505/C for onward transmission to the office of Punjab Forensic Science Agency, Lahore. Shahid Feroz 505/C (PW-2) deposited the sample parcel in the office of Punjab Forensic Science Agency, Lahore on next day. Muhammad Ilyas ASI, complainant (PW-3) and Ghulam Hussain 1656/C (PW-4) are the recovery witnesses of the alleged contraband. Muhammad Abid Sharif SI (PW-5) drafted formal FIR (Exh.PC). Mureed Hussain SI, (PW-6) is Investigating Officer of the case.

6. Muhammad Asif 1923/HC(PW-1) deposed that on 07.12.2014, he handed over the sample parcel to Shahid Feroz 505/C for onward transmission to the office of Punjab Forensic Science Agency. Shahid Feroz 505/C (PW-2) deposed that on 07.12.2014, Muhammad Asif 1923/HC Moharrir handed over to him one sealed parcel of 500 grams Doday of Poast for onward transmission to the office of Punjab Forensic Science Agency, Lahore for analysis, which he deposited the same in the said office on next day. There is no explanation that in which capacity he had kept the sample parcel in his possession and deposited the same in the office of Punjab Forensic Science Agency, Lahore on next day. Contrary to the above, in report (Exh.PE), the date of submission of the sample parcel in the office of Punjab Forensic Science Agency, Lahore is

mentioned as 09.12.2014 and not on 08.12.2014 i.e. the following day of 08.12.2014. Hence, in the light of above, the safe custody of the sample parcel cannot be proved, rendering the prosecution's case to be doubtful and under the law, the doubt is always to be resolved in favour of the accused. It has been held in case titled "The State through Regional Director ANF v. Imam Bakhsh and others"(2018 SCMR 2039) that:--

> "The chain of custody begins with the recovery of the seized drug by the Police and includes the separation of the representative sample(s) of the seized drug and their dispatch to the Narcotics Testing Laboratory. This chain of custody, is pivotal, as the entire construct of the Act and the Rules rests on the Report of the Government Analyst, which in turn rests on the process of sampling and its safe and secure custody and transmission to the laboratory. The prosecution must establish that the chain of custody was unbroken, unsuspicious, indubitable, safe and secure. Any break in the chain of custody or lapse in the control of possession of the sample, will cast doubts on the safe custody and safe transmission of the sample(s) and will impair and vitiate the conclusiveness and reliability of the Report of the Government Analyst, thus, rendering it incapable of sustaining conviction. This Court has already held in Amjad Ali v. State (2012 SCMR 577) and Ikramullah v. State (2015 SCMR 1002) that where safe custody or safe transmission of the alleged drug is not established, the Report of the Government Analyst becomes doubtful and unreliable.

7. In view of above, we are of the view that the prosecution has failed to establish its case against the appellant beyond any shadow of doubt.

For earning the acquittal, the accused is not obliged to establish a number of circumstances creating doubts but even a single circumstance, creating a reasonable doubt in the prudent mind is sufficient to extend him the benefit of doubt, in the shape of his acquittal. Reliance in this regard is placed upon case titled "Muhammad Ashraf and others v. The State and others" (PLD 2015 Lahore 1) and "Muhammad Zaman v. The State and others" (2014 SCMR 749). Consequently, we allow this appeal, set aside the judgment dated 30.06.2016 passed by learned Addl. Sessions Judge/ Special Judge (CNS), Kot Addu and acquit the appellant from the charge levelled against him. The appellant is in jail. He be released forthwith, if not required in any other criminal case.

SA/R-18/L **Appeal allowed.**

2021 Y L R 869

[Lahore (Multan Bench)]

Before Anwaarul Haq Pannun, J

JUNAID AHMAD KHAN SHAHZAD---Petitioner

Versus

DISTRICT POLICE OFFICE, MUZAFFARGARH and 5 others---Respondents

Writ Petition No. 12824-H of 2020, decided on 14th October, 2020.

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

----S. 491---Habeas corpus---Scope---Petitioner sought recovery of his wife from the illegal and improper custody of her parents---Alleged detenue on being produced affirmed the averments of the petition and showed the desire to accompany her husband---High Court with a view to examine the bona fide of the petitioner as to whether he had contracted marriage with detenue merely as a result of his crush, momentous and impulsive passion, arising out of her bodily and behavioral charm or he had entered into the sacred bond sincerely and with religious zeal, quizzed him and he in order to fortify his bona fide as well as to forge a sense of security in monetary terms in the mind of the detenue, showed his inclination to enhance/re-affix the amount of deferred dower by submitting his sworn affidavit---High Court observed that since the petitioner had enhanced the deferred dower of alleged detenue/his wife, with his volition, therefore, the same shall be considered as integral part of nikahnama---Petition was allowed, the detenue was set at liberty to accompany her husband.

(b) Islamic law---

----Dower---Dower may be fixed after marriage---Scope---Parties of a marriage can fix/enhance the amount of dower at any time after its solemnization even, during the subsistence of their marriage.

Ghania Hassan v. Shahid Hussain Shahid and another 2016 SCMR 2170 rel.

Ch. Noman Ahmad and Rana Rizwan with Petitioner.

Muhammad Ayyub Buzdar, Assistant Advocate General.

Sahibzada Munir Raza Gilani for Private Respondents.

Abdul Kareem, SI along with lady constable has produced the detenue Mst. Safia Manzoor.

ORDER

ANWAARUL HAQ PANNUN, J.---Through this petition under section 491, Cr.P.C, the petitioner seeks recovery of his wife Mst. Safia Manzoor Bibi, hereinafter to be called as the alleged detenue, from the illegal and improper custody of private respondents, so that she may be dealt with in accordance with law. The petitioner has made his averments in the petition which are to the effect that the detenue with her own free will and consent but against the wishes of her parents, contracted marriage with him on 22.12.2018. The couple has been enjoying the bliss of their marital union happily. On 15.9.2020, respondent No.3, father of the alleged detenue assured the spouses while stating that he has purged his ill-will against them, had taken the detenue along with him from the house of the petitioner to his own house on the pretext that her seriously ailing mother wanted to see her. The petitioner, after a lapse of 06 days when approached the respondents for return of his wife/detenue, they instead of allowing the detenue to join him, extended threats of dire consequences. The detenue however succeeded in sending a message to the petitioner that her movements have been restricted and she has been confined in a room, besides depriving her from proper food, causing

health hazard to her, which may ultimately prove detrimental to her life. Hence this petition.

2. Subject to deposit of Rs.20,000/- with D.R. (Judicial) of this Court, as security, this Court vide its order dated 30.09.2020 directed respondent No.2/ SHO that the alleged detenue after her recovery be produced before the Court. In compliance with aforesaid order, Abdul Kareem, SI accompanied by a lady constable has produced the alleged detenue before the Court, after her recovery from the house of her parents/ respondents, who categorically states that she is sui-juris and major and has contracted marriage with the petitioner, without the blessings of her parents. She after affirming the above mentioned averments of the petition, has shown her desire to accompany with her husband i.e. the petitioner.

3. For what has been described above, it emerges that the alleged detenue being sui-juris and major while exercising her free will has contracted marriage with the petitioner. Unfortunately, this marriage has been contracted by the spouses against the wishes and without the blessings of the detenue's parents and other siblings. In view of phenomenal increase in contracting choice marriages by the youth, considering this change in society a reality, the Courts are justified in exercising their jurisdiction in a befitting manner to harmonize the social values based on the primitive norms with the prevailing concept of society, giving access and opportunity both to the individuals to enjoy their fundamental rights guaranteed under the Constitution. Therefore, with a view to examine his bona fides as to whether the petitioner has contracted marriage with aforesaid detenue merely as a result of his crush, momentous and impulsive passion, arising out of her bodily and behavioral charm or he has entered into this sacred bond sincerely and with religious zeal, Junaid Ahmad Khan, the petitioner, being present before the Court, when quizzed, he in order to fortify his bona fide as well as to forge a sense of security, in monetary terms, in the mind of the detenue, showed his inclination to enhance/re-affix the amount of

deferred dower by submitting his sworn affidavit. Under the Islamic Law, the parties of a marriage can fix/enhance the amount of dower at any time, after its solemnization even during the subsistence of their marriage. The august Supreme Court of Pakistan in case reported as "Ghania Hassan v. Shahid Hussain Shahid and another" (2016 SCMR 2170) has expressly dealt with the issue in hand and observed as under:-

"In the Principles of Mohammadan Law by DF Mulla (Pakistan Edition), it has been stated as follows:-

"287. Dower may be fixed after marriage.---The amount of dower may be fixed either before or at the time of marriage or after marriage; and can be increased after marriage."

(Emphasis supplied)

In the Mahommedan Law Vol II (Containing the Law Relating to Succession and Status compiled from Authorities in the Original Arabic) by Syed Ameer Ali, it has stated as follows:

"Dower may be increased after marriage:--

The Musulman Law accepted in the matter the more liberal principle of the pre Islamic Arab customs. Under the Islamic system there is no community of goods between husband and wife. She is absolute owner of her own property and of whatever the husband settles on her as dower. The terms of the settlement are agreed to before marriage, but when these have been omitted, they may be settled subsequently. The terms of the contract may be varied at any time during the continuance of the marriage by mutual consent. The wife has the power either to relinquish the whole dower-debt, or make an abatement in her husband's favour: whilst the husband, similarly, has the power of making additions to her settlement or dower.

The amount of the dower, as already pointed out, is either settled by the contract of marriage or by custom, or in the case of tafwiz or tahkim,

by a subsequent agreement between the parties, or by an order of the Judge, or arbitrators."

(emphasis supplied)

In Hedaya (2nd Edition Vo. 1 page 45) Commentary on the Muslim Law, it is stated that:-

"Case of an addition made to the dower after marriage.---If a man makes any addition to the dower in favour of his wife subsequent to the contract, such addition is binding upon him."

"The question of addition of dower came up before this Court in the judgment, reported as Mian Aziz A. Sheikh v. The Commissioner of Income Tax Investigation, Lahore (PLD 1989 SC 613), wherein after examining the classical text books on the subject and the previous judgments of the Sub-continent on the matter in issue, it was observed as follows:

"19. It would have been seen that an acknowledgement in any form including declaration by the husband with regard to increase of dower is, as held by the Lahore High Court in Chan Pir's case. "quite sufficient" to prove the same under Muslim Law ..."

A similar view was taken by this Court in the judgment, reported as Ameer Ali Khan v. Kishwar Bashir and another (PLD 2004 SC 746).

An overview of the above reveals that it is not a settled proposition of law that the dower can be fixed before marriage and at time of marriage or thereafter. Furthermore, the dower once settled can always be increased by the husband or by an agreement between the parties."

4. In the light of above discussion, since the petitioner has submitted an affidavit/undertaking Mark "AA", fixing the amount of Rs.10,00,000/- (ten lac) as deferred dower of the alleged detenue/his wife, with his volition, therefore, the same shall be considered as integral part of Nikahnama.

5. In the light of what has been discussed above, this petition is allowed, consequently, the detenue Mst. Safia Manzoor Bibi is set at liberty. She may accompany with her husband. The security amount already deposited by the petitioner in compliance of order dated 30.09.2020 is ordered to be refunded to him. The office is directed to send the copies of this order and aforesaid affidavit (Mark-AA) to the Secretary, Union Council concerned, for its endorsement in the relevant column of the "Nikahnama", available with him/record. The assistance rendered in the matter by Mr. Fakhar Bashir Sial, Civil Judge/Research Officer, Lahore High Court, Multan Bench is appreciated.

SA/J-4/L **Petition allowed.**

2021 Y L R 2430

[Lahore]

Before Anwaarul Haq Pannun and

Muhammad Amjad Rafiq, JJ

NOOR ELAHI---Appellant

Versus

The STATE---Respondent

Criminal Appeal No. 682 and Capital Sentence Reference No.30-N of 2015, heard on 7th June, 2021.

(a) Control of Narcotic Substances Act (XXV of 1997)---

----S.9(c)---Transportation of narcotics---Appreciation of evidence---Scope---Accused was sentenced to death for trying to smuggle 46.800 kilograms of heroin through a consignment consisting of 16 iron boxes containing stones---Prosecution had succeeded in proving that the accused's firm was hired for the purpose of export of consignment in question and all the relevant documents such as, Goods Declaration Forms, Packing Invoices, Undertaking of the Company, Application for Export Approval / Import Authorization, Certificates of Origin, Declaration Form furnished by the Exporter, Air Waybill related to the accused (firm)---Material witnesses had remained consistent on all the relevant facts and no significant contradiction in their statements had come on record---Positive report was received from the Chemical Examiner in response to sixteen sample parcels of heroin sent for chemical analysis---No previous criminal history of the accused was brought on record, hence he was deemed to be the first offender warranting lesser sentence---Conviction of accused was altered from death to imprisonment for life---Appeal against conviction was dismissed, in circumstances.

(b) Criminal trial---

----Benefit of an extenuating circumstance was to be considered while deciding the question of sentence of a convict.

Ghulam Mohy-ud-Din alias Haji Babu and others v. The State 2014 SCMR 1034 ref.

Khawaja Muhammad Ajmal and Naveed Afzal Basraa for Appellant.

Zafar Iqbal Chohan, Special Prosecutor for A.N.F. for the State.

Date of hearing: 7th June, 2021.

JUDGMENT

ANWAARUL HAQ PANNUN, J.---The appellant faced trial in case FIR No.01/2011 dated 16.08.2011, in respect of an offence under section 9(c) of the Control of Narcotic Substances Act, 1997, registered at Police Station A.N.F. Lahore. According to the prosecution's case, upon receiving a spy information that a gang of drug peddlers would try to smuggle huge quantity of heroin, the consignment consisting of 16 iron boxes containing stones booked by the appellant was checked by A.N.F officials at P.I.A. Cargo Area of Allama Iqbal International Airport, Lahore and from that consignment, heroin concealed in stones weighing 46.800 kilograms was recovered.

2. After framing of formal charge against the accused/appellant, to which he pleaded not guilty and claimed trial, the prosecution examined four witnesses to prove charge against the appellant. Ghulam Hussain, HC (PW-1) chalked out the formal FIR in this case, he was also handed over the case property for safe custody in Malkhana and onward transmission of sample parcels of heroin to the office of Chemical Examiner. Asif Iqbal, Constable (PW-2) deposited the sample parcels of heroin in the office of Chemical Examiner. Ahmad Aftab, Constable (PW-3) is the witness of recovery memos. Azhar Hamesh, Inspector (PW-4) is the complainant/ Investigating Officer of this case. The documentary

evidence was produced by the prosecution in the shape of memo of possession of heroin (Ex.PB), memo of possession of consignment documents (Ex.PC), memo of personal search (Ex.PD), memo of possession of car (Ex.PE), memo of possession of motorcycle (Ex.PF), report of Chemical Examiner (Ex.PJ) and site plan (Ex.PH). Statement of the accused under section 342, Cr.P.C. was recorded, wherein he while professing his innocence and false involvement in this case, had refuted all the allegations levelled against him. The accused/appellant neither opted to appear as his own witness under section 340(2), Cr.P.C. nor produced any defence', evidence.

3. On conclusion of trial, the learned Judge Special Court CNS/ Additional Sessions Judge, Lahore, vide his judgment dated 06.04.2015 has convicted the appellant under section 9(c) of CNSA, 1997 and sentenced him to death along with a fine of Rs.5,00,000/- and in default of payment of fine to undergo two years R.I. The titled appeal of the convict (Criminal Appeal No.682 of 2015) and the case submitted by the learned trial court (Capital Sentence Reference No.30-N of 2015) for confirmation or otherwise of the death sentence, are being disposed of through this single judgment.

4. Heard. Record perused.

5. We have noted that on the basis of reliable/trustworthy evidence, available on record, the prosecution has succeeded in proving that the appellant's firm (Noor Haq and Company) was hired for the purpose of export of the consignment in question and all the relevant documents such as, Goods Declaration Forms, Packing Invoices, Undertaking of the Company, Application for Export Approval / Import Authorization, Certificates of Origin, Declaration Form furnished by the Exporter, Air Waybill (P2/1-38) also relate to the said company. Both the material witnesses i.e. PW-3 and PW-4 belonged to Anti-Narcotics Force who remained consistent on all the relevant facts of this case and no significant

contradiction in their statements has come on the record. A positive report (Ex.PJ) was received from the Chemical Examiner in response to sixteen sample parcels of heroin sent for chemical analysis. We find that the learned trial court, after considering all pros and cons of the matter, has delivered a well-reasoned judgment while holding the appellant guilty of the charge and discarding the defence plea being not substantiated through cogent evidence.

6. However, as regards the question of sentence of the appellant, we have been persuaded to reduce his sentence keeping in view the fact that no previous criminal history of the appellant has been brought on the record, hence he is deemed to be the first offender warranting lesser sentence. It is well settled by now that benefit of an extenuating circumstance should be considered while deciding the question of sentence of a convict. Reliance is placed on the dictum reported as Ghulam Mohy-ud-Din alias Haji Babu and others v. The State (2014 SCMR 1034).

7. Therefore, while maintaining the conviction of the appellant (Noor Elahi son of Fateh Muhammad) under section 9(c) of the Control of Narcotic Substances Act, 1997, his sentence is altered from death to Imprisonment for Life with the benefit of section 382-B, Cr.P.C., but the penalty of fine of Rs.500,000/- and the sentence in default thereof awarded to him by the learned trial court are maintained. With the above modification in the quantum of sentence, Criminal Appeal No.682 of 2015 is dismissed.

8. Death sentence of the convict Noor Elahi is not confirmed and Capital Sentence Reference No. 30-N of 2015 is answered in the Negative.

SA/N-19/L **Sentence reduced.**

P L D 2022 Lahore 313

Before Anwaarul Haq Pannun and Abid Hussain Chattha, JJ

AHMAD WAQAS and others---Appellants

Versus

ISHTIAQ ALI and others---Respondents

R.F.A. No. 114 of 2017, heard on 20th September, 2021.

(a) Transfer of Property Act (IV of 1882)---

----S. 53A---Constitution of Pakistan, Arts. 5 & 24---Civil Procedure Code (V of 1908), S. 144---Penal Code (XLV of 1860), S. 441---Respondent's suit for recovery of possession and mesne profit was concurrently decreed---Said suit was preceded by dismissal of appellant's suit for specific performance by High Court in appellate jurisdiction---Appellant contended that they were in possession of the suit property since long on the basis of agreement to sell; that suit of the respondents was hit by the principle of acquiescence; that their appeal with regard to the suit property was pending before the Supreme Court; and that possession of the appellants over the suit property was protected on the basis of equitable doctrine of part performance---Validity---Agreement to sell on the basis of which appellants sought transfer of title over the suit property was not accepted by High Court being invalid and accordingly their suit (for specific performance) was dismissed---Since the said disputed agreement itself remained legally unproved, therefore, appellants were not entitled to claim the benefit under the same document and no protection as envisaged by S.53A of Transfer of Property Act, 1882, could be extended to their possession---If there was no sale, then S.53A of Transfer of Property Act, 1882, would not be helpful---Causing annoyance by retaining possession over a property owned by others

without any lawful excuse would amount to committing a continuous offence---Appellants had no authority or claim to retain possession of property merely on the ground that they had filed an appeal before the Supreme Court wherein no injunctive order had been passed in their favour---Section 144 of Civil Procedure Code, 1908 was the complete answer to the submission/apprehension as to 'irreparable loss' in delivering possession of suit property---Obedience to the Constitution and law is the inviolable obligation of every citizen---Appeal was accordingly dismissed.

Abdul Khaliq v. Muhammad Asghar Khan and 2 others PLD 1996 Lah. 367; Noor Muhammad v. Abdul Ghani 2002 CLC 88 and H. M. Fazil Zaheer v. Kh. Abdul Hameed and others 1983 SCMR 906 rel.

(b) Transfer of Property Act (IV of 1882)---

----S. 53A-Part performance---Possession---Section 53A of the Transfer of Property Act, 1882, will come into play for protection of the buyer only when the buyer had performed his commitments substantially and was willing to perform the remaining part of his promise, if any---No other way existed in which the buyer could be considered to have committed breach or there was indication of the buyer breaching his promises required to be met as per contract---Benefit of the part performance doctrine was not available to a person who sought to acquire a valid title to the property dealt with under a transaction which remained inchoate.

Muhammad Yousaf v. Munawar Hussain and 5 others 2000 SCMR 204 rel.

(c) Constitution of Pakistan---

----Art. 24---Protection of property---Remedies against violation---Scope---No person should be deprived of his property save in accordance with law---Creating hindrances in the way of owner of the property debarring him from enjoying the benefits with regard to possession/use of the property amounts to clear breach of Art. 24 of the Constitution---Owner of property had right not only to recover possession of the property through Civil Court but also to seek the offender punished for committing such continuous offence by setting the machinery of criminal law into motion.

Watan Party and another v. Federation of Pakistan and others PLD 2011 SC 997 rel.

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

----S. 441---"Annoyance"---Connotation---Word "annoyance" means "nuisance" and has been defined as "a condition that interferes with the use or enjoyment of property, especially a non-transitory condition or persistent activity that either injures the physical condition of adjacent land or interferes with its use or with the enjoyment of easements on the land or of public highways".

Black's Law Dictionary, 9th Edition rel.

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

----Ss. 268 & 441---"Nuisance" and "trespass"---Distinguished---General distinction between a nuisance and a trespass is that the trespass flows from a physical invasion and the nuisance does not.

(f) Constitution of Pakistan---

----Arts. 186 & 188---Injunction/restraint order to be express---Mere filing of appeal/revision would not operate as stay order---

Prohibition/restraint could not be implied but must be clearly expressed/communicated.

Messrs Agro Dairies (Pvt.) Limited through Director and 2 others v. Messrs Agricultural Development Bank of Pakistan through Branch Manager and 3 others 2004 CLD 232 rel.

Muhammad Naveed Farhan for Appellants.

Muhammad Farooq Warind and Dr. Malik M. Hafeez for Respondents.

Muhammad Javed Khan, Civil Judge 1st Class/Research Officer, Lahore High Court, Legal Assistance.

Date of hearing: 20th September, 2021.

JUDGMENT

ANWAARUL HAQ PANNUN, J.---Through this Regular First Appeal, the judgment and decree dated 28.07.2017 passed by the learned Civil Judge 1st Class, Khanpur decreeing the suit for recovery of possession along with mesne profits filed by the respondents/ plaintiffs against the appellants/defendants has been assailed. It is pertinent to mention here that the appeal filed by the appellants before the learned appellate court below was returned because of lack of pecuniary jurisdiction.

2. The facts of this case in brief are that the respondents filed a suit for recovery of possession along with mesne profits with the averments that they handed over possession of their property (suit property) to one Muhammad Afzal on lease, but one Farooq Ahmad, the predecessor-in-interest of the appellants, in collusion with the said lessee after taking over the possession of the suit property, not only managed to forge an agreement to sell dated 08.05.1986 but also instituted a suit for specific performance against the respondents, which was decreed by the learned

trial court on 15.12.1996; the respondents filed an appeal against the said judgment and decree, which was dismissed by the learned lower appellate court on 19.02.2004; they filed second appeal before this Court, which was accepted on 04.06.2015 resulting in dismissal of the suit for specific performance of agreement to sell filed by the predecessor-in-interest of the appellants, whereupon the suit for recovery of possession was filed by the respondents that since possession of the appellants over the suit property is illegal after dismissal of their suit for specific performance on the basis of a forged/fictitious agreement to sell, therefore, they be put into possession of the property. The appellants contested the suit by filing their written statement mainly on the ground that they are in possession of the suit property since 1986 on the basis of agreement to sell and suit of the respondents is hit by the principle of law of acquiescence; further that their appeal with regard to the suit property is pending before the Hon'ble Supreme Court of Pakistan. On the basis of divergent pleadings of the parties, requisite issues were framed and evidence was recorded by the learned trial court. Consequently, as stated earlier, the suit of the respondents was decreed by the learned trial court. Hence, this appeal. It is worth mentioning here that allegedly a civil appeal has been filed by the appellants before the Hon'ble Supreme Court of Pakistan against the judgment dated 04.06.2015 passed by this Court, as mentioned above, in R.S.A. No.02 of 2004 relating to the suit for specific performance of agreement.

3. Arguments heard. Record perused.

4. The only ground on which the judgment and decree of the learned court below is sought to be set aside is that possession of the appellants over the suit property is protected on the basis of equitable doctrine of part performance i.e. existence of agreement to sell the property and the

transferees were put in possession of the property in part performance of the agreement, as embodied in section 53-A of the Transfer of Property Act, 1882 (hereinafter referred to be "the Act, 1882). We are afraid, the essence of handing over the possession as contemplated in section 53-A of the Act, 1882 lies not merely in handing over possession but lies in the intention of the transferor to transfer the ownership rights of the property for consideration in favour of the transferee. Section 53-A of the Act, 1882 is to protect interest of a buyer of the property who has satisfied his commitments and is also willing to honour his commitments, and in that eventuality the transferor cannot go against him and take back possession or cancel the sale. In case the buyer has made defaults or from his conduct it appears that he will not fulfill his promises which are required to complete the sale then the buyer may not get protection of section 53-A of the Act, 1882 and the seller can cancel the sale and repossess the property. In other words, it can be said that section 53-A of the Act, 1882 will come into play for protection of the buyer only when the buyer has performed his commitments substantially and is willing to perform the remaining part of his promise, if any, and there is no other way in which the buyer can be considered to have committed breach or there is indication of the buyer breaching his promises when required to be met as per contract. If there is no sale, then Section 53-A of the Act, 1882 will not be helpful. The benefit of the doctrine of part performance is not available to a person who seeks to acquire a valid title to the property dealt with under a transaction which remains inchoate. Reliance is placed on the dictum reported as Muhammad Yousaf v. Munawar Hussain and 5 others (2000 SCMR 204). In the instant case, the agreement to sell on the basis of which the appellants seek transfer of title over the suit property was not accepted by this Court being invalid and accordingly their suit was dismissed vide judgment dated 04.06.2015, meaning thereby payment

of sale consideration and delivery of possession under the agreement to sell has not been proved and even the disputed agreement to sell itself remained legally unproved, therefore, under the law, the appellants certainly are not entitled to claim the benefit under the said document and no protection as envisaged by Section 53-A of the Act, 1882 can be extended to their possession. In this context, reference is made to the judgments reported as Abdul Khaliq v. Muhammad Asghar Khan and 02 others (PLD 1996 Lahore 367) and Noor Muhammad v. Abdul Ghani (2002 CLC 88). Moreover, Article 24(1) of the Constitution of Islamic Republic of Pakistan, 1973, envisages that no person shall be deprived of his property save in accordance with law. Needless to observe that creating hindrances in the way of owner of the property debarring him from enjoying the benefits with regard to possession/use of the property amounts to clear breach of Article 24 of the Constitution of Islamic Republic of Pakistan, 1973. Reliance is placed on the judgment reported as Watan Party and another v. Federation of Pakistan and others (PLD 2011 SC 997).

5. It may be appropriate to observe that to safeguard the very precious rights conferred upon a citizen under the above referred Article, remedies are available to owner of the property on civil as well as criminal side and he has the right to recover possession of the property by having a resort not only to the Civil Court but can also seek the offender punished for committing this continuous offence by setting the machinery of law into motion on criminal side. It may not be out of context to refer the provisions of section 441 of Pakistan Penal Code, 1860, which read as under:--

"Criminal trespass. Whoever enters into or upon property in the possession of another with intent to commit an offence or to

intimidate, insult or annoy any person in possession of such property, or, having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit "criminal trespass".

It may be observed that causing annoyance by retaining possession over a property owned by others without any lawful excuse, amounts to committing a continuous offence. The word "annoyance" according to the Black's Law Dictionary, Ninth Edition, is meant for "nuisance" and has been defined as "A condition that interferes with the use or enjoyment of property, especially a non-transitory condition or persistent activity that either injures the physical condition of adjacent land or interferes with its use or with the enjoyment of easements on the land or of public highways". It has further been defined that the general distinction between a nuisance and a trespass is that the trespass flows from a physical invasion and the nuisance does not.

6. Since in the instant case, the alleged agreement to sell on the basis of which the appellants claim that they had been handed over possession of the property as part performance has since been found to be not enforceable for the reasons recorded in the judgment of this Court, therefore, in sum and substance the appellants have no authority or claim to retain possession of the property merely on the ground that they have filed an appeal before the Hon'ble Supreme Court of Pakistan wherein no injunctive order has been passed in their favour. Moreover, the reservation expressed by the learned counsel for the appellants that in case by way of execution of the judgment under challenge, possession of the suit property is delivered to the respondents and the Hon'ble Supreme Court of Pakistan decides the matter in favour of the appellants, they shall

suffer irreparable loss. Suffice it to say that there exists no occasion for any harm or loss to the appellants in case the decree under execution is reversed or the suit for specific performance filed by the appellants regarding which the appeal has been filed by the appellants is decreed, as in order to cater both the eventualities the law has provided a remedy in the shape of Section 144 of the Code of Civil Procedure, 1908, which is the complete answer to the above submission and apprehension made by the learned counsel, and reads as under:--

> "Application for restitution.--- (1) Where and in so far as a decree is varied or reversed the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.
>
> (2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under subsection (1)."

Moreover, a successful vendee can be put into possession of the suit property after passing of the decree for possession through specific performance of a contract.

7. The appellants at the moment have no right whatsoever to retain their possession over the disputed property as required by Article 5(2) of the Constitution of Islamic Republic of Pakistan, 1973, which ordains that obedience to the Constitution and law is the inviolable obligation of every

citizen wherever he may be and of every other person for the time being within Pakistan. Moreover, admittedly no injunctive order has been issued by the Hon'ble Supreme Court of Pakistan in the appeal filed against the judgment of this Court dated 04.06.2015. In the dictum reported as H. M. Fazil Zaheer v. Kh. Abdul Hameed and others (1983 SCMR 906), the Hon'ble Supreme Court of Pakistan has held that mere filing of appeal or revision does not operate as stay order and prohibition or restraint cannot be implied but must be clearly expressed and communicated. In the judgment reported as Messrs Agro Dairies (Pvt.) Limited through Director and 2 others v. Messrs Agricultural Development Bank of Pakistan through Branch Manager and 03 others (2004 CLD 232) it has been observed that mere filing or pendency of petition/appeal before the Hon'ble Supreme Court does not operate as a stay or restraint order.

8. In view of all above, no case for interference by this Court in this appeal is made out and the same is accordingly dismissed.

ZH/A-118/L **Appeal dismissed.**

P L D 2022 Lahore 437

Before Anwaarul Haq Pannun, J

MUHAMMAD ARSHAD and another---Appellants

Versus

The STATE and another---Respondents

Criminal Appeal No. 132466 of 2018, decided on 29th June, 2021.

(a) High Court (Lahore) Rules and Orders---

----Volume V (Revised Edition 2010), Chapter-3, Part-B, R. 2(1)(ii)(b)---Criminal Procedure Code (V of 1898), Ss. 417, 422 & 426---Division Bench---Jurisdiction---Principle---Suspension of sentence---Pendency of appeal against acquittal---Except where it has been provided either by law or by rules or by a special order, it is an exclusive prerogative of Chief Justice that all cases have to be heard and disposed of by a Judge sitting alone/Single Bench----Word 'a case' includes a motion application, petition, reference, suit, appeal, revision or other proceedings to be heard and disposed of by High Court under any law in exercise of its extra ordinary, original or appellate jurisdiction---Unless Division Bench of High Court passes an order in terms of S.422, Cr.P.C. read with R. 2 of Chapter 3 of Part-B of Volume V of High Court (Lahore) Rules and Orders, by issuing notice to acquitted accused, mere filing of appeal against acquittal has no bearing upon maintainability of such appeal or application seeking suspension of sentence, before Single Bench of High Court.

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

----S. 426 (1-A) (c)---Penal Code (XLV of 1860), Ss. 302 (b) & 324---Qatl-i-amd, attempt to Qatl-e-amd---Suspension of sentence---Statutory delay---Applicability---Accused persons were convicted by Trial Court and sentenced to imprisonment for life, who sought suspension of their sentences on statutory delay in conclusion of appeal---Validity---Accused

persons had been behind the bars since date of their arrests i.e. 14.4.2012 and they were awarded sentence vide judgment dated 22.12.2017---Accused persons had undergone 8 years of sentence and disposal of appeal was not within sight in near future---Liberty of a person was precious right and the same was also safeguarded/guaranteed under the Constitution---Ground of statutory delay was available to accused persons as provided under S.426(1-A)(c), Cr.P.C.---High Court suspended sentences of accused persons on the ground if after suffering incarceration in jail the accused persons were ultimately acquitted, there would be no compensation for their incarceration---Sentence was suspended, in circumstances.

Muhammad Zubair Khalid Chaudhry for the applicants assisted by Muhammad Imran Chaudhry and Muhammad Arfan Chaudhry for Appellants.

Ch. Muhammad Mustafa, Deputy Prosecutor General for the State.

Sohail Iqbal and Ch. Munir Ahmad for the Complainant.

ORDER

Crl. Misc.No.01/2020

Crl. Misc. No.01/2021

ANWAARUL HAQ PANNUN, J.---Allegedly being involved in case FIR No.15/2013 dated 20.01.2013, offence under sections 302, 324, 337-F(iii), 148, 149, P.P.C. and section 7 of Anti-Terrorism Act, 1997 (subsequently deleted), registered at Police Station Hadyara, Lahore, with the allegation of committing qatl-i-amd of Salman Akbar, Farhan Akbar and Muhammad Ashraf besides launching murderous assault/ causing injuries on the person of Afyan Ashraf by making firing with their respective weapons i.e. Kalashnikovs, the appellants/applicants along with their co-accused namely Manzoor Hussain and Rafaqat Ali (since acquitted) were tried by the learned Additional Sessions Judge, Lahore

and vide judgment dated 22.12.2017, they have been convicted and sentenced as under:-

i) Under section 302(b) read with section 149, P.P.C. sentenced to imprisonment for life on three counts each as Tazir with compensation of Rs.1,00,000/- each as envisaged under section 544-A, Cr.P.C. payable to the legal heirs of the three deceased persons and in default whereof to further undergo six months S.I. each.

ii) Under section 148, P.P.C. sentenced to three yeas R.I. each along with fine of Rs.10,000/- each and in default whereof to further undergo three months S.I. each.

iii) Under section 324, P.P.C. sentenced to seven years R.I. each along with fine of Rs.50,000/- each and in default whereof to further undergo three months S.I. each.

All the aforesaid sentences were ordered to run concurrently. Benefit of section 382-B, Cr.P.C. was also extended to them.

2. Muhammad Arshad and Nauman Arshad, the applicants, through these criminal miscellaneous applications filed under section 426, Cr.P.C, have sought their release on bail by way of suspension of their sentences, pending disposal of their appeal on the ground that despite the lapse of statutory period of two years as contained in section 426(1-A)(c) Cr.P.C, their appeal could not have been decided, particularly, when such delay in deciding their appeal had not occasioned, either due to any act or omission of the applicants or any other person acting on their behalf and nothing is available on the record to suggest that they are previously convicts for an offence punishable with death or imprisonment for life or hardened desperate or dangerous criminals or they are accused of an act of terrorism punishable with death or imprisonment for life.

3. It has been contended by the learned counsel for the complainant that as the two co-accused of the applicants namely Manzoor Hussain and

Rafaqat Ali were acquitted by the learned trial court through the impugned judgment, the complainant has filed Criminal Appeal No.155081/2018 under section 417(2-A), Cr.P.C. against their acquittal arisen out of the same/common facts/record, which is to be heard by a learned Division Bench, as provided under Chapter-3, Part-B of the Lahore High Court Rules and Orders (Volume V) (Revised Edition 2010), therefore, the instant applications as well as the appeals against conviction are not maintainable before a Single Bench, as such the matter may be ordered to be placed before the learned Division Bench. On merits, the learned counsel for the complainant has submitted that during the course of occurrence as many as three persons were murdered by the applicants in a reckless manner, therefore, they being hardened, desperate and dangerous criminals are also not entitled to the relief prayed for.

4. Arguments advanced pro and contra, have been heard. Record perused.

5. First of all, I would like to decide the above noted preliminary objection, raised by the learned counsel for the complainant qua maintainability of the instant applications before Single Bench. The applicants had filed the appeal against their conviction and sentence on 09.01.2018. It has been noticed with concern that the aforementioned appeal against acquittal under Section 417 (2-A) Cr.P.C was filed by the complainant on 19.01.2018 and despite the lapse of more than three years, till date the same has not been fixed for hearing before the Court. The question in the facts of this case, requiring its determination is as to whether mere filing of an appeal against acquittal of a co-accused under section 417(2-A), Cr.P.C. will be a stumbling bar before the Single Bench in hearing the appeal against conviction and sentence up to the imprisonment for life and the application moved therein, seeking suspension of sentence, in view of Chapter-3, Part-B of the Lahore High Court Rules and Orders (Volume V) (Revised Edition 2010). For ready

reference, it will be appropriate to reproduce the relevant portion of Chapter-3, Part-B of the Lahore High Court Rules and Orders, as under:--

"PART-B JURISDICTION OF A SINGLE JUDGE AND OF BENCHES OF THE COURT

1. Save as provided by law or by these rules or by a special order of the Chief Justice, all cases shall be heard and disposed of by a Judge sitting alone.

Explanation.- A case includes a motion application, petition, reference, suit, appeal, revision or other proceedings to be heard and disposed of by the High Court under any law in the exercise of its ordinary, extra-ordinary, original or appellate jurisdiction.

2. (1) Save as provided by these rules, the following cases shall be heard and disposed of by a Division Bench:-

(i) (a) A regular first appeal from the decree of a subordinate court, jurisdictional value of which exceeds that of the District Court prescribed by the Civil Courts Ordinance, 1962 (No.II of 1962), and any cross-objection to decree.

(b) An appeal under the Land Acquisition Act if the jurisdictional value involved in the appeal exceeds the one indicated in sub-clause (a) above.

(ii) (a) An appeal or reference in a case in which a sentence of death has been passed.

(b) A case in which a notice has been issued to person sentenced to imprisonment or imprisonment for life requiring him to show cause as to why the sentence should not be altered to death.

(c) An appeal by -

(i) the Provincial Government under section 417(1) of the Code of Criminal Procedure, or

(ii) the complainant under section 417(2) of the Code after grant of leave by a Singe Judge, or

(iii) an aggrieved person under section 417(2-A) of the Code,

from an order of acquittal of a charge punishable with death or imprisonment for life.

(2) A Single Judge while sitting in the long vacation or winter holidays, or when he is the only Judge available at a Bench, may exercise the original and appellate jurisdiction vested in the Court-

(i) in any criminal matter other than one mentioned in clause (ii) of sub-rule (1);

(ii) in any urgent matter connected with, relating to or arising out of, the execution of a decree; and

(iii) in any miscellaneous matter which in his opinion requires immediate attention."

Upon bare reading of above reproduced Rule, it becomes quite clear that except where it has been provided either by law or by these Rules or by a special order, being exclusive prerogative of the Hon'ble Chief Justice, all the cases shall be heard and disposed of by a Judge sitting alone/Single Bench. The word "a case" (as per explanation) includes a motion application, petition, reference, suit, appeal, revision or other proceedings to be heard and disposed of by the High Court under any law in the exercise of its ordinary, extra-ordinary, original or appellate jurisdiction. Rule 2 further provides that except as provided by these rules, following cases will be heard by a Division Bench:-

(i) Under Rule 2 (1)(i) sub-clauses (a) and (b), a regular first appeal from the decree of a subordinate court exceeding the pecuniary jurisdictional value of District Court prescribed by the Civil Courts Ordinance, 1962 (No.II of 1962) and any cross-objection to the decree and an appeal under the Land Acquisition Act if the

jurisdictional value involved in the appeal exceeds the one indicated in sub-clause (a);

(ii) Under Rule 2(1)(ii)(a) an appeal or reference in a case in which a sentence of death has been passed;

(iii) Under Rule 2(1)(ii)(b) a case in which a notice has been issued to person sentenced to imprisonment or imprisonment for life requiring him to show cause as to why the sentence should not be altered to death;

(iv) Under Rule 2(1)(ii)(c) (i, ii, iii), an appeal by the Provincial Government under section 417(1) of the Code of Criminal Procedure or by the complainant under section 417(2) of the Code after grant of leave by a Single Judge or by an aggrieved person under section 417(2-A) of the Code, from an order of acquittal of a charge punishable with death or imprisonment for life.

In addition to the above, it has further been provided in sub-rule (2) of Rule 2 that (i) in any criminal matter other than one mentioned in clause (ii) of sub-rule (1), (ii) in any urgent matter connected with or relating to or arising out of the execution of a decree and (iii) in any miscellaneous matter which in his opinion requires immediate attention, a Single Judge while sitting in the long vacation or winter holidays or when he is the only Judge available at a Bench may exercise the original and appellate jurisdiction vested in the Court. From the above it is quite obvious that Rule 2(1)(ii)(b) does not place any bar in hearing the matters by a Single Judge during the pendency of other connected matters till the notice in appeal against acquittal has been issued.

6. The mandate of the above discussed Rule 2(1)(ii)(b) of the Lahore High Court Rules and Orders appears to be quite in line with the provisions of Section 422 of the Code of Criminal Procedure, 1898, the verbatim of which is reproduced below for proper comprehension:-

"If the Appellate Court does not dismiss the appeal summarily, it shall cause notice to be given to the appellant or his pleader, and to such officer as the Provincial Government may appoint in this behalf, of the time and place at which such appeal will be heard, and shall, on the application of such officer, furnish him with a copy of the grounds of appeal;

and, in cases of appeals under section 411-A, subsection (2) of section 417, the Appellate Court shall cause a like notice to be given to the accused."

Perusal of the above provision unequivocally indicates that if an appeal is not dismissed by an appellate court summarily, it shall cause notice to be given to the appellant or his pleader and to such officer as the Provincial Government may appoint in this behalf, of the time and place at which such appeal will be heard and shall on the application of such officer furnish him with a copy of the grounds of appeal. And in cases of appeal under Section 411-A, subsection (2) of section 417 the Appellate Court shall cause a like notice to be given to the accused. The word "shall" used in section 422, Cr.P.C. makes the issuance of notice to the accused mandatory, so that the accused be given a fair opportunity of hearing to defend himself, as this provision is based upon the principle of "audi alteram partem" and has duly been enshrined in the form of Article 10A of the Constitution of Islamic Republic of Pakistan, 1973. This principle is fully applicable in appeal being continuation of trial. I am of the considered view that unless the learned Division Bench passes an order in terms of section 422 ibid. read with the above rule by issuing notice to the acquitted accused, mere filing of an appeal against acquittal has no bearing upon maintainability of any such appeal or application seeking suspension of sentence, before the Single Bench, for the reason that in case a convict makes out a case for suspension of his sentence either on merits or on statutory ground and he is accordingly released on bail by way of suspension of his sentence pending his appeal, it will cause no

prejudice either to the complainant or the State as in case of dismissal of his appeal and upholding of judgment of his conviction, the period during which the convict remained on bail, in view of the provisions of section 426(3) of the Code of Criminal Procedure, 1898, which reads that "When the appellant is ultimately sentenced to imprisonment, or imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentenced", shall be excluded from his total period of imprisonment. But, on the other hand, if the convict is ultimately acquitted of the charge there can be no compensation for the period for which he remained in jail because of non-hearing of his appeal or application for suspension of sentence. Even under Article 4 of the Islamic Republic of Pakistan, 1973 it has in clear terms been declared that it is the inalienable right of every citizen for the time being within Pakistan, wherever he may be, to enjoy the protection of law and to be treated in accordance with law. Article 9 of the Constitution also commands that no person shall be deprived of life or liberty save in accordance with law or the Constitution of Islamic Republic of Pakistan, 1973. Therefore, it appears to be more appropriate and in the interest of justice to decide the instant applications for suspension of sentence pending appeal against acquittal of co-accused of the applicants. Accordingly, the objection raised by the learned counsel for the complainant is repelled.

7. As far as the instant applications for suspension of sentences of the applicants are concerned, there is no denial to this fact that the applicants are incessantly behind the bars since the date of their arrest i.e. 14.04.2013 and they were awarded aforesaid sentences vide judgment dated 22.12.2017; they have undergone the sentence of more than 08 years and the disposal of their appeal is not within sight in the near future, hence I am constrained to observe that liberty of a person being precious right, which is also safeguarded/guaranteed under the Constitution of the Islamic Republic of Pakistan, 1973. Thus, in view of amendment made in

the Code of Criminal Procedure (Amendment) Act, 2011, dated 18th April 2011, the ground of statutory delay is available to the applicants. Moreover, allegedly the occurrence in this case is repercussion of a personal enmity between the parties and there is nothing on the record to suggest that the applicants are hardened, desperate or dangerous criminals or they are previously convicted offenders for an offence punishable with death or imprisonment for life or are accused of an act of terrorism punishable with death or imprisonment for life, hence, keeping in view the above facts, since the applicants have earned the statutory right for suspension of their sentences and grant of bail as provided under section 426(1-A)(c), Cr.P.C, therefore, I am of the considered view that if after suffering the incarceration in jail, the applicants are ultimately acquitted, there will be no compensation for their incarceration. Hence, while accepting the instant applications, the above mentioned sentences of the applicants are ordered to be suspended till the final decision of the titled appeal. The applicants are directed to be released on bail subject to their furnishing of bail bonds in the sum of Rs.100,000/- (Rupees one hundred thousand only) each with two sureties each in the like amount to the satisfaction of the Deputy Registrar (Judicial) of this Court. The applicants shall ceaselessly appear before this Court till the final decision of the main criminal appeal.

8. Before parting with this order, in the light of discussion made hereinabove and at the costs of a little repetition, it is observed that since an appeal against the judgment of acquittal under section 417, Cr.P.C falling within the purview of Rule 2(1)(ii) of Chapter-3, Part-B of the Lahore High Court Rules and Orders (Volume V), has to be heard by a Division Bench, whereas an appeal against conviction not involving the death sentence, having arisen out of the one and the same judgment, is to be heard by a Single Bench under Rule 1 of the abovementioned Chapter and despite the difference in the principles applicable to interfere with the judgment of acquittal and that of against conviction, there remains a

likelihood of conflict of opinion on the same record, which may cause prejudice to the case of either side, in case the appeal against conviction is decided prior to the decision of appeal against acquittal, therefore, to rule out such possibility I feel it to be equitable for this Court to issue a direction to the Additional Registrar (Judicial) of this Court for fixation of appeals falling within the purview of Rule 2(1)(ii)(b) ibid. before final hearing of such appeals against conviction.

MH/M-156/L **Bail allowed.**

2022 P Cr. L J 1793

[Lahore (Multan Bench)]

Before Anwaarul Haq Pannun, J

RIAZ HUSSAIN---Petitioner

Versus

The STATE and others---Respondents

Criminal Miscellaneous No. 1229-M of 2011, decided on 27th October, 2020.

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

----S. 404---Right of appeal---Scope---Appeal is a statutory right of aggrieved individual or authority---Such right cannot be exercised on any analogy unless expressly conferred upon under some law.

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

----Ss. 382-A, 426 & Chapt. XXVIII---Appeal, filing of---Procedure---Convict either can file appeal against his conviction and sentence being on bail under S. 382-A, Cr.P.C or he can seek his release on bail under S. 426, Cr.P.C. during pendency of his appeal, while under custody---Unless convict is either on bail by way of postponement of his sentence in terms of S. 382-A, Cr.P.C. or he is confined in terms of the provisions of Chapt. XXVIII, Cr.P.C. (of execution), no appeal against judgment of conviction can be entertained.

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

----S. 337-Y(1a)---Criminal Procedure Code (V of 1898), Ss. 382-A, 417(2)(A) & 561-A---Diyat, Arsh and Daman Fund Rules, 2007, R. 11---Daman, return of---Executed sentence---Accused after conviction by Trial Court deposited amount of Daman and filed appeal---Lower Appellate

Court allowed appeal and acquitted the accused---Applicant was injured witness who was aggrieved of direction issued by Trial Court to return amount of Daman received by him---Validity---In absence of any express provision of law, it was not lawful for a Court to allow convict to deposit such amount of "Diyat, Arsh and Daman" under protest for his release except as required under S. 337-Y(1a), P.P.C.---Any departure from such procedure amounted to act without lawful authority not liable to sustain in law---Accused upon pronouncement of conviction and awarding punishment of "Daman" by Trial Court immediately deposited the amount and secured his release---Punishment of accused was not postponed in the manners contemplated by S. 382-A, Cr.P.C, rather it stood executed---Appeal filed by accused was incompetent and Lower Appellate Court had failed to examine such aspect of maintainability of appeal, as the Court was bound to examine question of maintainability before passing any order thereon---Order of acquittal was of no consequences as the same was illegal, without jurisdiction and could not sustain in the eye of law---High Court set aside order directing applicant to reimburse amount of "Daman" as such order was illegal---Application was allowed accordingly.

Abid Hussain and another v. Chairman, Pakistan Bait-ul-Mal and others PLD 2002 Lah. 482; Government of Punjab, Lahore v. Abid Hussain and others PLD 2007 SC 315; Mst. Ubaida v. Makhdoom Abrar Ahmad and 2 others 1986 PCr.LJ 539; Sakhawat Ali v. The State 1999 PCr.LJ 450; Faiz Muhammad v. A. Rauf and others 1999 PCr.LJ 864; The State v. Muhammad Umar alias Chotoo 2003 PCr.LJ 216; Attaullah v. Abdur Razaq and another PLD 2002 SC 534; Muhammad Adnan alias Dana v. The State and others 2015 SCMR 1570 and Dr. Waqar Hussain v. The State 2000 SCMR 735 rel.

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

----S. 561-A---Inherent jurisdiction of High Court---Object, purpose and scope---Inherent powers under S. 561-A, Cr.P.C, enable High Court to make an order which is deemed appropriate for giving effect to any order passed under Criminal Procedure Code, 1898, or prevent abuse of process of any Court or otherwise to secure ends of justice.

Muhammad Usman Sharif Khosa and Dr. Malik M. Hafeez for the Petitioner.

Muhammad Abdul Wadood, Additional Prosecutor General for the State.

Muhammad Javed Khan and Fakhar Bashir Sial, Research Officers of Lahore High Court.

ORDER

ANWAARUL HAQ PANNUN, J.---By means of instant application under section 561-A, Cr.P.C. the petitioner has questioned the vires of order dated 24.11.2011 passed by respondent No.3/ Additional Sessions Judge, D.G Khan, dismissing a criminal revision petition filed by him against the order dated 17.10.2011 passed by respondent No.2/Magistrate Section-30, D.G. Khan, whereby he ordered the petitioner to pay back/return the amount of Daman Rs.90,000/-, deposited by the convict and received by him being an injured witness in pursuance of the judgment dated 29.06.2011.

2. The shorn of unnecessary factual details of the matter, suffice it to state that on 11.07.2003 at about 2.30/3.00 p.m., while armed with deadly weapons, respondent No.5 along with his co-accused, in furtherance of their common intention, caused injuries on the bodies of Ghulam Haider,

Faiz Muhammad PWs, consequently, on the complaint of the petitioner, a criminal case vide FIR No.106, dated 11.07.2003, offence under sections 324, 342, 427, 337-A(v), 337-A(i), 337-F(iii), 337-F(i), 34, P.P.C., was registered at Police Station Kot Mubarik, District Dera Ghazi Khan against the culprits. The investigation was encapsulated into a report under section 173 of the Code of Criminal Procedure, 1898. On the conclusion of a thorough trial, respondent No.5 along with his co-accused Manzoor and Shamla were convicted and sentenced vide its judgment dated 29.06.2011, passed by learned trial Court as under:-

"Accused Manzoor

(Under section 337-L(1), P.P.C.)

Rigorous Imprisonment for two years and is liable to pay Daman Rs.50,000/- to legal heirs of Ghulam Haider deceased injured and in case of non-payment of Daman, he shall further undergo simple imprisonment till the payment of Daman.

(Under section 337-A(i), P.P.C.)

To pay Daman Rs.30,000/- to legal heirs of Ghulam Haider injured and in default thereof to further undergo simple imprisonment till the payment of Daman.

(Under section 337-L(2), P.P.C.)

To pay Daman Rs.20,000/- to legal heirs of injured Ghulam Haider and in case of non-payment of Daman, he shall further undergo simple imprisonment till the payment of Daman.

Accused Shamla

(Under section 337-A(i), P.P.C.)

To pay daman Rs.30,000/- to injured Riaz Ahmad and in default, he shall undergo for simple imprisonment till the payment of Daman.

Accused Yasin

(Under sections 337-A(i), 337-L(2) and 337-F(v), P.P.C.)

To pay daman total Rs.90,000/- to injured Riaz Ahmad and in default, he shall undergo for simple imprisonment till the payment of Daman.

All the Daman shall be paid in lump sum. The convict Manzoor was given benefit of section 382-B, Cr.P.C, if any."

It will be important to note that on pronouncement of judgment, respondent No.5 Ghulam Yasin and his co-convict Shamla after depositing the amount of Daman Rs.90,000/- and Rs.30,000/-, respectively, with the learned trial Court vide challan No.200 dated 29.6.2011, secured their release. The amount of Daman, after it was ordered to be released by the Trial Court, was received by the petitioner, on 05.07.2011. Respondent No.5 and his other co-convict Manzoor Hussain challenged the aforesaid judgment of their conviction by filing an appeal under section 408, Cr.P.C on 02.07.2011 before the learned lower Appellate Court. Shamla, the co-convict, however did not prefer appeal against his conviction and sentence. While extending the benefit of doubt, the learned Addl. Sessions Judge, D.G Khan, seized of the matter, proceeded to acquit respondent No.5 and his co-appellant of the charge, vide its judgment dated 23.08.2011. Thereafter, respondent No.5, after his acquittal, moved a miscellaneous application before the learned trial Court with the prayer that "the Daman amount, he deposited in pursuance of the judgment of his conviction and sentence, which since has been released to the petitioner by the court, may be ordered to be returned to him. The learned Illaqa Magistrate, D.G Khan, ordered the petitioner to

reimburse the amount of Daman, vide its order dated 17.10.2011, which, in its verbatim is reproduced as under:-

After submitting bail bonds in terms of above order, the petitioner was released from custody. Thenceforth, he challenged the aforesaid order by filing a criminal revision petition, which was dismissed vide judgment dated 24.11.2011 by the learned Addl. Sessions Judge, D.G Khan. Hence this criminal miscellaneous petition.

3. Arguments heard. Record perused.

4. At the very outset, it may be observed that the Criminal Courts are established for dispensation of justice, under the law. Likewise the Special Courts or the Tribunals are also established in order to try certain offences under the provisions of their respective statutes. The proceedings before courts are regulated by the statutory provisions. Broadly speaking the trial can be divided into two kinds (1) Summary trial (2) regular trial. For holding both kinds of trial, different procedures have been provided by law. Regular trial can be held under the law by more than one class of Court i.e. Court of Session and that of Magistrate. Holding a person, accused of an offence, [under general, local or special law], guilty of the charge for committing an offence either on pleading or making of confession of his guilt or on the conclusion of a thorough trial by a Court is known as conviction in the legal parlance. Concomitantly, the conviction is followed by imposition/awarding of the punishment

prescribed under the relevant law for such offence or offences by a trial Court. It may be relevant to point out that while enacting "The Punjab Sentencing Act, 2019 (XXXIV of 2019)", the Provincial Legislature has enumerated various factors, which may be considered to improve consistency while sentencing by the courts. According to section 53, P.P.C., an offender, upon having been found guilty of the charge may be imposed upon any one or more, out of the following punishments i.e. Qisas, Diyat, Arsh, Daman, Death either as Qisas or Ta'zir, Imprisonment for life, (Imprisonment is of two descriptions, namely:-- (i) Rigorous, i.e., with hard labour (ii) Simple), Forfeiture of property and Fine by a court of competent jurisdiction. Under the Hudood Laws, the punishment of whipping and flogging was also permissible. Furthermore, Chapter XVI, P.P.C., deals with the offences affecting human body, section 299(b), P.P.C. provides that "arsh" means the compensation specified in that Chapter to be paid to the victim or his heirs. Similarly under clause (d) of the ibid Section, "Daman" has been defined as the compensation determined by the Court to be paid by the offender to the victim for causing hurt not liable to arsh. Likewise under clause (e) of the same provision, definition of "Diyat" has also been given, as the compensation specified in section 323 [value of Diyat] payable to the legal heirs of the victim. It may also be beneficial to state that the term "Ta'zir" under clause (i) has been defined as a punishment other than Qisas, Diyat, Arsh or Daman.

5. In the above noted background, the reading of the provisions of sections 337-Y, P.P.C., 382-A, 404, 412 and 426, Cr.P.C in their befitting chronology seems to be necessary. For ready reference section 337-Y, P.P.C. is reproduced as under:-

Value of daman. (1) The value of daman may be determined by the Court keeping in view:

(a) the expenses incurred on the treatment of the victim;

(b) loss or disability caused in the functioning or power of any organ; and

(c) the compensation for the anguish suffered by the victim.

[(1a) The daman may be made payable in lump sum or in installments spread over a period of five years from the date of the final judgment;]

[(2) Where a convict fails to pay daman or any part thereof within the period specified in subsection (1a), the convict may be kept in jail and dealt with in the same manner as if sentenced to simple imprisonment until daman is paid in full or may be released on bail if he furnishes security or surety equivalent to the amount of daman to the satisfaction of the court or may be released on parole as may be prescribed in the rules.]

Subsection (1) of the above narrated Provision points out the factors which may be considered while determining the value of daman. Perusal of subsection (1a) of the above provision further indicates that the daman can either be paid in lump sum or in installments, spread over a period of five years from the date of final judgment by a convict. The term decision or judgment appears to be interchangeable because of their implication and effect. The Black's Law Dictionary 9th edition defines the term final judgment as under:-

"A court's last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs (and, sometimes, attorney's fees) and enforcement of the judgment.

Earlier in the case reported as "Abid Hussain and another v. Chairman, Pakistan Bait-ul-Mal and others" (PLD 2002 Lahore 482), it was held by this Court that "After the final judgment by the Court (presumably the trial Court) the convict is to be allowed a period not exceeding three years to pay Diyat or Arsh either in lumpsum or in installments." The said judgment was challenged before the august Supreme Court of Pakistan vide case reported as "Government of Punjab, Lahore v. Abid Hussain and others" (PLD 2007 Supreme Court 315), however, the same was not only upheld but the apex Court issued the directions to the Federal Government for framing the rules for payment of diyat, arsh and daman, resultantly, Federal Government framed the rules namely "The Diyat, Arsh and Daman Fund Rules, 2007, which hereinafter shall be called the "Rules 2007". Rule 11 being relevant is reproduced as under:-

> 11. Release of convict on parole. Where a convict has served out the substantive sentence of imprisonment and makes payment of diyat, arsh or daman, he may be released on such terms and conditions as may be determined by the Court for payment of remaining amount. The Court may pass an order for detention of the convict if he fails to fulfill the terms and conditions of release.

6. It is important to point out that the period of 03 years prescribed for the payment of diyat, arsh and daman, by the above referred judgment of this Court, had later-on been extended up to 05 years through an amendment i.e. Pakistan Penal Code (Amendment) Act, 2010 (Act XV of 2010 dated 22.06.2010). It is further observed that the moment, an order under section 337-Y, P.P.C. permitting the convict to pay the requisite amount either in installments or in lumpsum by the Court, is passed, by implications, the convict is barred from challenging his conviction by way of appeal as no-body can be allowed to approbate and reprobate in the

same breath, rather he would be bound by his previous stance. Reliance is placed upon case reported as "Mst. Ubaida v. Makhdoom Abrar Ahmad and 2 others" (1986 PCr.LJ 539), "Sakhawat Ali v. The State" (1999 PCr.LJ 450), "Faiz Muhammad v. A. Rauf and others" (1999 PCr.LJ 864), "The State v. Muhammad Umar alias Chotoo" (2003 PCr.LJ 216) and "Attaullah v. Abdur Razaq and another" (PLD 2002 Supreme Court 534). Furthermore, under section 412, Cr.P.C, except on the ground of its legality, no appeal is maintainable against a judgment of conviction, passed upon pleading guilty of the charge, by a convict. The seeking of a permission by a convict to pay Diyat, Arsh or Daman, while invoking the power of a court, which has passed the final judgment, in-fact amounts to accepting his conviction and sentence, foregoing his right of appeal. Upon passing an order by a court under section 337-Y(1a), P.P.C., allowing prayer of the convict, the judgment of conviction attains finality. The criminal Court after passing a final judgment becomes functus officio. Such court has been vested with the power under section 337-Y, P.P.C. read with Rule 11 of Rules 2007 to pass an order for giving effect to its own judgment.

7. A criminal Court may afford an opportunity of hearing to a victim or heirs of victim as the case may be, while passing the order on the request of a convict for payment of amount in installments to eliminate any possibility of maneuver, pretention or misrepresentation regarding financial status of an unscrupulous convict. Furthermore, section 337-Y(2), P.P.C. read with rule 11 of Rules 2007, manifest that in case a convict fails to pay daman or any part thereof within the period specified in subsection (1a), the convict may be kept in jail and dealt with in the same manner as if he has been sentenced to simple imprisonment until daman is paid in full or he may be released on bail upon furnishing his

security or surety equivalent to the amount of daman to the satisfaction of the court or may be released on parole as prescribed in the rules.

8. In addition to above, it is a fundamental right of every person, accused of an offence under Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973 to have a fair trial to be held by a properly and legally constituted Court or Tribunal. The appeal is a statutory right of an aggrieved individual or authority and same cannot be exercised on any analogy unless expressly conferred upon under some law. The provision of section 404, Cr.P.C is an embodiment of this concept which reads as follows:-

> "No appeal shall lie from any judgment or order of a criminal court except as provided for by this code or by any other law for the time being in force".

9. For what has been discussed above, in the given circumstances, the question of maintainability of an appeal by a convict, yet can be looked into from another angle. After passing the sentence, the convict has to be taken into custody for execution of his sentence in terms of section 383, Cr.P.C, unless execution of his sentence is postponed in terms of section 382-A, Cr.P.C. For ready reference, section 382-A, Cr.P.C. is reproduced as under:-

> [382-A. Postponement of execution of sentence of imprisonment under Section 476 or for a period of less than one year. Notwithstanding anything contained in Section 383 or 391, where the accused:
>
> (a) is awarded any sentence of imprisonment under section 476, or
>
> (b) is sentenced in cases other than those provided for in section 381, to imprisonment whether with or without fine or whipping for a period of less than one year.

the sentence shall not, if the accused furnishes bail to the satisfaction of the Court for his appearance at such time and place as the Court may direct, be executed, until the expiry of the period prescribed for making an appeal against such sentence, or, if an appeal is made within that time, until the sentence of imprisonment is confirmed by the appellate Court, but the sentence shall be executed as soon as practicable after the expiry of the period prescribed for making an appeal, or, in case of an appeal as soon as practicable after the receipt of order of the appellate Court confirming the sentence]."

Section 382-A, Cr.P.C makes it clear that a convict who is awarded a sentence of imprisonment less than one year, upon furnishing his bail bonds to the satisfaction of the trial Court for his appearance as the Court may direct, his sentence of imprisonment shall be postponed and shall not be executed until the expiry of period for making an appeal against such conviction and sentence and if an appeal is made within that time, until the sentence of imprisonment is confirmed by the appellate Court. The submission of bail bonds by a convict for the postponement of his sentence enabling him to file an appeal, in-fact amounts to surrendering before the Court. The august Supreme Court of Pakistan has authoritatively held in the case reported as "Muhammad Adnan alias Dana v. The State and others" (2015 SCMR 1570) that without surrender, appeal against the conviction is not maintainable. Let's have a close look at the provision of section 426, Cr.P.C having nexus with the issue under determination, which is reproduced hereunder in its verbatim:-

Section 426 Cr.P.C Suspension of sentence pending appeal: Release of appellant on bail. (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in

writing order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail or on his own bond.

[1-A] Omitted by Ordi. LIV of 2001, PLD 2002 Cent. St. 973, w.e.f. 10.10.2001.

[1-A]

(a)

(b)

(c)

(2) The power conferred by this section on an appellate Court may be exercised also by the High Court in the case of any appeal by a convicted person to a Court subordinate thereto.

[2-A) [Subject to the Provisions of section 382-A,] when any person other than a person accused of a non-bailable offence is sentenced to imprisonment by a Court, and an appeal lies from that sentence, the court may, if the convicted person satisfies the Court that he intends to present an appeal, order that he be released on bail for a period sufficient in the opinion of the court to enable him to present the appeal and obtain the orders of the Appellate Court under subsection (1) and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

(2-B) Where a High Court is satisfied that a convicted person has been granted special leave to appeal to the Supreme Court against any sentence which it has imposed or maintained, it may if it so thinks fit order that pending the appeal the sentence or order appealed against be suspended, and also, if said person is in confinement, that he be released on bail.

(3) When the appellant is ultimately sentenced to imprisonment, or [Imprisonment for Life], time during which he is so released shall be excluded in computing the term for which he is so sentenced.

The provision of section 426, Cr.P.C. clearly deals with a situation where the case of a convict is not covered by section 382-A, Cr.P.C. and the convict thus being in custody, pending his appeal, can be released on bail by way of suspension of his sentence. The above discussion leads this court to conclude that a convict either can file an appeal against his conviction and sentence being on bail under section 382-A, Cr.P.C or he can seek his release on bail under section 426, Cr.P.C during the pendency of his appeal, while being under custody. It is, therefore, held that unless convict is either on bail by way of postponement of his sentence in terms of section 382-A, Cr.P.C. or he is confined in terms of the provisions of Chapter XXVIII, Cr.P.C. (of execution), no appeal against the judgment of conviction can be entertained. Further, in absence of any express provision of law, it is not lawful for a Court to allow the convict to deposit such amount of "Diyat, Arsh and Daman" under protest for his release except as required under section 337-Y(1a), P.P.C. and any departure therefrom would amount to act without lawful authority, thus not sustained in the law.

10. So far as the argument of learned Prosecutor assisted by learned counsel for the complainant that after passing the judgment of acquittal of respondent No.5, since the petitioner had not challenged it by resorting to available remedy of appeal under section 417(2)(A), Cr.P.C. and as such, acquittal judgment has attained finality, therefore, this court cannot examine the question of maintainability of appeal filed by respondent No.5 at this stage. I am afraid that in view of revisional jurisdiction, vested with this court, under section 439, Cr.P.C. above noted argument

of learned Prosecutor has no legs to stand. For ready reference, section 439, Cr.P.C is reproduced as under:-

439. High Court's powers of revision. (1) In the case of any proceeding the record of which has been called for by itself, [....] or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 423, 426, 427 and 428 or on a Court by section 338, and may enhance the sentence; and, when the Judges composing the Court of Revision are equally divided in opinion, the case shall be disposed of in manner provided by section 429.

(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defense.

(3) Where the sentence dealt with under this section has been passed by Magistrate [....], the Court shall not inflict a greater punishment for the offence which, in the opinion of such Court, the accused has committed, than might have been inflicted for such offence by Magistrate of the first class.

[(4) Nothing in this section shall be deemed to authorize a High Court:

(a) to convert a finding of acquittal into one of conviction; or

(b) to entertain any proceedings in revision with respect to an order made by the Sessions Judge under section 439-A.]

(5) Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.

(6) Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under subsection

(2) of showing cause why his sentence should not be enhanced, shall, in showing cause, be entitled also to show cause against his conviction."

11. It is pertinent to mention here that during hearing of instant application, vide order dated 12.10.2020, the record of learned appellate court had been requisitioned and after perusal thereof, the above noted factual and legal defects have been found in existence. It has been ruled by the august Supreme Court of Pakistan in case reported as "Dr. Waqar Hussain v. The State" (2000 SCMR 735) that:-

"The intention of the law to confer suo motu powers of revision on the High Court is to ensure that the Courts subordinate to it act strictly within the legal bounds and do not transgress their jurisdiction and the findings, sentence or orders, recorded or passed by them are just and legal, but, nevertheless, in order to avoid any impression of arbitrariness in the exercise of this power the order of initiating suo motu proceedings by the High Court should mention the ostensible error or irregularity in the orders or proceedings of the subordinate Courts. This would help the parties in knowing the reasons for such an action. So far as the power of the High Court under section 439, Cr.P.C. are concerned, it may be stated that it is not a power only but a duty whenever facts for its jurisdiction are brought to the notice of the Court, or otherwise come to its knowledge because the revisional jurisdiction is in the nature of corrective jurisdiction. To see what types of orders the High Court can pass under section 439, Cr.P.C., the case of Emperor v. Varjivandas alias Kalidas Bhaidas (ILR 1903 (Bombay) Vol.XXVII, page 84) may be cited wherein it was observed as under:-----

"the fact that this particular power which is conferred by section 423 on Courts in the exercise of their appellate jurisdiction, is excluded in express terms in section 439 seems clearly to point to the conclusion that all the other powers not expressly excluded may be exercised by the High Court as a Court of Revision."

The following observations of this Court in Mushtaq Ahmad v. The State (PLD 1966 SC 126, at page 128) may also be advantageously quoted:--

"....Under section 439 of the Criminal Procedure Code the High Court has a power to interfere upon information in whatever way received, as the section clearly says that it may do so in any case in which it has itself called for the record or which has been reported for orders or 'which otherwise comes to its knowledge'. These are words of wide import. In the present case the record of the case was placed before the learned Judge in the course of his inspection and the facts of the case thus came to his knowledge. Under this section the High Court has also the right to exercise its power on its own initiative and there can be no warrant for the proposition that the High Court is debarred from examining the record suo motu."

Ramgopal Ganpatrai Ruia and another v. State of Bombay (PLD 1958 SC (Ind.) 293, at page 303) is another authority on this proposition. It was held therein:--

.....We have, therefore, to look into section 423 to find out not the cases in which the High Court can interfere but only the nature of the power that it can exercise in a case, in its revisional jurisdiction, that is to say, we have to incorporate only the several

powers contained in section 423, into section 439 except the power to convert a finding of acquittal into one of conviction".

The case of Khatija v. The State and another (PLD 1978 Karachi 348, at page 356) may also be cited where it was held that:--

" ....Both under section 439 and under section 561-A(a) of the Criminal Procedure Code this Court can act suo motu and it is not necessary that it should have the application of any person before itself."

12. Epitome of above discussion is that respondent No.5 upon pronouncement of conviction and awarding the punishment of "Daman" by the learned Judicial Magistrate Section 30, D.G Khan, immediately deposited the amount of Rs.90,000/- and secured his release. Admittedly, his punishment was not postponed in the manners contemplated by section 382-A Cr.P.C, rather it stood executed, therefore, the appeal filed by respondent No.5 was incompetent. The learned lower appellate Court had failed to examine the aspect of maintainability of appeal, despite the fact that the Court was bound to examine the question of maintainability before passing any order thereon. I have no hesitation in my mind to hold that order of acquittal is of no consequences being patently illegal, without jurisdiction and thus cannot sustain in the eye of law, consequently, while exercising inherent powers under section 561-A, Cr.P.C, which enables the High Court to make an order which is deemed appropriate for giving effect to any order passed under Code of Criminal Procedure or prevent abuse of process of any Court or otherwise to secure the ends of justice, the judgment of acquittal dated 23.08.2011 passed by lower appellate Court, the order dated 17.10.2011 passed by learned Magistrate Section-30, directing the petitioner to reimburse the amount of "Daman" and the order of Revisional Court dated 24.11.2011 are set aside being patently illegal and this petition is allowed for giving effect to the

order dated 29.06.2011 of learned Magistrate Section-30, D.G Khan whereby respondent No.5 was allowed to deposit the amount of "Daman" imposed upon him.

MH/R-19/L **Petition allowed.**

PLJ 2022 Lahore (Note) 115

***Present*: ANWAARUL HAQ PANNUN, J.**

BILAL LATIF--Petitioner

versus

MUHAMMAD ASLAM, etc.--Respondents

W.P. No. 13877 of 2022, decided on 29.3.2022.

Civil Procedure Code, 1908 (V of 1908)--

----O.VIII R. 1 & O. XLVII, Rr. 1(3)--Suit for possession through pre-emption--Closing of right to file written statement--Dismissal of application for restoration of right to file written statement revision petition was barred by time--Challenge to--Petitioner's right to file written statement was closed by trial Court--Revision petition, same was badly time barred as it was filed after lapse of more than one year, which is beyond period of limitation under law--Court cannot rescue a party sleeping over its rights, which fails to challenge even a void order against it, within prescribed period of limitation from date of knowledge--Expiry of within which a legal resort can be made, a right accrues in favour of other side by operation of law which cannot lightly be taken away--Petition disposed of. [Para 3 & 4] A, B & C

Mr. Asif Raza Naul, Advocate for Petitioner.

Ch. Muhammad Imran Bhatti, Advocate for Respondent No. 1.

Date of hearing: 29.3.2022.

ORDER

In a suit for possession through pre-emption filed by the plaintiff (hereinafter called as the respondent) against the defendant (hereinafter called as the petitioner), the petitioner's right to file written statement was closed by learned trial Court, *vide* its order dated 19.11.2020, the application seeking setting aside the order dated 19.11.2020 and restoration of right to file written statement was dismissed by the learned trial Court, *vide* its order dated 02.11.2021. Even, the petitioner's revision petition before the learned Addl. District Judge, Faisalabad, also failed, *vide* its order dated 03.01.2022. Hence, this writ petition.

2. Arguments heard and record perused.

3. It is straightaway observed that petitioner's right to file written statement was closed by the learned trial Court, *vide* its order dated 19.11.2620. The petitioner moved an application for recalling the order dated 19.11.2020 while restoring his right to file written statement on 23.01.2021, which was also dismissed by the learned trial Court, *vide* its order dated 02.11.2021, with the observation that the order regarding closing of right to file written statement/written reply is an appealable order. Moreover, according to Order XLVII Rr. (1)(3), *'No application for review shall be entertained unless the person seeking review furnishes cash security of rupees five thousand. The security shall stand forfeited if the review petition is dismissed at the initial stage without notice to the opposite party. The amount deposited as security shall be paid to the opposite party if the review petition is dismissed after being contested. The provisions of this rule shall*

not apply where the appellant seeking review is a person who has been declared by a competent Court to be an undischarged insolvent or a pauper". In the present case, the petitioner is guilty of non-compliance of provision of the *ibid* Order. The petitioner filed revision petition against the order dated 02.11.2021 passed by the learned trial Court on 30.11.2021 whereby, the learned Addl. District Judge, Faisalabad dismissed the revision petition, *vide* its order dated 03.01.2022, with the observation that *"the learned trial Court rightly dismissed the application for recalling of the order. The petitioner/ applicant has not described sufficient ground for recalling of order as provided in Order 47 of CPC. Present petitioner/ defendant failed to point out any illegality and irregularity in order dated 2.11.2021"*. Furthermore, perusal of the contents of the civil revision show that the petitioner did not challenge expressly the order dated 19.11.2020 through which, the petitioner's right to file written statement had been closed. Even otherwise, if for the sake of arguments, it is presumed that the petitioner assailed the order dated 19.11.2020 through the revision petition, the same was badly time barred as it was filed after lapse of more than one year, which is beyond the period of limitation i.e. 90-days as provided under the law.

4. It is settled principle of law that a Court cannot rescue a party sleeping over its rights, which fails to challenge even a void order against it, within the stipulated/prescribed period of limitation from the date of knowledge. Needless to say that expiry of within which a legal resort can be made, a right accrues in favour of the other side by operation of law which cannot lightly be taken away. In this view of the matter, no case is made out

for issuance of writ of certiorari. No illegality or irregularity is observed in the impugned orders, which are pregnant with sound reasons and well founded, resultantly, this writ petition having no merits is hereby dismissed.

(Y.A.) **Petition disposed of.**

PLJ 2022 Cr.C. (Note) 47

[Lahore High Court, Multan Bench]

***Present*: ANWAARUL HAQ PANNUN, J.**

MUHAMMAD ASHRAF--Appellant

versus

STATE etc.--Respondents

Crl. Misc. No. 2627-B of 2021, decided on 25.5.2021.

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

----Ss. 497--Pakistan Penal Code, 1860 (XLV of 1860), Ss. 365/355/292/148/149--Post-arrest bail--Role of the present petitioner is not distinguishable from the co-accused--Who has already been allowed bail--Object of--Rule of consistency and principle of parity has deep rooted nexus with Articles 9 and 25 of the Constitution of Islamic Republic of Pakistan, 1973--Bail allowed. [Para 4] A

Hafiz Muhammad Abu Bakar Ansari, Advocate for Petitioner.

Mr. M. Abdul Wadood, Addl. Prosecutor General for State.

Mr. Ahsan Raza Hashmi, Advocate for Complainant.

Date of hearing: 25.5.2021.

ORDER

The petitioner seeks his release on post arrest bail in case/FIR No. 185 dated 27.03.2021, offence under Sections 365/355/292/148/149, PPC, registered at Police Station Chowk Azam, District Layyah.

2. Precisely, the allegation against the petitioner is that be along-with his co-accused in prosecution of their common object, abducted complainant's son and daughter-in-law namely Tahir Nazir and *Mst.* Nasreen Akhtar and used criminal force to dishonor his son.

3. Arguments heard and record perused.

4. Learned counsel for the petitioner while referring the order dated 18.05.2021, passed by learned Addl. Sessions Judge, Layyah in pre-arrest bail petition titled *"Juma Khan vs. The State, etc."* submitted that role of the present petitioner is not distinguishable from the co-accused Juma Khan, who has already been allowed bail. On the other hand, learned Additional Prosecutor General for the state has not been able to distinguish the case of present petitioner with that of the aforesaid co-accused. The prosecution has tried to resist the contention of learned counsel for the petitioner through an abortive effort. The above referred co-accused is enjoying the fruit of bail in the form of liberty. The object of rule of consistency and principle of parity has deep rooted nexus with Articles 9 and 25 of the Constitution of Islamic Republic of Pakistan, 1973 which envisage equality before law and protection of his life and liberty. Since the co-accused, who was assigned the similar role as to the present petitioner, has been enlarged on bail, therefore, in absence of any distinguishable features, it will not only be in the interest of justice but surely in accordance with law that the petitioner should be meted out with the same treatment as his co-accused has given. Resultantly, the instant petition is allowed and the petitioner Muhammad Ashraf is admitted to post arrest bail, subject to their furnishing bail bonds in the tune of Rs. 1,00,000/- (Rupees one hundred thousand only), with one surety, in the like amount to the satisfaction of learned trial Court.

(A.A.K.) **Bail allowed.**

PLJ 2022 Cr.C. (Note) 52

[Lahore High Court, Multan Bench]

***Present*: ANWAARUL HAQ PANNUN, J.**

UMAR FAROOQ--Petitioner

versus

STATE etc.--Respondents

Crl. Misc. No. 7693-M of 2020, decided on 22.12.2020.

Police Rules, 1834--

----Rr. 25.13(2)(i)--Preparation of map of a crime scene--Prepare by a qualified police officer, expert or other suitable agencies--The police officer investigating cases of heinous crimes especially of homicide, riots, land disputes etc., if considers, that an accurate map of crime scene is required to be prepared, he after summoning Patwari of circle or a duly qualified draftsman to scene of crime, causes him to prepare map in duplicate i.e. one for its submission along with charge-sheet or final report for producing it as evidence in Court and other for use of police/investigating agency--In original map, a reference relating to facts observed by police officer is to be entered while in duplicate, references are recorded which are not relevant for evidence but are based on statements of witnesses. [Para 5] A

Responsibility of Patwari, Draftsman and Police Officer--

----It is necessary to clearly define responsibility of Patwari, draftsman etc. and police officer in respect of these maps--The police officer has to indicate to Patwari limits of land, of which map, topographical items etc., he desires to be shown--While drawing a map, Patwari is responsible for its correctness--The Patwari cannot write any explanation on map which is intended to be produced as evidence before Court--The police officer, however, may write any explanation on duplicate copy of map--He can add such remarks which may be necessary to duplicate of map to explain

its connection with case--A police officer is equally responsible along with Patwari for correctness of all particulars regarding crime scene--However, he cannot make any remarks or explanations on copy of a map produced by a party--It will be convenient if all entries made by Patwari are made in black ink and those added by police officer in red ink--The police officer in any case cannot require a Patwari to make a map of any inhabited enclosure or of land inside a town or village site--The site plan is not per se admissible in evidence as it has to be proved by producing its maker, as a witness in Court, who may be subjected to cross-examination. [Para 5] B

2020 SCMR 1414 & 1996 SCMR 908.

Crime scene--

----Appreciation of evidence--It is generally used for explaining information relating to crime scene for purpose of appreciation of evidence--Being a reflection of crime scene, preparing and bringing on record site plan is part of an attempt to furnish a panoramic view of occurrence to scrutinize evidence of prosecution witnesses produced at trial. [Para 5] C

2018 YLR (Notes) 59.

Power of Magistrate--

----Power of local inspection--While exercising this power of local inspection, a Judge or a Magistrate is required to regulate proceedings in light of Maxim *"Actus curiae neminem gravabit" i.e. an act of Court should prejudice no man.* [Para 7] D

Criminal justice system--

----Duty of police officer--Preparation of a crime site-plan--Our system for criminal dispensation of justice even from investigation stage is adversarial in its nature--The Police Officer conducting investigation into an offence has been enjoined upon to collect evidence having nexus with case, irrespective of fact that it is in favour of prosecution or defence and

after forming a mature opinion regarding involvement or otherwise of accused in crime under investigation, he is bound to forward/submit it in form of a report before Court--Preparation of a crime's site plan at inception of investigation, as aforesaid, significantly is a wise step to preserve relevant and available information about place of occurrence. [Para 8] E

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

----S--540--Under Section 540, Cr.P.C. a Court trying an accused is also vested with power to examine any person in attendance or to summon any person as a witness, though not summoned as a witness or recall and re-examine any person already examined, if his evidence appears to be essential for just decision of case--The defence, at same-time, is permitted to produce evidence or any person as a witness in its defence also. [Para 8] F

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

----S. 539-A--That despite it being discretionary with Judge or a Magistrate seized of an inquiry or trial to exercise, primarily suo-motu or on application of a party, his powers under Section 539-B, Cr.P.C. for local inspection provided "It is in his opinion necessary to view for purpose of properly appreciating evidence given at such inquiry or trial", yet in view of fact that system for criminal dispensation of justice being adversarial in its nature, after production of site plan of crime scene as evidence, and prosecution and defence being at liberty to produce evidence they wish, coupled with fact that a Judge or a Magistrate is also empowered under Section 540, Cr.P.C. as aforesaid during trial, existence of some exceptional and extraordinary reasons justifying resort to exercise of such power appears to be a sine qua none and scope for exercise of power under Section 539-A, Cr.P.C. for local inspection becomes relatively narrow--However, exercise of power for site inspection during an inquiry is envisaged differently. [Para 9] G

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

----S. 561-A & 539-B--Inherent jurisdiction--Scope of Section 539-B, Cr.P.C. in light of case law in detail, and while considering facts and circumstances of instant case, it is observed that under Section 95 of Provincial Motor Vehicles Ordinance, 1965, in case of an occurrence of an accident in which a motor vehicle is involved, a mechanism in detail has been provided for inspection of vehicle by authority concerned--The ground on basis of which petitioner has made request for site inspection to Court is that road on which accident had taken place is relatively narrow and a car could not have been driven thereon negligently or rashly, appears to be fictional and result of imagination, particularly when place of occurrence is not as such disputed, therefore, in absence of any exceptional circumstances justifying Court to make a resort to local inspection appears to be fanciful and without force, thus cannot be entertained under law--Neither any impropriety nor any illegality while rejecting request of petitioner could have been shown in impugned orders passed by Courts below--Application was dismissed. [Para 10] H

Ms. Humaira Naheed Khand, Advocate for Petitioner.

Malik Mudassir Ali, Deputy Prosecutor Generals for State.

Mr. Mubashar Hussain Khosa, Advocate for Respondent No. 2.

Date of hearing: 22.12.2020.

ORDER

By means of instant miscellaneous application under Section 561-A, Cr.P.C., the petitioner calls in question the vires of orders dated 25.11.2020 passed by the learned Revisional Court/Additional Sessions Judge, Dera Ghazi Khan and the order dated 10.09.2020 passed by the learned Magistrate Section-30, Dera Ghazi Khan, whereby the petitioner's application **under Section 539-B, Cr.P.C.** for local inspection was dismissed.

2. Precisely the relevant facts for the disposal of the instant miscellaneous application are that a criminal case *vide* F.I.R No. 250/2016 dated 09.06.2016, offence under Sections 322, 427, 279, PPC, Police Station Saddar Dera Ghazi Khan, has been registered on the complaint of Respondent No. 2 against the petitioner with the allegation that while driving a car rashly and negligently he collided with the motorcycle of complainant's paternal cousin namely Muhammad Kamran, who succumbed, the pillion rider namely Abdul Ghaffar also sustained serious injuries. Presently, the petitioner is facing trial before the learned Magistrate Section-30 Dera Ghazi Khan. After the evidence of some of the PWs and one CW had been recorded by the trial Court, the petitioner moved an application under Section 539-B, Cr.P.C., which is reproduced in its verbatim hereunder:-

1۔ یہ کہ مقدمہ ہذا میں سائل / ملزم پر جو الزامات Charge frame ہوئے ہیں ان کی روح کے مطابق سائل / ملزم کے اوپر تیز رفتاری کے الزامات ہیں ۔

2۔ یہ کہ جائے وقوعہ ایک مصروف روڈ ہے جس کے اوپر ہر وقت ٹریفک رواں دواں ہے اور جائے وقوعہ والی جگہ پر کوئی گاڑی زیادہ سے زیادہ سپیڈ نہیں چل سکتی۔

3۔ یہ کہ جائے وقوعہ والی جگہ پر زیادہ سے زیادہ 35 / 40 کلومیٹر سپیڈ سے زیادہ گاڑی چل ہی نہیں سکتی یا Normally گاڑی دوسرے سے تیسرے گیئر میں چلتی ہے ۔

4۔ یہ کہ 539-B Local Inspection کے تحت

Any Judge or Magistrate may at any stage of any inquiry, trial or other proceeding, after due notice to the parties visit and inspect any place in which an offence is alleged to have been committed, or any other place which it is in his opinion necessary to view for the purpose of properly appreciating the evidence given at such inquiry or trial, and shall without any un-necessary delay record a memorandum of any relevant facts observed at such inspection.

بحالات بالا استدعا ہے کہ زیر دفعہ539-Bکے تحت سائل کی درخواست منظور فرماتے ہوئے جناب والا خود موقع ملاحظہ فرمائیں تاکہ مقدمہ کے حالات و واقعات سامنے آسکیں اور سائل / ملزم کے ساتھ انصاف ہوسکے اور انصاف کے تقاضے پورے ہوسکیں ۔

The request of the petitioner failed to find favour, as stated above, with the learned Magistrate as well as the learned Revisional Court. Hence, the instant petition.

3. The learned counsel for the petitioner while reiterating the grounds urged through his application in writing and relying upon the judgments reported as *Asfandyar and another v. Kamran and another* (2016 SCMR 2084), *Abdur Rehman v. the State* (2000 SCMR 1355) and *Ghulam Hussain alias Hussain Bakhsh and 4 others v. the State and another* (PLD 1994 SC 31), has craved for acceptance of the instant petition. The learned Deputy Prosecutor General assisted by the learned counsel for the complainant/ Respondent No. 2, on the other hand, have vociferously opposed the submissions of the learned counsel for the petitioner and defended the impugned orders.

4. Heard. Record perused.

5. At the outset it may be observed that while considering the importance of the sketch of a crime scene, some necessary guidelines have been issued to police officers by means of Rule 25.13, Chapter 25 of Police Rules, 1934, to preserve the factual information relating to crime during investigation for proper appreciation of evidence at trial. The site-plan of a crime scene or place of occurrence is prepared either by a qualified **police officer,** expert or other suitable agencies. The Financial Commissioner with the concurrence of the Inspector General of Police as required under sub-rule 2(i) of Rule 25.13 *ibid.,* read with Paragraph No. 26 of the Patwari Rules is competent to issue instructions concerning the preparation of map of a crime scene to Patwaris, to illustrate police inquiries regarding the crime scene. Ordinarily in petty offences no demands are made upon Patwaris for the

preparation of such site-plan of scene of the offence. However, after visiting the crime scene, while conducting investigation into even ordinary offences, in the light of available factual information relating to crime, as an established practice, the Investigating Officers proceed to prepare such maps. The police officer investigating cases of heinous crimes especially of homicide, riots, land disputes etc., if considers, that an accurate map of crime scene is required to be prepared, he after summoning the Patwari of the circle or a duly qualified draftsman to the scene of crime, causes him to prepare map in duplicate i.e. one for its submission along with the charge-sheet or the final report for producing it as evidence in the Court and the **other** for the use of the police/investigating agency. In the **original** map, a reference relating to facts observed by the police officer is to be entered while in the **duplicate,** references are recorded which are **not relevant** for evidence but are based on the statements of the witnesses. It is necessary to clearly define the responsibility of the Patwari, draftsman etc. and the police officer in respect of these maps. The police officer has to indicate to the Patwari the limits of the land, of which the map, the topographical items etc., he desires to be shown. While drawing a map, the Patwari is responsible for its correctness. The Patwari cannot write any explanation on the map which is intended to be produced as evidence before the Court. The police officer, however, may write any explanation on the duplicate copy of the map. He can add such remarks which may be necessary to the duplicate of the map to explain its connection with the case. A police officer is equally responsible along with the Patwari for the correctness of all particulars regarding crime scene. However, he cannot make any remarks or explanations on the copy of a map produced by a party. **It will be convenient if all the entries made by the Patwari are made in black ink and those added by the police officer in red ink. The police officer in any case cannot require a Patwari to make a map of any inhabited enclosure or of land inside a town or village site.** The site-plan is not per se admissible in evidence as it has to be proved by producing its maker, as a witness in the Court, who may be

subjected to cross-examination. Needless to say that the site-plan is not a substantive piece of evidence. See *Javed Ishfaq vs. The State* (2020 SCMR 1414) and *Muhammad Iqbal and others vs. Muhammad Akram and another* (1996 SCMR 908). It is generally used for explaining the information relating to the crime scene for the purpose of appreciation of evidence. Being a reflection of the crime scene, preparing and bringing on record the site-plan is part of an attempt to furnish a panoramic view of the occurrence to scrutinize the evidence of prosecution witnesses produced at the trial. *Alam Zar Khan vs. The State and another* (2018 YLR (Notes) 59) is referred.

6. It may further be observed that the diversity of motive behind crimes, the variety in modes of commission thereto, coupled with a perceptible desire of perpetrator, either to attenuate or for shielding him from the culpability or punishment of the crime, he had committed, being the undeniable realities have been taken care of while evolving the systems of criminal dispensation of justice throughout the world. The keen inspection of the prevailing circumstances and self-evident hard realities at the crime scene, despite their silence and voice lessness, in some cases may carry a potential either to fortify the accusation or to belie the same. While making use of modern techniques in the field of forensic science, by keenly observing a crime scene; an officer conducting investigation to form a mature opinion about the involvement of an accused so that his liability may be fixed by a Court is, therefore, considered to be relevant and important. A Criminal Court or a Judge while deciding about a crime is, therefore, well advised to make every effort to visualize the crime scene through site map or from other pieces of evidence, for proper appreciation of evidence to reach at a just conclusion.

7. After making the above discussion, the stage has now been set to examine the scope of the provisions of Section 539-B, Cr.P.C., which is reproduced hereunder:

> ***"539-B. Local Inspection.*** *(1) Any judge or Magistrate may at any stage of any inquiry, trial or other proceeding, after due notice to the parties visit and inspect any place in which an offence is alleged to have been committed, or any other place which it is in his opinion necessary to view for the purpose of properly appreciating the evidence given at such inquiry or trial, and shall without unnecessary delay record a memorandum of any relevant facts observed as such inspection.*
>
> *(2) Such memorandum shall form part of the record of the case. If the Public Prosecutor complainant or accused so desires, a copy of the memorandum shall be furnished to him free of cost.*

Upon bare perusal it transpires unequivocally that the traits of this provision are procedural and substantive in their nature besides being discretionary. A Judge or a Magistrate at any stage of the trial or inquiry or other proceedings, after due notice to the parties, is vested with the power to **visit** and **inspect** any **place** in which either an offence is alleged to have been committed or any other place having a nexus with the offence committed, which **"it is in his opinion"** is necessary to view for the purpose of properly appreciating the evidence given at such inquiry or trial. It may further be observed that the proceedings under this provision are judicial in their nature. The requirement of issuance of notices before local inspection is ingrained in the Maxim *"audi alteram partem"* i.e. no one should be condemned unheard, to afford a fair opportunity to the parties to represent themselves even during such inspection proceedings. The power of local inspection either may be exercised suo motu or on the application of a party. A Judge or a Magistrate is required mandatorily, without any unnecessary delay, to record a memorandum of relevant facts observed by him at such local/site inspection. Such memorandum shall form part of the record of the case. A copy of the memorandum, if so desired by the public prosecutor, the complainant or the accused, shall be furnished to them free of cost. The requirement of recording of

memorandum of the relevant facts observed by a Judge or a Magistrate at the time of inspection and forming it a part of the record without unnecessary loss of time appears to be a pragmatic attempt of the law givers to cover the risk of loss of evidence which occurs with the passage of time as a result of fading of human memory. The main object behind vesting of such power with a Judge or a Magistrate is to enable him for properly appreciating evidence given at an inquiry or trial. The power of local inspection cannot be delegated to any other agency, as has been held by the Hon'ble Supreme Court of Pakistan in the dictum reported as *Asfandyar and another vs. Kamran and another* (2016 SCMR 2084). Therefore, while exercising this power of local inspection, a Judge or a Magistrate is required to regulate the proceedings in the light of Maxim *"Actus curiae neminem gravabit" i.e. an act of the Court should prejudice no man*.

8. Our system for criminal dispensation of justice even from the investigation stage is adversarial in its nature. The Police Officer conducting investigation into an offence has been enjoined upon to collect the evidence having nexus with the case, irrespective of the fact that it is in favour of the prosecution or the defence and after forming a mature opinion regarding the involvement or otherwise of the accused in the crime under investigation, he is bound to forward/submit it in the form of a report before the Court. Preparation of a crime's site-plan at the inception of investigation, as aforesaid, significantly is a wise step to preserve the relevant and available information about the place of occurrence. It may be observed that tendering the site-plan in evidence besides producing its maker as a witness, affording a fair opportunity to cross-examine such witness, by the adversaries, is a pragmatic effort to enable the Judge/Magistrate/ Court to visualize the crime scene, for appreciating properly the evidence brought before it/him, at trial. Under Section 540, Cr.P.C. a Court trying an accused is also vested with the power to examine any person in attendance or to summon any person as a witness, though

not summoned as a witness or recall and re-examine any person already examined, if his evidence appears to be essential for just decision of the case. The defence, at the same-time, is permitted to produce evidence or any person as a witness in its defence also.

9. In the light of above discussion, it can safely be concluded that despite it being discretionary with the Judge or a Magistrate seized of an inquiry or trial to exercise, primarily suo-motu or on the application of a party, his powers under Section 539-B, Cr.P.C. for local inspection provided **"It is in his opinion necessary to view for the purpose of properly appreciating the evidence given at such inquiry or trial"**, yet in view of the fact that the system for criminal dispensation of justice being adversarial in its nature, after production of site-plan of the crime scene as evidence, and prosecution and the defence being at liberty to produce the evidence they wish, coupled with the fact that a Judge or a Magistrate is also empowered under Section 540, Cr.P.C. as aforesaid during the trial, the existence of some exceptional and extraordinary reasons justifying the resort to exercise of such power appears to be a *sine qua none* and the scope for exercise of power under Section 539-A, Cr.P.C. for local inspection becomes relatively narrow. However, exercise of power for the site inspection during an inquiry is envisaged differently.

10. After discussing the scope of Section 539-B, Cr.P.C. in the light of case law in detail, and while considering the facts and circumstances of instant case, it is observed that under Section 95 of the Provincial Motor Vehicles Ordinance, 1965, in case of an occurrence of an accident in which a motor vehicle is involved, a mechanism in detail has been provided for the inspection of the vehicle by the authority concerned. The ground on the basis of which the petitioner has made the request for site inspection to the Court is that the road on which the accident had taken place is relatively narrow and a car could not have been driven thereon negligently or rashly, appears to be fictional and result of imagination, particularly when the place of occurrence is not as such disputed,

therefore, in absence of any exceptional circumstances justifying the Court to make a resort to local inspection appears to be fanciful and without force, thus cannot be entertained under the law. Neither any impropriety nor any illegality while rejecting the request of the petitioner could have been shown in the impugned orders passed by the Courts below. Resultantly, the orders impugned are upheld and this miscellaneous application is **dismissed.** Before parting with the order, it may be observed that in the case law cited by the learned counsel referred hereinabove, is outcome of laudable efforts for expounding the scope of provision of Section 539-B, Cr.P.C. made by their lordships but at the same time it does not advance the petitioner's cause, hence, it requires no separate discussion.

(A.A.K.) **Application dismissed.**

PLJ 2022 Cr.C. (Note) 76

[Lahore High Court, Multan Bench]

***Present*: ANWAARUL HAQ PANNUN, J.**

ZAHID IQBAL--Petitioner

versus

STATE etc.--Respondents

Crl. Misc. No. 3206-B of 2021, decided on 26.5.2021.

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

----S. 498--Pakistan Penal Code, (XLV of 1860), Ss. 420, 467, 468, 471 & 473--For pre-arrest bail petition, personal appearance of petitioner is mandatory--Petitioner was absent and counsel of petitioner was unable to put forth any reasonable cause for absence of petitioner--Petitioner is exploiting concession of pre-arrest bail--Furthermore, Additional Prosecutor General, after perusing record, states that during investigation, on basis of reasonable grounds, petitioner has been found to be connected with commission of offence--*Prima facie* it seems that petitioner has committed offence mentioned in F.I.R--Bail dismissed. [Para 3] A

Syed Jaffar Tayyar Bukhari, Advocate for Petitioner.

Mr. Muhammad Abdul Wadood, Additional Prosecutor General for State.

Date of hearing 26.5.2021.

ORDER

After arguing the matter at considerable length, learned counsel for the petitioner wishes to withdraw this petition.

2. At this stage, it has been noticed that petitioner is absent. This is a pre-arrest bail petition wherein personal appearance of the petitioner is

mandatory. Learned counsel for the petitioner is unable to put forth any reasonable cause for absence of the petitioner.

3. Perusal of record reveals that the instant criminal case (F.I.R No. 11/2021 under Sections 420, 467, 468, 471, 473, PPC) was registered on 08.01.2021. The petitioner's pre-arrest bail petition was dismissed by the learned Additional Sessions Judge, Chichwatni, *vide* order dated 13.03.2021. Thereafter, the petitioner was granted ad-interim pre-arrest bail by this Court *vide* order dated 04.05.2021. It appears that the petitioner is exploiting the concession of pre-arrest bail. Furthermore, the learned Additional Prosecutor General, after perusing the record, states that during the investigation, on the basis of reasonable grounds, the petitioner has been found to be connected with the commission of the offence. *Prima facie* it seems that the petitioner has committed the offence mentioned in the F.I.R. Therefore, the instant bail petition is **dismissed** for non-appearance of the petitioner as well as on merits and ad-interim pre-arrest bail granted to the petitioner *vide* order dated 04.05.2021 is recalled.

(A.A.K.) **Bail dismissed.**

PLJ 2022 Cr.C. (Note) 93

[Lahore High Court, Multan Bench]

***Present*: ANWAARUL HAQ PANNUN, J.**

GHULAM ABBAS--Appellant

versus

STATE, etc.--Respondents

Crl. A. No. 976 of 2017, decided on 12.11.2019.

Pakistan Penal Code, 1860 (XLV of 1860)--

----S. 302(b)--Qatl-e-amd--Conviction and sentence--Challenge to--Benefit of doubt--Medical evidence--Ocular account--As per contents of FIR, no specific injury has been attributed to appellant and both appellants have been assigned role of making fire-shots with their respective weapons, hitting on head, face and different parts of body of deceased--Case of present appellant is no more distinguishable from case of his co-accused (since acquitted)--Appellant has earned a right that his case be considered on touchstone of principle of parity, embodied in Article 25 constitution of Islamic Republic of Pakistan, 1973, with case of his co-accused (since acquitted)--On account of case of prosecution being full of doubts, that appellant has been roped in this case--**Held:** It is axiomatic and universal recognized principle of law that conviction must be founded on unimpeachable evidence and certainty of guilt and hence any doubt that arises in prosecution case must be resolved in favour of accused--Moreover it is cardinal principle of criminal jurisprudence that a single instance causing a reasonable doubt in mind of Court entitles accused to benefit of doubt not a matter of grace but as a matter of right--Appeal allowed. [Para 11, 12 & 13] A, B & C

1995 SCMR 1345, 2009 SCMR 230, 2018 SCMR 344 PLJ 2000 SC 1041 and 2016 SCMR 1763.

Rana Muhammad Asif Saeed, Advocate for Appellant.

Mr. Mudassir Altaf Qureshi, Advocate for Complainant.

Mr. Muhammad Abdul Wadood, Deputy Prosecutor General for State.

Date of hearing: 12.11.2019.

JUDGMENT

Through the titled appeal u/S. 410, Cr.P.C., the appellant Ghulam Abbas has challenged the vires of judgment dated 31.07.2017, passed by learned Addl. Sessions Judge, Sahiwal, on the conclusion of trial, in case FIR No. 434/2010, for offence under Sections 302/109/379/ 411/404/34, PPC, registered at Police Station Harrappa, District Sahiwal, whereby he has been convicted and sentenced as under:

Under Section 302(b), PPC

"Imprisonment for life along-with compensation Rs. 2,00,000/- payable to the legal heirs of the deceased under Section 544-A, Cr.P.C. In case of default, he shall further undergo four months S.I. Benefit of Section 382-B, Cr.P.C. was extended to the convict".

Under Section 404, PPC

Imprisonment for a term of three years alongwith fine of Rs. 1,00,000/-. In case of default, he shall further undergo two months S.I."

"Both the sentences of imprisonment shall run concurrently".

2. The case of the prosecution as contained in the FIR (Exh.PF/1) lodged on the written complaint (Exh.PF) of the complainant Noor Ahmad (PW-2) is to the effect that on 02.09.2010, at about 6/7.00 a.m, when Niaz Ahmad complainant's father reached near Square No. 9, Killa No. 22 on motorbike, the accused/appellant Ghulam Abbas while armed with repeater

and Ilyas (Since acquitted) while armed with Carbine attracted from the deserted room of nearby tubewell, whereby the accused/appellant raised *lalkara* to teach lesson to Niaz Ahmad for contracting marriage with *Mst.* Pathani widow of Bashir Ahmad, deceased and for perusing her cases, on which, the appellant and Ilyas (since acquitted) made fire shots with their respective weapons hitting on the head, face and different parts of body of Niaz Ahmad who fell on the ground. The accused ensuring the death of complainant's father removed his licensed rifle from his body and fled away. The occurrence was witnessed by the complainant, Muhammad Bakhsh and Ismail who were present in their fields. The accused persons committed the occurrence on the instigation of accused Dilmeer and Ahmad Yar (since acquitted). The motive behind the occurrence is that the accused had grudge against the deceased Niaz Ahmad for solemnizing Nikah with *Mst.* Pathani and perusing the cases of her deceased husband.

3. Registration of the case, after its usual investigation encapsulated into a report under Section 173, Cr.P.C., which was duly submitted before the learned trial Court, the appellant, after supplying him with the copies of incriminating material under Section 265-C, Cr.P.C., was charged sheeted to which he while professing his innocence, pleaded not guilty, claimed trial, and the prosecution was directed to produce evidence.

4. The prosecution has produced as many as 13 witnesses besides tendering, in evidence, reports of Chemical Examiner, Serologist, FSL, FIRs No. 77/2007, 38/2008, 604/2005, 385/2004, 290/2004, Rappat No. 14, kalandra under Sections 107/151, Cr.P.C., application for giving up PW , Ilyas alongwith order dated 31.03.2009 (Exh.PT to Exh.PZ and Exh.PAA, Exh. PBB, Exh.PBB/1, Exh.PCC and Exh.PCC/1).

5. The medical evidence had been furnished by Muhammad Saleem Pharmacy Technician(PW-9) in the instant case as Dr. Ghulam Farid Khichi, Medical Officer, who conducted post-mortem examination of the deceased

Niaz Ahmad had passed away during trial. He verified the signatures of Ghulam Farid Khichi deceased over post-mortem report (Exh,PQ/1) pictorial diagrams (Exh.PQ/2), injury statement (Exh.PQ/3) and inquest report (Exh.PQ/4).

6. The ocular account in this case has been furnished by Muhammad Ismail (PW-1) and Noor Ahmad, complainant (PW-2). Muhammad Hanif (PW-7) furnished account of story of abetment allegedly made by the accused Dilmeer and Ahmad Yar (since acquitted). Muhammad Siddique SI, the investigating officer was appeared as (PW-13).

7. When examined under Section 342, Cr.P.C., the appellant denied every bit of incriminating material so produced. While replying the question that as to why this case against him and why the prosecution witnesses had deposed against him, he replied as follows:

> *"It is a false case, the PWs have deposed falsely due to relationship inter-se with the deceased and inimical towards me. It was un-witnessed occurrence. The complainant party is inimical for the last two decades and whenever, there is any occurrence, they falsely implicate me in such cases. However, I have been acquitted in such cases. I have been again roped in the murder case of Niaz Ahmad. I had no motive against Niaz Ahmad. I have been acquitted in the murder case of Bashir Ahmad registered at the instance of Mst. Pathani Bibi. Ilyas my co-accused since acquitted is inimical to me as he was eye witness against me in the murder case of Bashir Ahmad, how can I be privy to offence with him. Furthermore, the same evidence which has been led against me has been disbelieved by the predecessor of this Hon'ble Court on 25.02.2016. I am absolutely innocent in this case. It may also be added that in the FIR and during the investigation no specific any injury of deceased was attributed to me, the prosecution dishonestly attributed the head injury of the*

deceased to me in the Court. It is pertinent to mention here that the only two empties recovered from the spot and according to the report of FSL Ex.P-V, the same were found to have been fired from the shot gun recovered from Ilyas my co-accused since acquitted."

"The PWs falsely deposed against me due to relationship inter-se and inimical towards me."

8. The appellant did not make his statement under Section 340(2), Cr.P.C. The appellant, had produced certified copies of judgment dated 25.02.2016, FIR No. 77/2007, private complaint titled *"Mst. Shamim Akhtar vs. Shabbir etc*. and judgment dated 28.10.2011 (Exh.DF to Exh.DJ) and closed his defence evidence.

9. Learned trial Court, on conclusion of the trial, proceeded to convict the appellant as aforesaid. Hence, the titled appeal.

10. Arguments heard. Record perused.

11. The prosecution's case is that the appellant Ghulam Abbas and Ilyas (since acquitted) made fire shots with their respective weapons, hitting on head, face and different parts of body of Niaz Ahmad, complainant's father, who succumbed to the injuries. As per post-mortem report, the deceased had received three fire-arm injuries on his body and according to opinion of medical officer, the Injury No. 1 which causes brain damage, leads to intracranial hemorrhage, which is sufficient to cause death in ordinary course of nature. Admittedly, as per contents of FIR, no specific injury has been attributed to the appellant and both Ghulam Abbas, appellant and Ilyas (since acquitted) have been assigned the role of making fire-shots with their respective weapons, hitting on head, face and different parts of body of the deceased. Though, Noor Ahmad Complainant (PW-2) stated during cross-examination that he got recorded in his written application Exh.PF that the gun fire of Ghulam Abbas accused had specifically landed on right side of head and face of the deceased father.

This portion of statement of the complainant has duly been confronted with Exh.PF, wherein it had not been found to be mentioned. I have also gone through the statements of the PWs recorded under Section 161, Cr.P.C. including statements of Muhammad Bakhsh and Muhammad Ismail, eye-witnesses, where they have not assigned specific role to any of the accused and they have alleged that the accused persons Ghulam Abbas and Ilyas had made fire-shots, which hit on head, face and different parts of body of Niaz Ahmad, complainant's father. Thus assigning role by PW-1 and the complainant (PW-2) later-on to the present appellant for inflicting Injury No. 1 is of no avail to him. The learned trial Court has disbelieved motive part of the occurrence while assigning cogent and valid reasons in Para No. 28 of the impugned judgment. Even otherwise, the co-accused Ilyas who had been assigned similar role, has been acquitted of the charge by extending him the benefit of doubt by the learned trial Court *vide* its judgment dated 25.02.2016. It has been held in case titled *"Shahbaz vs. The State"* (2016 SCMR 1763), that:

> *"... The law is settled by now that if some eye-witnesses are disbelieved against some accused persons attributed effective roles then the same eye-witnesses cannot be relied upon to the extent of the other accused persons in the absence of any independent corroboration and a reference in this respect may be made to the cases of Ghulam Sikandar and another v. Mamaraz Khan and others (PLD 1985 SC 11), Sarfraz alias Sappi and 2 others v. The State (2000 SCMR 1758), Iftikhar Hussain and others v. The State (2004 SCMR 1185) and Akhtar Ali and others v. State (2008 SCMR 6). In the case in hand no independent corroboration worth its name was available to the extent of Shahbaz appellant inasmuch as the trial Court and the High Court had disbelieved the motive set up by the prosecution, the alleged recovery of a chhurri from the custody of the appellant was inconsequential because the recovered chhurri was not*

stained with blood, post-mortem examination of the deadbody of Aftab Akhtar deceased was noticeably delayed as the same had been conducted in the following morning and the duration between death and post-mortem examination was recorded as about eleven hours. It appears that time had been consumed by the complainant party and the local police in procuring and planting eye-witnesses and in cooking up a story for the prosecution. The said story of the prosecution already stands substantially disbelieved to the extent of Muhammad Abbas co-accused and we have found that the same was not free from doubt even to the extent of Shahbaz appellant."

The above said view has been further fortified in the recent case law titled as *"Imtiaz alias Taj vs. The State and others"* (2018 SCMR 344).

12. For what has been discussed above, the case of the present appellant is no more distinguishable from the case of his co-accused Ilyas (since acquitted). In this way, the appellant has earned a right that his case be considered on the touchstone of principle of parity, embodied in Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973, with the case of his co-accused Ilyas (since acquitted). On account of case of prosecution being full of doubts, it can be concluded that the appellant has been roped in this case.

13. The nutshell of the above discussion is that the prosecution's case is not free of doubts, benefit of doubt has accrued in favour of the accused as the apex Court has held in case titled *"Muhammad Khan and another vs. State"* (PLJ 2000 SC 1041) that *it is axiomatic and universal recognized principle of law that conviction must be founded on unimpeachable evidence and certainty of guilt and hence any doubt that arises in prosecution case must be resolved in favour of accused*. Moreover it is cardinal principle of criminal jurisprudence that a single instance causing a reasonable doubt in the mind of Court entitles the accused to the benefit of doubt not as a matter

of grace but as a matter of right. Reliance is placed on case law reported as *"Muhammad Akram versus The State"* (2009 SCMR 230) and *"Tariq Pervaiz vs. The State"*(1995 SCMR 1345). Consequently, the instant appeal is allowed, the conviction and sentence awarded to the appellant by the learned trial Court, *vide* impugned judgment dated 31.07.2017 is set-aside and the appellant is acquitted of the charge by extending him the benefit of doubt. The appellant is detained in jail, directed to be set at liberty forthwith in this case, if not liable to be detained in any other case.

(A.A.K.) **Appeal allowed.**

PLJ 2022 Cr.C. (Note) 132

[Lahore High Court, Lahore]

Present: **ANWAARUL HAQ PANNUN, J.**

BATI--Petitioner

versus

STATE etc.--Respondents

Crl. Rev. No. 154 of 2014, heard on 16.3.2021.

Pakistan Arms Ordinance, 1965 (XX of 1965)--

----S. 13--Criminal Procedure Code, (V of 1898), Ss. 435/439--Criminal revision--Conviction and sentence--Challenged--Appeal dismissed, hence revision petition--Allegation--A rifle 12 bore bump action and four rounds were recovered from petitioner and could not produce any license or permit--Modification in sentence--Petitioner is crawling in corridors of Courts as justice seeker since 2009--As stated *supra*, his probable date of release is 03.07.2015, if fine paid, as such, he has served out his major portion out of total sentence--Since case was registered against petitioner he was convicted and sentenced in year 2011 and at that time, his case comes with proviso of Pakistan Arms Ordinance, 1965--Petitioner's case comes within proviso of Pakistan Arms Ordinance, 1965, as stated *supra*--Thus considering all this and in view of no objection by learned Prosecutor while maintaining conviction, taking a lenient view, his quantum of sentence under Section 13 of Pakistan Arms Ordinance XX of 1965 is reduced from 02 years R.I. to period he had already undergone--Sentence of petitioner regarding fine amount is modified and enhanced from Rs. 10,000/- to Rs. 20,000/-, which shall be paid by petitioner within one month--Revision dismissed.

[Para 6] A & B

Mr. Falak Sher Bakhsh Gill, Advocate for Petitioner

Ms. Noshe Malik, Deputy Prosecutor General for Complainant/ State.

Date of hearing: 16.3.2021.

JUDGMENT

Through this criminal revision petition underSections 435/439, Cr.P.C., the petitioner Bati has challenged the vires of judgments dated 10.12.2011 and 04.02.2014, passed by learned trial Court and lower appellate Court respectively in case/FIR No. 59, dated 11.03.2009, offence under Section 13 of Pakistan Arms Ordinance XX of 1965, registered at Police Station Jhawarrian, District Sargodha. The petitioner has been convicted and sentenced by learned Magistrate 1st Class, Shahpur, *vide* impugned judgment dated 10.12.2011 as under:

Under Section 13 of Pakistan Arms Ordinance XX of 1965

02-years R.I alongwith fine of Rs. 10,000/-, failing which, he will further undergo one month S.I. Benefit of Section 382-B, Cr.P.C. is given to the convict.

Feeling aggrieved of the aforesaid judgment, the petitioner filed a criminal appeal before learned Addl. Sessions Judge, Sargodha, which was dismissed *vide* impugned judgment dated 04.02.2014.

2. Precisely, the prosecution's case is that upon personal search of the appellant, a rifle 12 bore pump action' and four rounds were recovered from his possession, for which, he could not produce any license or permit.

3. Learned counsel for the petitioner contends that the instant case is a progeny of a criminal case/FIR No. 53 dated 28.03.2008, offence under Sections 324/337-F(iii)/337-F(vi)/34, PPC, registered at Police Station Jhawarian, Tehsil Shahpur, District Sargodha. After payment of Daman etc. in view of judgment dated 18.07.2014, passed by this Court, the petitioner has been released. Learned counsel for the petitioner submits that the petitioner does not contest his conviction and only craves for reduction of his sentence as he has already undergone.

4. Learned Deputy Prosecutor General for the State has half-heartedly opposed the aforesaid contention of learned counsel for the petitioner and requested for dismissal of the titled vision petition.

5. Arguments heard. Record perused.

6. I have gone through the record appended with this petition. No illegality or impropriety is found in the impugned judgments. On directions of this Court, learned Deputy Prosecutor General has produced a report of the Superintendent District Jail Shahpur bearing No. 3741 dated 16.03.2021, according to which, the petitioner has been released on bail on 13.12.2014. Perusal of order dated 08.12.2014 reveals that as per report of Superintendent, District Jail Shahpur, the petitioner has served out major portion of his sentence and his probable date of release is 03.07.2015, if fine paid, thus his sentence was suspended on this ground. It has been noticed that the petitioner is crawling in the corridors of the Courts as justice seeker since 2009. As stated *supra*, his probable date of release is 03.07.2015, if fine paid, as such, he has served out his major portion out of the total sentence. Since the case was registered against the petitioner on 11.03.2009, he was convicted and sentenced in the year 2011 and at that time, his case comes with the proviso of the Pakistan Arms Ordinance, 1965, for which punishment is provided as ***"imprisonment for a term which may extend to [seven years, or with fine, or with both."*** Thereafter, Punjab Arms (Amendment) Act, XV of 2015 promulgated on 18.03.2015, according to which punishment for aforesaid offence is provided as ***"imprisonment for a term which shall not be less than two years and which may extend to seven years and with fine."*** But this amendment has no retrospective effect, therefore, the petitioner's case comes within the proviso of the Pakistan Arms Ordinance, 1965, as stated *supra*. Thus considering all this and in view of no objection by the learned Prosecutor while maintaining the conviction, taking a lenient view, his quantum of sentence under Section 13 of Pakistan Arms Ordinance XX of 1965 is reduced from 02 years R.I. to the period he had already undergone. However, the sentence of the petitioner regarding

fine amount is modified and enhanced from Rs. 10,000/- to Rs. 20,000/-, which shall be paid by the petitioner within one month and in default thereof, he shall further undergo one month S.I. The petitioner is granted one month's time to deposit the enhanced amount of fine, and also submit surety bonds equal to the value of fine *i.e*. Rs. 20,000/- to the satisfaction of learned trial Court, failing which, he shall be taken into custody and shall be dealt with in accordance with law. With the above modification, the instant criminal revision petition stands dismissed.

(A.A.K.) **Revision dismissed.**

PLJ 2022 Cr.C. (Note) 143

[Lahore High Court, Lahore]

Present: **ANWAARUL HAQ PANNUN AND MUHAMMAD WAHEED KHAN, JJ.**

MUHAMMAD SALEEM & another--Appellants

versus

STATE, etc.--Respondents

Crl Appeal No. 241589-J of 2018, heard on 19.4.2021.

Control of Narcotic Substances Act, 1997 (XXV of 1997)--

----Ss. 9(c) & 15--Conviction and sentence--Challenge to--Recovery of charas--Benefit of doubt--In narcotic cases it is prime duty of prosecution to establish, by producing on record a confirmatory report issued by Chemical Examiner, compiled by following requisite tests in line with Rule 6 of Control of Narcotic Substances (Government Analysts) Rules, 2001, that alleged recovered material was in fact contraband--**Held:** It is well settled principle of law that a single instance causing a reasonable doubt in mind of Court entitles accused to benefit of doubt not as a matter of grace but as a matter of right--Appeal allowed. [Para 3 & 4] A & B

2018 SCMR 2039, PLD 2020 SC 57, 2009 SCMR 230 and 2014 SCMR 749.

Mr. Asjad Pervaiz Abbasi, Advocate for Appellant No. 1.

Mr. Tayyab Shakoor Rana, Advocate for Appellant No. 2.

Mr. Muhammad Irfan Malik, Special Prosecutor for A.N.F for State.

Date of hearing: 19.4.2021.

JUDGMENT

Anwaarul Haq Pannun, J.--The appellants, Muhammad Saleem and Shakil Ahmad, were tried in case F.I.R No. 22/2015 dated 05.04.2015, offence under Sections 9(c) and 15 of the Control of Narcotic Substances

Act, 1997, registered at Police Station A.N.F, Lahore, as allegedly recovery of charas weighing 14.400 kilograms and 7.200 kilograms respectively was effected, at the time of their arrest from their possession by the police party. After framing of formal charge against the accused/appellants, to which they pleaded not guilty and claimed trial, the prosecution examined four witnesses to prove charge against the appellants. Muhammad Ehsan, S.I., PW-1 chalked out the formal FIR (Exh.PA) on the basis of complaint. He was also handed over the sealed parcels said to contain charas for safe custody in Malkhana and onward transmission to the office of Chemical Examiner. Asif Farooq, constable, PW-2 is the witness of recovery memo. (Ex.PB). Haroon Tariq, A.D, PW-3 is complainant/I.O. of this case and PW-4 Muhammad Imran, constable, deposited sealed parcels said to contain charas in the office of Chemical Examiner. Statements of the accused under Section 342, Cr.P.C. were recorded, wherein they while professing innocence and alleging their false involvement in this case, had refuted all the allegations levelled against them. The appellants did not opt to appear as their own witness under Section 340(2), Cr.P.C., however, the appellant Shakil Ahmad in his defence had produced Muhammad Nadeem (DW-1) and *Mst.* Iqbal Begum (DW-2). On conclusion of trial, the learned trial Court, *vide* its judgment dated 18.09.2018, has convicted both the appellants under Section 9(c) of C.N.S.A, 1997 and awarded imprisonment for life to accused Muhammad Saleem with a fine of Rs. 100,000/- and in default thereof to further undergo six months S.I., whereas the accused Shakil Ahmad was sentenced to 11 years R.I. with a fine of Rs. 60,000/- and in default thereof to further undergo six months S.I. Benefit of Section 382-B, Cr.P.C. was, however, extended to both the convicts/appellants.

2. Arguments heard. Record perused.

3. Leaving aside the verbosity revolving around the demeanor of statements of the PWs, it is straightaway observed that in narcotic cases it is the prime duty of the prosecution to establish, by producing on record a confirmatory report issued by the Chemical Examiner, compiled by

following the requisite tests in line with Rule 6 of the Control of Narcotic Substances (Government Analysts) Rules, 2001, that the alleged recovered material was in fact the contraband. We have noticed that in the instant case the reports (Ex.PH/1-3) issued by the Federal Government Analyst, National Institute of Health, Islamabad has not been prepared by following Rule 6 ibid. The Hon'ble Supreme Court of Pakistan in the dictum reported as *The State through Regional Director ANF vs. Imam Bakhsh and others* (2018 SCMR 2039) has held as under:-

> *"Non-compliance of Rule 6 can frustrate the purpose and object of the Act, i.e. control of production, processing and trafficking of narcotic drugs and psychotropic substances, as conviction cannot be sustained on a Report that is inconclusive or unreliable. The evidentiary assumption attached to a Report of the Government Analyst under Section 36(2) of the Act underlines the statutory significance of the Report, therefore details of the test and analysis in the shape of the protocols applied for the test become fundamental and go to the root of the statutory scheme. Rule 6 is, therefore, in the public interest and safeguards the rights of the parties. Any Report (Form-II) failing to give details of the full protocols of the test applied will be inconclusive, unreliable, suspicious and untrustworthy and will not meet the evidentiary assumption attached to a Report of the Government Analyst under Section 36(2)."*

The above view of the Apex Court has been reiterated in a recently delivered judgment reported as *Qaiser Javed Khan vs. The State through Prosecutor General Punjab, Lahore and another* (PLD 2020 SC 57).

4. Thus, following the law laid down by the Hon'ble Supreme Court of Pakistan in the dictums *supra*, which is binding on all Courts, we hold that the prosecution has miserably failed to bring home charge against the appellants. It is well settled principle of law that a single instance causing a reasonable doubt in the mind of the Court entitles the accused to the benefit

of doubt not as a matter of grace but as a matter of right. Reliance in this regard is placed upon the judgments reported as *Muhammad Akram vs. The State* (2009 SCMR 230) and *Muhammad Zaman v. The State and others* (2014 SCMR 749).

5. Resultantly, this appeal is allowed, the conviction and sentences recorded by the learned trial Court against the appellants through the impugned judgment dated 18.09.2018 are set aside and they are acquitted of the charge. The appellants are in jail, they shall be released forthwith if not required in any other case.

(A.A.K.) **Appeal allowed.**

PLJ 2022 Cr.C. (Note) 159

[Lahore High Court, Lahore]

***Present*: ANWAARUL HAQ PANNUN AND MUHAMMAD WAHEED KHAN, JJ.**

ASIF MASIH--Appellant

versus

STATE etc.--Respondents

Crl. A. No. 19671 of 2021, heard on 21.4.2021.

Control of Narcotic Substances Act, 1997 (XXV of 1997)--

----S. 9(c)--Conviction and sentence--Recovery of charas--Challenge to--Modification in sentence--Quantum of sentence--Appellant was not a previous convict; he was only bread earner of his family; he is behind bars since his arrest and so far he has undergone more than one year and six months of sentence imposed upon him, case of petitioner calls for lenient view--Counsel for appellant since has not pressed this appeal on merits and craved for reduction of quantum of sentence awarded, therefore, considering all these aspects, this Court is of opinion that interest of justice will be met if sentence imposed on appellant is reduced, same is accordingly reduced upto period which he has already endured/undergone so far--The sentence of fine and imprisonment in default thereof is, however, maintained with modification in sentence appeal was dismissed.

[Para 8] A & B

M/s. Ch. Muhammad Riaz and Kamran Javaid Malik, Advocates for Appellant.

Mr. Muhammad Waqas Anwar, DPG for State.

Date of hearing: 21.4.2021.

JUDGMENT

Anwaarul Haq Pannun, J.--The appellant, Asif Masih, was sent up to face trial in case FIR No. FIR No. 707/2019, dated 05.08.2019, offence under Sections 9(c) of the Control of Narcotic Substances Act, 1997 (hereinafter to be called as CNSA), registered at P.S. Saddar Gujranwala, as allegedly recovery of Charas (P-1) weighing 1500 grams affected from his possession, out of which 150 grams Charas was separated for analysis.

2. After framing of formal charge against the accused/appellant, to which he pleaded not guilty and claimed trial, the prosecution examined six witnesses to prove charge against him. Muhammad Anwar, SI/Complainant (PW-1) alongwith Ansar Javed, ASI (PW-2) are the witnesses of recovery memo (Exh.PA). Saifullah, SI (PW-3) is the I.O. of this Case. Tariq Mehmood 695/ASI (PW-4) chalked out formal FIR (Exh.PD) in this case. Muhammad Ashraf 2809/HC (PW-5) was handed over the case property for safe custody in Malkhana and its onward transmission to the quarter concerned. Faiz Ahmad 21612/C (PW-6) handed over case property to Saifullah SI for its onward deposit in the office of PFSA.

3. After full-fledged trial, the learned trial Court while convicting the appellant u/S. 9-C of CNSA, 1997 sentenced him to *undergo three years and one month R.I and fine of Rs. 20,000 and in default whereof to further undergo SI for five months*.

4. Incipiently, without contesting conviction, learned counsel for the appellant submits that appellant has already undergone more than one year

and six months of the sentence imposed upon him, therefore, in view of the fact that he is a only bread earner of his family & previous non-convict, hence, he deserve leniency in the quantum of sentence and has thus impetrated that sentence of imprisonment which the appellant has already undergone may be deemed sufficient to meet the ends of justice.

5. Learned DPG has not opposed the defence counsel's above noted contention in view of the fact that conviction is being maintained.

6. Heard. Record perused.

7. The prosecution has examined as many as 06 witnesses in order to prove the case against the appellant. The evidence has been gone through. The Court is of the view that the prosecution has ably proved its case against the appellant.

8. Nothing is available on record to show that the appellant is a previous convict; he is the only bread earner of his family; he is behind the bars since his arrest *i.e*. 05.08.2019 and so far he has undergone more than one year and six months of the sentence imposed upon him, therefore, the case of the petitioner calls for lenient view in view of the judgment of the Hon'ble Supreme Court of Pakistan titled *Abdul Rehman v. The State* (2011 SCMR 965). The learned counsel for the appellant since has not pressed this appeal on merits and craved for reduction of quantum of sentence awarded, therefore, considering all these aspects, this Court is of the opinion that interest of justice will be met if the sentence imposed on the appellant is reduced, the same is accordingly reduced upto the period which the he has

already endured/undergone so far. The sentence of fine and imprisonment in default thereof is, however, maintained.

9. With the above modification, the instant appeal stands dismissed.

(A.A.K.) **Appeal dismissed.**

PLJ 2022 Cr.C. (Note) 172

[Lahore High Court, Lahore]

***Present*: ANWAARUL HAQ PANNUN, J.**

MUHAMMAD IQBAL and another--Appellants

versus

STATE etc.--Respondents

Crl. A. No. 72360 & Crl. Rev. No. 72359 of 2019, decided on 9.3.2022.

Pakistan Penal Code, 1860 (XLV of 1860)--

----S. 302(b)--Conviction and sentence--Challenge to--Absconsion of accused--Duty of prosecution--Mitigating circumstances--The statement of I.O. has made it crystal clear that he was declared as an absconder after completion of necessary formalities--Absconsion of an accused is also a corroborative circumstance of charge against him--Motive has also been proved--Ocular account is fully corroborated by medical evidence coupled with abscondence of appellant--Trial Court has rightly appreciated evidence of prosecution/material available on record in its true perspective and as such no substance has been found to interfere with well-reasoned judgment of trial Court to extent of appellant and High Court has not been able to point out any perversity, illegality and impropriety as well as any loophole to extend any benefit to appellant--As far as contiguity of quantum of sentence is concerned, that trial Court while taking into account mitigating circumstances rationally inflicted equitable quantum of sentence considering all pros and cons of case, therefore, instant appeal being devoid of any force merit to his extent is hereby dismissed, as a consequence whereof, his conviction and sentence as recorded by trial Court *vide* impugned judgment is maintainable and upheld. [Para 9] A & B

Pakistan Penal Code, 1860 (XLV of 1860)--

----S. 302(b)--Conviction and sentence--Challenge to--Absconsion of accused--Motive has also not directly been attributed to him--He is real brother of co-appellant and as such possibility of his false implication by complainant with *mala fide* and ulterior motive by throwing wider net cannot be ruled out--As far as his absconsion for a considerable period is concerned, suffice it to say that long abscondence of accused cannot be formed basis for recording of conviction and it can be considered as a corroborative piece of evidence--There are serious doubts regarding his involvement--His absence was corroborative factor if otherwise prosecution succeeds to prove its case or there was some plausible evidence available on record to connect him with commission of alleged offence--Even otherwise, it is not necessary that not only guilty persons abscond to avoid their arrest but also innocent persons also used to abscond to avoid agonies at hands of police, hence, it cannot be held that he absconded being guilty mind rather it would be being innocent--In such circumstances, his involvement is highly doubtful--So while extending him benefit of doubt, he is acquitted of charge framed against him--He is in jail, greeted to be set at liberty in this case, in a trice, if not required in any other case. [Para 10] C & D

Ms. Nighat Saeed Mughal, Advocate for Appellants.

Miss Rahila Shahid, DDPP for State.

M/s. Shoukat Nawaz Gondal and Mian Mazhar Hussain, Advocates for Complainant.

Date of hearing: 9.3.2022.

JUDGMENT

Muhammad Iqbal and Muhammad Javed sons of Mureed Hussain were involved in case FIR No. 81/2001 dated 26.07.2001, offence under Sections 302, 324, 34, PPC, registered with Police Station Dalwaryam,

District Pakpattan Sharif, thus tried by learned Additional Sessions Judge/Judge MCTC, Pakpattan, who *vide* his judgment dated 30.10.2019 convicted and sentenced them in the following terms:

1) Muhammad Iqbal

2) Muhammad Javed

Under Section 302(b), PPC

Life Imprisonment each by way of Ta'zir with direction to pay Rs. 5,00,000/-each as compensation under Section 544-A, Cr.P.C. to the legal heirs of deceased Nazar Muhammad. In case of default in payment whereof, to further undergo SI for six months each.

They were also extended the benefit of Section 382-B, Cr.P.C.

2. Feeling himself aggrieved of the judgment of conviction, the appellants have assailed it by filing the captioned criminal appeal. The complainant Muhammad Iqbal has filed captioned revision petition seeking enhancement of sentence of appellants as well as compensation amount imposed through the impugned judgment. Since both the matters have emanated from the same judgment, therefore, are being disposed of through this consolidated judgment.

3. Prosecution's story as projected through FIR (Exh.PA) reflects that in the intervening night of 25/26.07.2001, the complainant, Muhammad Iqbal *(PW-1)* alongwith his brothers namely Nazar Muhammad (deceased), Zafar Iqbal and father Muhammad Ramzan were sleeping in the Courtyard of their house. The son of Nazar Muhammad namely Shahbaz (aged about 4/5 years) was also sleeping with him. In the Courtyard, the electric bulb was on. At about 1.45 a.m. (night), he woke up on the noise and found accused Mureed, Zubair s/o Mureed (empty handed), Muhammad Iqbal s/o Mureed armed with .12 bore, Muhammad Javed s/o Mureed armed with rifle standing near the cot of Nazar Muhammad. Mureed and Zubair raised a *'Lalkara'* to murder Nazar Muhammad whereupon Muhammad Iqbal made fire-shot with

his .12 bore gun hitting Nazar Muhammad on his chest. Then Muhammad Javaid made a fire shot from his rifle which landed on left elbow of Nazar Muhammad. The PWs tried to apprehend the accused but they threatened them to stay away and escaped from the scene of crime. Nazar Muhammad succumbed at the spot. Shahbaz (minor) was also injured in the occurrence.

Motive behind the occurrence was that on 16.04.1999, the brother of accused Muhammad Iqbal namely Zafar Iqbal was murdered and the accused Muhammad Iqbal had the grudge that Zafar Iqbal was involved in that murder. On this grudge the accused persons murdered Nazar Muhammad and injured minor Shahbaz. The appellants were found involved in the occurrence. On submission of challan, after ancillary proceedings, the accused pleaded not guilty and claimed trial.

4. The prosecution's case hinges upon direct evidence. Ocular account has been furnished by Muhammad Iqbal s/o Ramzan, complainant *(PW-1)* and Zafar Iqbal son of Ramzan *(PW-2)*. Ghulam Abbas Inspector/I.O. (PW-11) and Muhammad Ashraf SI/I.O (PW-12) The medical evidence has been furnished by Dr. Muhammad Farooq Malik, M.O. (PW-10) who conducted post-mortem examination on the dead body of Nazar (deceased) on 26.07.2001 at 1.30 p.m. and observed following injuries:--

1. A fire-arm lacerated wound of entry 2.5 x 2 cm x deep going inverted burnt margins on right sterna area slightly above and 8 cm from right nipple.
2. A fire-arm lacerated wound of entry 1 x 1½ cm x deep going with inverted margins on outer side of left elbow joint.
3. A fire-arm lacerated wound of entry 1 x 1½ cm x deep going on medial middle part of left upper arm. Left humerious bone was fractured. Skill, brain, membranes were healthy.

He expressed his opinion as follows:--

"In my opinion, the cause of death was excessive hemorrhage and shock due to Injury No. 1 resulting severe damage to the blood vessels of the heart, right pulmonary blood vessels and the lung, Injury No. 1 was sufficient to cause death in an ordinary course of nature. All the three injuries were ante-mortem.

On dissection of Injury No. 1, one plastic wad and 6 pellets were recovered from the chest cavity and posterior internal wall on the right side.

Probable time that elapsed between injury and death was within about five minutes and between death and post-mortem was within 15 hours."

5. Learned DDPP while tendering in evidence report of Chemical Examiner (Exh.PT) and Fire Arms and Tool Marks Examiner report of PFSA (Exh.PU) closed the prosecution's case. Evidence of rest of the PWs being formal in its nature, therefore, discussion thereon is dispensed with in order to main brevity.

6. When examined under Section 342, Cr.P.C., the appellants gainsaid the allegations levelled against them through the prosecution version/evidence and professed their innocence. They did not opt to appear as their own witness in terms of Section 340(2), Cr.P.C., they, however, opted to adduce evidence in their defence and while placing on record certain documents in shape of Mark-DA and Exh.DD closed defence evidence.

7. The learned trial-Court on conclusion of trial as aforesaid, convicted and sentenced the appellants only in the above stated terms.

8. Heard. Record perused.

9. First of all, I take up the case of appellant **Muhammad Iqbal.** The occurrence under discussion took place in the intervening night of 25/26.07.2001 which was promptly reported to the police on 26.07.2001 at

3.45 a.m. (night). He, as per prosecution's version, while armed with .12 bore gun made fire shot hitting deceased on his chest; The occurrence allegedly committed inside the house. Both the eye-witnesses namely Muhammad Iqbal *(PW-1)* and Zafar Iqbal *(PW-2)* are jointly resident of the house of occurrence. The occurrence was committed in the month of July and in the month of June-and July normally weather is much hot and people of the, villages used to sleep in their Courtyard. Both the aforesaid PWs remained consistent on material point despite the fact that they were cross-examined at length by the of defence regarding scene of crime. They are the real brothers of the deceased. Their residence/presence in the same house is established. The occurrence is of midnight, therefore, their presence in the Courtyard of the same house is quite natural. As far as identity of appellant Iqbal is concerned, he and the PWs are the resident of the same village *i.e.* 78/D, Pakpattan. They belong to same caste and inter se related. The PWs from the lodging of the FIR till their deposition before Court have taken a consistent stand that they identified the accused in the light of bulb. As witnesses and accused are relative, therefore, their identity in the light of bulb is quite plausible, hence, question of mistaken identity does not arise. The site-plan of the place of occurrence Exh.PB/B reflects the presence of PWs at the time of occurrence. The occurrence took place in year, 2001 whereas the trial of the appellants comments on 22.02.2019. After such a long time, minor contradictions in deposition are natural because human memory fades with the afflux of time. The defence has not challenged the time, date and place of occurrence. So far as abscondence of the appellant is concerned, he was arrested in this case on 29.12.2018 and as such he remained fugitive from law for, a long period of about 18 years and no plausible explanation whatsoever has been furnished for such absconsion. The statement of I.O. has made it crystal clear that he was declared as an absconder after completion of necessary formalities. Absconsion of an accused is also a corroborative circumstance of the charge against him. It is paramount duty of the prosecution to prove presence of the PWs at the relevant time of

occurrence. Being residents of the same house, the presence of the prosecution witnesses at the time of occurrence at the scene of crime is quite natural. Both the PWs have been cross-examined at length by the defence. Nothing favourable to the defence could has been brought on record. Ocular account is duly corroborated with the medical evidence furnished by Dr. Muhammad Farooq Malik, Medical Officer (PW-10). He on 26.07.2001 at 1.30 p.m. conducted post-mortem examination on the dead body of Nazar (deceased). He while appearing in the witness box as M.O. has affirmed the stamps of injuries he observed at the time of post-mortem examination on the person of deceased. The injuries coincide with the deposition made by eye-witnesses *i.e*. PW-1 Muhammad Iqbal, complainant and PW-2 Zafar Iqbal. Recovery of .12 bore gun (P-1) alongwith live bullets P-2 has also been affected by the I.O. *(PW-5)* on pointing out of the appellant on 04.01.2019 *vide* memo Exh.PL. As far as non-matching of recovery of P-1 with the secured empty is concerned, since recovery was affected after 18 years of the occurrence, hence may not coincide with the empty etc. because there is possibility of rust after such a long period of time. Even otherwise, evidence of recovery is a corroboratory piece of evidence. Motive has also been proved. In view of above, the ocular account is fully corroborated by the medical evidence coupled with abscondence of the appellant. The learned trial Court has rightly appreciated the evidence of the prosecution/material available on record in its true perspective and as such no substance has been found to interfere with the well-reasoned judgment of the learned trial Court to the extent of appellant Muhammad Iqbal and this Court has not been able to point out any perversity, illegality and impropriety as well as any loophole to extend any benefit to the appellant. As far as the contiguity of the quantum of sentence is concerned, it has been observed that learned trial Court while taking into account mitigating circumstances rationally inflicted equitable quantum of sentence considering all the *pros* and *cons* of the case, therefore, the instant appeal being devoid of any force merit to his extent is hereby dismissed, as a consequence whereof, his conviction and sentence as

recorded by the learned trial Court *vide* impugned judgment dated 30.10.2019 is maintainable and upheld.

10. As far as case of appellant Muhammad Javed is concerned, the role attributed to him is that he while armed with rifle made fire shot hitting Nazar Muhammad deceased on his left elbow. He has not been attributed fatal fire shot. The doctor PW-10 has mentioned that 'one plastic wad and 6 pellets were recovered. Since co-appellant made fire shot with .12 bore gun, hence, there is possibility that one of the pellets of gun .12 bore may have hit the deceased at his elbow. Even otherwise, the empty collected by the I.O. from the spot was not matched with the recovery affected from him as per report of PFSA (Exh.PU). Motive has also not directly been attributed to him. He is the real brother of co-appellant and as such possibility of his false implication by the complainant with *mala fide* and ulterior motive by throwing wider net cannot be ruled out. As far as his absconsion for a considerable period is concerned, suffice it to say that long abscondence of the accused cannot be formed basis for recording of conviction and it can be considered as a corroborative piece of evidence. As stated above, there are serious doubts regarding his involvement. His absence was corroborative factor if otherwise prosecution succeeds to prove its case or there was some plausible evidence available on the record to connect him with the commission of alleged offence. Even otherwise, it is not necessary that not only the guilty persons abscond to avoid their arrest but also innocent persons also used to abscond to avoid the agonies at the hands of the police, hence, it cannot be held that he absconded being guilty mind rather it would be being innocent. In such circumstances, his involvement is highly doubtful. So while extending him the benefit of doubt, he is acquitted of the charge framed against him. He is in jail, greeted to be set at liberty in this case, in a trice, if not required in any other case.

11. So far as Crl. Revision Petition No. 72359 of 2019 filed by Muhammad Iqbal complainant for enhancement of sentence of respondent/appellants as well as increase of amount of compensation is

concerned, in view of my op-cit findings, the same stands dismissed accordingly.

(A.A.K.) **Appeal dismissed.**

PLJ 2022 Cr.C. 67

[Lahore High Court, Multan Bench]

Present: **ANWAARUL HAQ PANNUN, J.**

MUHAMMAD AMJID and another--Petitioners

versus

STATE and another--Respondents

Crl. Misc. No. 5093-B of 2021, decided on 9.8.2021.

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

----S. 498--Pakistan Penal Code, (XLV of 1860), S. 406--Pre-arrest bail, confirmed--Committed criminal breach of trust--Misappropriating cash and gold ornaments--No specific date, time and place of alleged entrustment had been mentioned, FIR, which has been lodged after an unexplained delay of about one year and nine months, prima facie, ingredients of Section 406, PPC are conspicuously missing as prima face there appears to be some dispute of civil in nature between parties, therefore, possibility of false involvement of petitioners with malice and ulterior motive of complainant cannot be ruled out, offence does not fall within prohibitory clause of Section 497, Cr.P.C., petitioners have joined investigation, as such sending the behind bars would serve no useful purpose, resultantly, instant bail petition is allowed and ad-interim pre-arrest bail already granted to petitioners is confirmed. [P. 68] A

Syed Jaffar Tayyar, Advocate with Petitioners.

Mr. M. Abdul Wadood, Addl. Prosecutor General for state.

Mr. Abdul Rehman Zooq, Advocate for Complainant.

Date of hearing: 9.8.2021.

ORDER

The petitioners Muhammad Amjad and *Mst.* Parveen Bibi seek pre-arrest bail in case/FIR No. 260, dated 02.06.2021, offence under Sections 406, PPC, registered at Police Station Saddar Mian Channu, District Khanewal.

2. Precisely the allegation against the petitioners is that they alongwith their co-accused committed criminal breach of trust by misappropriating cash Rs. 16,00,000/-and gold ornaments weighing 12-tolas belonging to the complainant, which were given to them on different occasions on account of spiritual treatment of the complainant.

3. Arguments heard and record perused.

4. On bare perusal of the record, it reveals that no specific date, time and place of alleged entrustment had been mentioned, the FIR, which has been lodged after an unexplained delay of about one year and nine months, prima facie, the ingredients of Section 406, PPC are conspicuously missing as prima facie there appears to be some dispute of civil in nature between the parties, therefore, the possibility of false involvement of the petitioners with malice and ulterior motive of the complainant cannot be ruled out, the offence does not fall within the prohibitory clause of Section 497, Cr.P.C., The petitioners have joined the investigation, as such sending them behind the bars would serve no useful purpose, resultantly, the instant bail petition is allowed and ad-interim pre-arrest bail already granted to the petitioners *vide* order dated 16.07.2021 is confirmed, subject to their furnishing bail bonds in the sum of Rs. 1,00,000/- (Rupees one hundred thousand only) each, with one surety each, in the like amount to the satisfaction of learned trial Court.

(A.A.K.) **Bail confirmed.**

PLJ 2022 Cr.C. 101

[Lahore High Court, Multan Bench]

Present: **ANWAARUL HAQ PANNUN, J.**

MUHAMMAD USMAN--Petitioner

versus

STATE & another--Respondents

Crl. Misc No. 2403/B of 2021, decided on 19.5.2021.

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

----S. 498--Pakistan Penal Code, (XLV of 1860), Ss. 322, 279 & 427--Pre-arrest bail, confirmed--Allegation of--Accusation of committing qatl-bis-sabab by rash and negligent driving--According to Schedule-II of Code of Criminal Procedure, 1898, offences under Sections 279 and 427, PPC are bailable in their nature--Punishment for qatl-bis-sabab provided under Section 322, PPC is 'Diyat' only--If an accused charged under Section 322, PPC, upon pleading his guilty or his trial, is convicted accordingly, he can only be kept in confinement in case he commits default in payment of Diyat amount--Petitioner has already joined investigation and Investigating Officer present in Court concedes that he is no more required for purpose of investigation--As such, incarceration of petitioner during trial would amount to his punishment before conviction and sending him behind bars is not justified--Bail was allowed. [P. 102] A

Mr. Nadeem Ahmad Tarar, Advocate along with Petitioner.

Mr. Muhammad Abdul Wadood, Additional Prosecutor General for State.

Ch. Muhammad Saeed, Advocate for Complainant.

Date of hearing: 19.5.2021.

ORDER

Having been booked in case F.I.R No. 35/2021 dated 20.01.2021, offence under Sections 320 (converted into Section 322), 279, 427, PPC, registered at Police Station Jaleel-Abad, Multan, with the accusation of committing qatl-bis-sabab of Muhammad Yasin (son of the complainant) by rash and negligent driving and colliding the car being driven by him with the motorcycle on which the aforesaid victim was riding, the petitioner seeks pre-arrest bail from this Court on the ground of his false implication in the case allegedly prompted by motivational considerations of the complainant.

2. Heard. Record perused.

3. According to Schedule-II of the Code of Criminal Procedure, 1898, offences under Sections 279 and 427, PPC are bailable in their nature. Punishment for qatl-bis-sabab provided under Section 322, PPC is 'Diyat' only. If an accused charged under Section 322, PPC, upon pleading his guilty or his trial, is convicted accordingly, he can only be kept in confinement in case he commits default in the payment of Diyat amount. The petitioner has already joined the investigation and the Investigating Officer present in the Court concedes that he is no more required for the purpose of investigation. As such, incarceration of the petitioner during trial would amount to his punishment before conviction and sending him behind the bars is not justified. Therefore, this petition is allowed and ad-interim pre-arrest bail already granted to the petitioner by this Court *vide* order dated 08.04.2021 is confirmed subject to his furnishing of fresh bail bond in the sum of Rs. 100,000/-(Rupees one hundred thousand only) with one surety in the like amount to the satisfaction of the learned trial Court/Area Magistrate.

(A.A.K.) **Bail allowed.**

PLJ 2022 Cr.C. 253

[Lahore High Court, Multan Bench]

Present: **ANWAARUL HAQ PANNUN, J.**

MUHAMMAD SIDDIQUE *alias* SEEKA--Petitioner

versus

STATE, etc.--Respondents

Crl. Misc. No. 2959-B of 2021, decided on 7.5.2021.

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

----S. 497--Control of Narcotic Substances Act, (XXV of 1997), S. 9-C--Recovery of 2040 grams charas was recovered--Petitioner's maternal aunt much prior to registration of case filed application u/S. 22-A and 22-B, Cr.P.C. against the complainant of this and other unknown officials of the police--Petitioner has no previous record of such like cases--Possibility cannot be ruled out that out of the revenge of aforesaid proceedings--Bail allowed.

[Pp. 253 & 254] A & B

Sh. Javaid Akhtar, Advocate for Petitioner.

Mr. M. Abdul Wadood, Addl. P.G. for Respondents.

Date of hearing: 7.5.2021.

ORDER

By means of instant petition, the petitioner has prayed for the grant of his post arrest bail in a case registered *vide* FIR No. 270 dated 03.04.2020, offence under Section 9(c) of the Control of Narcotic Substances Act, 1997 with Police Station City Layyah (hereinafter to be called as CN.S.A, 1997).

2. Precisely the allegation against the petitioner is that on the aforesaid date, he was captured by the police contingents and on his personal search, 2040 grams Charas was allegedly recovered from his possession.

3. Heard. Record perused.

4. The perusal of the record reveals that petitioner maternal aunt namely Mariam Bibi much prior to registration of instant case *i.e*. 03.04.2020 filed an application under Section 22-A and 22-B, Cr.P.C. against the complainant of this case and other unknown officials of the police of P.S. City Layyah on 28.08.2018 in which *vide* order dated 04.09.2018, SHO concerned was directed to proceed with the matter in accordance with law in the light of MLC issued to the injured *Mst.* Mariam Bibi of DHQ Hospital, Layyah which order was challenged by Irfan Iftikhar, SI through W.P. No. 12959/2018 and was upheld by this Court *vide* order dated 03.12.2018. More so, in the aforesaid complaint, the father of the petitioner namely Bilal is a witness. Petitioner has no previous record of such like cases. Even otherwise, as per report of SHO P.S. City Layyah, Complainant namely Muhammad Sajjad Bashir, ASI has been dismissed from service, therefore, in such circumstances, the possibility cannot be ruled out that out of the revenge of aforesaid proceedings ordered under Section 22-A and 22-B, Cr.P.C., the petitioner might have been involved in this case, rendering his case to be one of further inquiry. The culpability of the petitioner in this case shall be determined by the learned trial Court after receipt report of Chemical Examiner and recording of evidence.

5. The investigation is already complete. Resultantly, the petition in hand is **allowed** subject to furnishing bail bonds by the petitioner in the sum of Rs. 100,000/-(rupees one lac) with one surety in the like amount to the satisfaction of learned trial Court and he is admitted post arrest bail.

6. On account of upcoming Eid Holidays, copy 'dasti' provided copying charges.

(K.Q.B.) **Bail allowed.**

PLJ 2022 Cr.C. 395

[Lahore High Court, Multan Bench]

Present: **ANWAARUL HAQ PANNUN, J.**

MUHAMMAD ASLAM--Petitioner

versus

STATE, etc.--Respondents

Crl. Misc. No. 4982-B of 2021, decided on 5.8.2021.

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

----S. 497--Control of Narcotic Substances Act, (XXV of 1997), S. 9(c)--Bail after arrest, grant of--Allegation of--Recovery of charas 1280 grams--Investigation was completed and further in carceration of petitioner is of no consequence to prosecution's case--Narcotic substance (charas) allegedly recovered from petitioner weighing 1280 grams is marginally above upper limit of Section 9(b) of CNSA, 1997--Petitioner in the lightof law has made out his case for release on bail.

[P. 396] A

PLJ 2018 SC 812.

Mr. Nadeem Ahmad Tarar, Advocate for Petitioner.

Malik Mudassir Ali, Deputy Prosecutor General for State.

Date of hearing: 5.8.2021.

ORDER

The petitioner Muhammad Aslam seeks his release on post arrest bail in case/FIR No. 471, dated 20.06.2021, registered at Police Station Saddar Jalalpur Pirwala, District Multan, for offence under Section 9(c) of The Control of Narcotic Substances Act, 1997 (hereinafter to be called as C.N.S.A, 1997).

2. Precisely the allegation against the petitioner is that on suspicion, he was apprehended and charas weighing 1280 grams was recovered from his possession.

3. Arguments heard. Record perused.

4. The narcotic substance (charas) allegedly recovered from the petitioner weighing 1280 grams is marginally above the upper limit of Section 9(b) of C.N.S.A, 1997. The petitioner in the light of law laid down in the case reported as *"Saeed Ahmad vs. State through P.G Punjab and another"* (PLJ 2018 SC 812) has made out his case for his release on bail wherein the apex Court has observed as under:

> *"The record reveals that the petitioner has been found in possession of 1350 grams of charas. Since the substance recovered marginally exceeds 1 kg. we doubt petitioner could be awarded maximum sentence provided by the statute. The fact that he has been in jail for more than seven months and his trial is not likely to be concluded in the near future would also tilt in favour of grant of bail rather than refusal. "*

5. The investigation is already complete and further incarceration of the petitioner is of no consequence to the prosecution's case Resultantly, subject to his furnishing bail bonds in the sum of Rs. 100,000/-(rupees one lac) with one surety in the like amount to the satisfaction of learned trial Court, the petitioner is admitted to post arrest bail and this petition stands allowed.

(A.A.K.) **Bail allowed.**

PLJ 2022 Cr.C. 822

[Lahore High Court, Multan Bench]

***Present*: ANWAARUL HAQ PANNUN, J.**

SHAMS-UL-ISLAM and another--Petitioners

versus

STATE and 2 others--Respondents

Crl. Misc. No. 4171-B of 2021, decided on 11.8.2021.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), S. 409--Prevention of Corruption Act, (II of 1947), S. 5(2)--Bail after arrest, grant of--Further inquiry--Allegation of--Possession over disputed Government land--The I.O present before Court after perusing states that petitioners have misappropriated wheat crop in collusion with revenue staff, as such, culpability of petitioners would be determined by trial Court, after recording prosecution's evidence--The petitioners are previous non-convict, behind bars since their arrest and keeping them behind bars for an indefinite period would serve no useful purpose--All these factors accumulatively render case of petitioners within realm of further inquiry--Bail allowed. [Pp. 823 & 824] A

Syed Jaffar Tayyar Bukhari, Advocate for Petitioners.

Mr. M. Abdul Wadood, Addl. Prosecutor General for State with Shahid Mehboob, Director, Abdul Majeed Circle Officer, Anti-Corruption Establishment, Dera Ghazi Khan.

Mr. Zahid Mubarik, Assistant Director Legal.

Mr. Mujahid Bahsir Gurmani, Advocate for Complainant.

Date of Hearing: 11.8.2021.

ORDER

Report on behalf of Regional Director, Anti-Corruption Establishment, Dera Ghazi Khan Region filed.

2. Through this petition, the petitioners Shams-ul-Islam and Munawar Iqbal seek their release on post arrest bail in case/FIR No. 17 dated 14.11.2020, offence under Section 409, PPC read with Section 5(2) of the Prevention of Corruption Act, 1947, registered at Police Station Anti-Corruption Establishment Dera Ghazi Khan.

3. Arguments heard and record perused.

4. Learned counsel for the petitioners on instructions of the petitioners states that neither the petitioners are currently in possession over the disputed government land nor they again make any resort to take possession over the said land. On the other hand, the Director, Anti-Corruption Establishment, Dera Ghazi Khan, present before the Court undertakes to complete the investigation against all the accused persons within two months. The I.O present before the Court after perusing the record states that the petitioners have misappropriated the wheat crop in collusion with the revenue staff, as such, the culpability of the petitioners would be determined by learned trial Court, after recording prosecution's evidence. The petitioners are previous non-convict, behind the bars since their arrest and keeping them behind the bars for an indefinite period would serve no useful purpose. All these factors accumulatively render the case of the petitioners within the realm of further inquiry, resultantly, subject to their furnishing bail bonds in the sum of Rs. 100,000/- (one lac) each, with one surety each, in the like amount to the satisfaction of learned trial Court, the petitioners are admitted to post arrest bail and this petition stands allowed accordingly.

(A.A.K.) **Bail allowed.**

P L D 2023 Lahore 446

Before Anwaarul Haq Punnun, J

MUHAMMAD FAYYAZ and others---Petitioners

Versus

ADDITIONAL DISTRICT JUDGE and others---Respondents

Writ Petition No. 5899 of 2020, decided on 21st September, 2021.

(a) Family Courts Act (XXXV of 1964)---

----S. 5, Sched.---Suit for recovery of dower---Wakeel of Nikahnama, liability of---Scope---Plaintiff claimed deferred dower by filing a suit against her father-in-law (defendant) as he had acted as a wakeel of her late husband---Validity---Defendant was a party to the Nikahnama and his name was clearly mentioned in column No. 9 as the 'wakeel of the bridegroom'---Nikahnama also bore his thumb impression---Undeniably, it was primarily duty and obligation of the husband to pay dower to his wife---However, there was no bar or prohibition on another person binding himself as a surety by putting his signature on the Nikahnama, ensuring the payment---Such a surety cannot wriggle out from this legal obligation when a suit for the recovery of dower is brought against him by the wife---Subordinate courts had rightly decreed the suit---Constitutional petition was dismissed.

Gul Akbar and another v. Jameela Afridi and 4 others PLD 2016 Pesh. 109 ref.

Muhammad Anwar Khan v. Sabia Khanam and another PLD 2010 Lah. 119 and Mst. Faqraz Bibi v. Elahi Bakhsh and 2 others 1994 SCMR 686 rel.

(b) Family Courts Act (XXXV of 1964)---

----S. 5, Sched.---Suit for recovery of dower---Father-in-law, liability of---Scope---Suit for recovery of dower can validly be filed against father-in-law.

(c) Family Courts Act (XXXV of 1964)---

----S. 5, Sched.---Suit for recovery of dower---Wakeel (Father-in-law) in Nikahnama, liability of---Scope---Word 'wakeel' is synonymous to English word agent----Agency may be created expressly i.e. in writing or through implication; it can even be inferred from the circumstances of the case, from things spoken or written or on the basis of ordinarily course of dealings---By creating agency, the principal confers certain authorities to agent and agent owes certain liabilities in exchange towards principal---Agency remains intact unless rescinded or some act of agent renders him incapable of continuing his authority---Normally agent is not held responsible for enforcement of contract entered by him on behalf of the principal---However, under Islamic law a departure to the general rule in case pertaining to the marriage has been made, particularly, where father had acted as a wakeel of his son/bridegroom---In absence of tangibly expressed repudiation of such authority the agent/wakeel cannot get rid of the liabilities imposed upon him being wakeel/father of bridegroom.

Maulana Mujeebullah Nadvi at page 644, Volume II of his Book "Islami Fiqha" and 'Urdu Daaira Maarif Islamia' at page 21, Volume 23 rel.

(d) Family Courts Act (XXXV of 1964)---

----S. 5, Sched.---Suit for recovery of dower---Wakeel in Nikahnama, liability of---Scope---Family Court under Section 5 of the Family Court Act, 1964 had exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in Part I of the Schedule to the said Act and there was no barring provision that while claiming dower from the husband, only bridegroom/husband can be impleaded in the suit for recovery of dower and none else---If another person has stood surety or has guaranteed the

payment of dower, he/she can lawfully be impleaded in the suit---Surety and guarantor to the dower are as much party and liable to pay dower as the bridegroom himself.

Khan Asadullah Khan and others v. Sheikh Islamud Din PLD 1978 Lah. 711 rel.

(e) Islamic law---

----Nikah---Scope---Nikah is a civil contract that binds the parties and can be solemnized through an agent or wakeel---All Islamic Schools of thought recognize the nikah performed through a wakeel as valid.

The law of Lexicon with Legal Maxims and Words and phrases reprint Edition 1996 at page 1329 and Urdu English Law Dictionary Edition 2000 published Irfan law Book house page 515 rel.

Muhammad Naeem Bhatti for Petitioners.

Rao Muhammad Ashraf Idrees and Dr. Malik M. Hafeez for Respondents.

Assistance Rendered by Muhammad Javed Khan and Miss Mehwish Mahmood, Research Officers.

Date of hearing: 21st September, 2021.

JUDGMENT

ANWAARUL HAQ PANNUN, J.---Through the instant writ petition, the petitioners have called in question the vires of the judgment and decree dated 19.11.2019, passed by learned Judge Family Court, Hasilpur, decreeing the suit of respondent No.3 for recovery of dower and judgment and decree dated 27.08.2020, passed by learned Addl. District Judge, Hasilpur, whereby their appeal was dismissed.

2. The facts of the case in brief are that respondent No.3 claimed her deferred dower i.e. Rs.1,00,500/- and possession of land measuring 04 Kanals or its alternate price Rs.10,00,000/- by filing a suit against her

father-in-law, the late Rahim Bux (died on 28.9.2017 during the pendency of the suit) with the averments that she was married to one Muhammad Shehzad Khan on 13.05.2005 in consideration with aforesaid dower, duly incorporated in the Nikahnama, while the late Rahim Bux acted as a Wakeel of her late husband, and thus is liable to pay the outstanding dower. Since, after the death of her husband, she is entitled to recover the dower from her father-in-law, who being signatory of the nikahnama and Wakeel of his son, is bound to pay the same. After the death of Rahim Bux, the petitioners substituted in the matter as his legal heirs. They have resisted the suit on legal as well as factual planks while denying the averments of the plaint. After a thorough trial, learned Judge Family Court decreed the suit of respondent No.3 vide its judgment and decree dated 19.11.2019, in the following terms:-

> "The plaintiff towards dower is entitled to receive Rs.500/- and 04-K from the property of original defendant (Rahim Bux deceased) in Mouza Awal Khan, Tehsil Khairpur Tamewali or in alternative its market value prevailing on the date of death of plaintiff's husband Muhammad Shahzad Khan (05.12.2015), mode and value to be determined by the learned executing court during execution, from the defendants (legal heirs of original defendant) as per their proportionate share in the inheritance of original defendant. No order as to costs."

Being dissatisfied with the aforesaid judgment and decree, the petitioners preferred an appeal, which was dismissed by learned Addl. District Judge, Hasilpur, vide its judgment and decree dated 27.08.2020. Hence, this writ petition.

3. Arguments heard and record perused.

4. The main thrust of argument of learned counsel for the petitioners is that as husband of respondent No.3 died on 05.12.2012, she filed the suit on 02.05.2017 i.e. after lapse of more than 04 years and 05 months which

ought to have been brought within a period of three years after the death of her husband, therefore, suit of respondent No.3 was badly time barred. They produced photocopy of Death Certificate of the deceased Muhammad Shehzad Khan (Mark-A) to substantiate their claim. On the other hand, learned counsel for respondent No.3 contended that since her husband died about 1- years prior to the institution of the suit, hence the suit is well within time and to fortify her claim, she also produced Death Certificate (Exh.P-2). Exh.P-2 is certified copy while Mark-A is photocopy of Death Certificate of the deceased husband. Exh.P-2 being a public document enjoys presumption of truth qua its entries. Muhammad Imran, Secretary Union council Inayati, Teshil Khairpur Tamewali (DW-1) brought the original death record register and according to him, Exh.D-1 is correct copy as per record, the particulars of Exh:P-2 and Exh.D-1 are the same and entry is available at Serial No.18 of the register. As per Death Certificate (Exh.P-2), Muhammad Shehzad Khan, husband of respondent No.3 and brother of the petitioners died on 05.12.2015. Neither the petitioners produced certified copy of Death Certificate Mark-A nor they got summoned the original record of said document, as such, said document has no evidentiary value and is inadmissible, thus discarded. Hence, in view of the above, the suit of respondent No.3 is well within time.

5. The next argument of learned counsel for the petitioners is that the suit for recovery of dower against father of the husband (father-in-law) being incompetent, is not maintainable. However, suffice it is to say that the suit for recovery of dower can validly be filed against father-in-law. Under Islamic law, nikah is a civil contract which binds the parties. Such contract can be made/solemnized through agent/wakeel. According to legal and Arabic dictionary the word wakil/vakil mean and define as under:

The law of Lexicon with Legal Maxims and Words and phrases reprint Edition 1996 at page 1329: -

WAKIL: A person invested with authority to act for another.

Urdu English LAW DICTIONARY Edition 2000 published Irfan Law Book House page 515:

VAKIL: A plenipotentiary; a representative with absolute authority

(Page 1104)

As per Shariah, Nikah of female/parties can be solemnized through their Wakeel and all the Islamic Schools of thought recognized Nikah performed through Wakeel as valid. Maulana Mujeebullah Nadvi at page 644, Volume II of his Book "Islami Fiqha" defined the meaning of ' Wakalat' in the following words: --

At page 646 of the said Book the author observed as under:--

The term "Wakalat" has further been explained at page 648 of the said Book in the following words: --

In 'Urdu Daaira Maarif Islamia' at page 21, Volume 23, published by Danish Gah Punjab the word 'Wakalat' has been defined as under: --

6. The word wakeel is synonymous to English word agent. The agency may be created expressly i.e. in writing or through implications. Even it can be inferred from the circumstances of the case, the thing spoken or written or on the basis of ordinarily course of dealings. By creating agency, the principal confers certain authorities to agent and agent owes certain liabilities in exchange towards Principal. Agency remains intact unless rescinded or some act of agent renders him incapable of continuing his authority. Normally agent is not held responsible for enforcement of contract entered by him on behalf of the Principal. However, Islamic law clearly a departure to the general rule in case pertaining to the marriage

has made, particularly, where father had acted as a wakeel of his son/bridegroom. In absence of tangibly expressed repudiation of such authority the agent/wakeel cannot get rid off the liabilities imposed upon him being wakeel/father of bridegroom. The term 'Wakeel' has not been defined in the Muslim Family Laws Ordinance, 1961. However, Wakeel is an attorney legally competent to conduct marriage on behalf of bride. The Wakeel generally is representative of the party appointing/nominating him. Registration of Nikah is mandatory under the Muslim family laws.

7. In the present case, respondent No.3 and Muhammad Shehzad Khan, deceased in lieu of dower Rs.1,00,500/- and four kanals land, situated at Mauza Awal Khan, 538/6, 23/6, Tehsil Khairpur Tamewali or its alternate price Rs.10,00,000/-, were tied in their nuptial bond on 13.05.2005, as mentioned in the Nikahnama (Exh.P-1). The late Rahim Bux (father-in-law of respondent No.3) was party to the Nikahnama and his name is clearly mentioned in Column No.9 as "Wakeel of the bridegroom". The Nikahnama also bears his thumb impression. There is no denial that it is primarily duty and obligation of the husband to pay dower to his wife, yet there is no bar or prohibition on another person to bind himself as a surety by way of putting his signature on the Nikah Nama, ensuring its payment and such surety cannot wriggle out from such legal obligation when a suit for the recovery of dower is brought against him by the wife, hence, there is no escape by father-in-law to wriggle out of his liability if being "Wakeel" of bridegroom, he had signed the prescribed column of nikahnama at the time of marriage. Reliance is placed upon case reported as "Gul Akbar and another v. Jameela Afridi and 4 others" (PLD 2016 Peshawar 109). Reliance may also be placed upon case reported as "Muhammad Anwar Khan v. Sabia Khanam and another" (PLD 2010 Lahore 119), wherein, it has been held that:-

> "Husband as a rule, could not give as dower property that did not belong to him but belonged to someone else including his father---

Exception to this rule could be found if it was shown that the father of the husband agreed to do so---in spite of having knowledge that his house had been given as dower in nikahnama, the father of the husband never took any step to take any legal action for exclusion of the house from nikahnama---House mentioned in the nikahnama as dower even though, it did not belong to the husband was liable to be transferred to the plaintiff as the father of the husband had given his consent for the same.

The august Supreme Court of Pakistan in case reported as "Mst. Faqraz Bibi v. Elahi Bakhsh and 2 others"(1994 SCMR 686) has pleased to observe that

"Petitioner's claim of ownership to house in question was based on entry in "Nikahnama" on strength of which she claimed that the house was given to her in lieu of dower at the time of marriage---Petitioner claimed that she had been exercising proprietary rights over the house in question, without let or hindrance by respondents and that both respondents (her husband and his father) had signed "Nikahnama" of petitioner in token of confirmation of stipulation contained in "Nikahnama"--- Contention raised by petitioner required examination---Leave to appeal was granted in circumstances."

Family Court under Section 5 of the West Pakistan Family Courts Act, 1964 had exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in Part I of the Schedule to the said Act and there was no barring provision that while claiming dower from the husband only bridegroom/ husband could be impleaded in the suit for recovery of dower and none else--If another person had stood surety or had guaranteed the payment of dower, he/she could lawfully be impleaded in the suit---Surety and guarantor to the dower were as much party and liable to pay dower as the bridegroom himself. It has been held in the case reported as "Khan

Asadullah Khan and others v. Sheikh Islamud Din" (PLD 1978 Lahore 711) that:-

10. "As regards the second question, Mulla in Principles of Mohammadan Law reproduces the definition of dower as "a sum of money or other property which the wife is entitled to receive from the husband in consideration of the marriage" It has further been observed "if the dower is not paid, the wife, and after her death, her heirs, may sue for it" In Baillie's Digest of Mohammadan Law on the subject of disputes with regard to dower the following observations occur:-

"Disputes regarding the dower may take place between the married parties themselves in their lifetime, or between their heirs when both are dead, or after the death of one of them, between his or her heirs and the survivors."

11. In the Mohammadan Law of Inheritance by Almaric Russay on the subject of posthumous claims of dower it has been observed:-

"It has been seen already that the right to dower is not extinguished by the death of husband or wife or both and it is in fact distinctly laid down that a claim of dower may be maintained by the wife against the husband's inheritors, by the wife's inheritors against the husband, or by the wife's inheritors against the husband's inheritors."

12. It is clear, therefore, that the right to sue survives the death and the heirs can continue the proceedings and their claim in the proceedings continues to be for the dower.

8. For what has been discussed above, the suit filed by respondent No.3 for recovery of dower against her father-in-law, who had acted as a "Wakeel" of the bridegroom and had signed it, is held to be competent. The learned trial court after appraisal of the material available on record

has rightly passed the impugned judgment and decree. The findings and observations of learned trial court have been maintained and upheld by the learned appellate court after reappraisal of the evidence available on record. The learned counsel for the petitioners has been unable to point out any illegality or irregularity in the impugned Judgments, which are well founded and based on well reasoning. Resultantly, the instant writ petition having no substance, is dismissed.

9. I also duly appreciate the assistance rendered by the Research Officers of this Bench to deal with the issue discussed and dealt with hereinabove.

SA/M-223/L **Petition dismissed.**

PLJ 2023 Cr.C. (Note) 78

[Lahore High Court, Lahore]

***Present*: ANWAARUL HAQ PANNUN, J.**

***Mst.* NASREEN BIBI--Petitioner**

versus

STATE, etc.--Respondents

Crl. Misc. No. 71754-B of 2022, decided on 22.12.2022.

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

----S. 498--Pakistan Penal Code, (XLV of 1860), S. 489-F--Pre-arrest bail, dismissal of--Allegation of--dishonoured of cheque--During investigation, petitioner has also been found involved in commission of offence, in such circumstances, reasonable grounds exist to believe that petitioner has committed non-bailable offence, hence, in absence of any mala-fide or ill-will of complainant for her false involvement in this case, she is not entitled to relief prayed for resultantly, while dismissing instant pre-arrest bail petition--Bail dismissed. [Para 4] A

Mr. Bashir Ahmad Qureshi, Advocate for Petitioner.

Ch. Muhammad Ishaq, Addl. Prosecutor General for State.

Mr. Zakria Khalil Tijra, Advocate for Complainant.

Date of hearing: 22.12.2022.

ORDER

Through this petition, the petitioner seeks pre-arrest bail in case/FIR No. 2147, dated 20.09.2022, offence under Section 489-F PPC, registered at Police Station Qilla Gujjar Singh, Lahore.

2. Precisely the allegation against the petitioner is that she without making arrangements with the bank ensuring that the cheques on presentation, shall be honoured, had dishonestly issued two cheques (fully

detailed in the FIR) valuing Rs.6,00,000/- and Rs. 1,39,470/- to the complainant for fulfillment of some financial obligation, when presented before the concerned bank, stood dishonoured.

3. Arguments heard and record perused.

4. It is straightaway observed that in addition to what has been mentioned in paragraph No. 2 of the order, during investigation, the petitioner has also been found involved in the commission of offence, in such circumstances, reasonable grounds exist to believe that the petitioner has committed non-bailable offence, hence, in absence of any mala-fide or ill-will of the complainant for her false involvement in this case, she is not entitled to the relief prayed for resultantly, while dismissing the instant pre-arrest bail petition, the ad-interim pre-arrest bail already granted to the petitioner *vide* order dated 15.11.2022 is recalled. Previous surety of the petitioner is discharged from the liability of her bail bonds.

(A.A.K.) **Bail dismissed.**

PLJ 2023 Cr.C. (Note) 167

[Lahore High Court, Lahore]

***Present*: ANWAARUL HAQ PANNUN, J.**

MUHAMMAD ARSHAD--Appellant

versus

STATE and another--Respondents

Crl. A. No. 709 & Crl. Rev. No. 458 of 2017, heard on 25.10.2022.

Extra-Judicial Confession--

----Weak type of evidence--Even otherwise, it has been held by apex Court in various judgments that extra judicial confession is weak type of evidence and such like confession can easily be procured whenever direct evidence of crime is not available--Until and unless extra judicial confession is not corroborated by any other independent piece of evidence, no reliance can be placed thereon and it would not be safe to maintain conviction of appellant on basis of such type of evidence. [Para 6] A

2006 SCMR 231, 1996 SCMR 188, 2010 PCr.LJ 1730 & 2015 SCMR 155.

Pakistan Penal Code, 1860 (XLV of 1860)--

----Ss. 302(b)/364-A--Qatl-e-amd--Conviction and sentence--Challenge to--Benefit of doubt--According to PFSA report, after complete examination, no friction ridge detail was found in mold of foot print (Item No. 6)--Hence, comparison of foot impression cannot be conducted--The above referred reports are not completely favouring prosecution's case, even otherwise, reports of PFSA are just corroboratory piece of evidence and not pinpoint actual culprit, therefore, when other incriminating prosecution's evidence has been disbelieved/discarded same, cannot be relied upon in case of capital punishment--Prosecution has failed in proving guilt of appellant through cogent, confidence inspiring, trust

worthy and unimpeachable evidence--The basic principle of law is that conviction must be based on evidence beyond any shadow of doubt because damage resulting from erroneous sentence is irreversible, therefore, while extending benefit of doubt to appellant, instant criminal appeal is accepted--The conviction and sentence recorded through impugned judgment Trial Court is set-aside and appellant is acquitted of charges levelled against him--He is confined in jail, therefore, he be released forthwith, if not required in any other case. [Para 8 & 9] B & C

M/s. Pir Muhammad Masood Chishti, Barjees Iftikhar Bhatti and Muhammad Qaiser Saleem, Advocates for Appellant.

Ms. Rahila Shahid, Deputy District Public Prosecutor for State.

M/s. Mirza Muhammad Azam and Muhammad Arshad Mohandra, Advocate for Complainant.

Date of hearing: 25.10.2022.

JUDGMENT

This single judgment shall decide the above noted Criminal Appeal filed under Section 410 of the Code of Criminal Procedure, 1898 by the appellant Muhammad Arshad and Revision Petition under Sections 435/439 of the Code of Criminal Procedure, 1898, filed by the complainant Muhammad Shafique, seeking enhancement of sentence, arisen out of the judgment dated 28.02.2017, passed on the conclusion of trial in case/FIR No. 530, dated 17.12.2015. offence under Sections 302/364-A, PPC, registered at Police Station Saddar Arifwala, by the learned Addl. Sessions Judge-I, Pakpattan, whereby the appellant has been found guilty, hence convicted under Sections 364-A and 302(b), PPC and sentenced to imprisonment for life on two counts along-with compensation Rs. 2,00,000/-, payable to the legal heirs of the deceased Sadia Shafique under Section 544-A of Cr. P.C and in default thereof to further undergo six months SI, with extension of

benefit under Section 382-B, Cr.P.C. Both the sentences have been ordered to run concurrently.

2. Based on the statement (Exh.PA) of Muhammad Shafique, PW-1, recorded by Munawar Hussain, Inspector, PW-11, which had laid foundation for registration of formal FIR (Exh:PA/1), the prosecution's case is that on 16.12.2015 at about 05.30 PM, the complainant's minor daughter *Mst.* Sadia Shafique (06-years old) did not return from the shop of one Ashraf Rehmani where she had gone to purchase some Candies, thus being worried, he along-with Muhammad Sharif and Malik Raja (PW-6) in the company of some persons of the area while in search of his minor daughter, met Gulshad and Faisal(PW-3) in the way who told that they had seen an unknown person taking *Mst.* Sadia Shafique towards the fields of Taj Muhammad Wattoo; they found dead body of *Mst.* Sadia Shafique bearing marks of violence on her neck and the mouth filled with jnud lying in the nearby watercourse.

3. After usual investigation and submission of challan, the appellant, when confronted with the charges, pleaded not guilty and claimed trial. The prosecution had produced as many as 1-3 PWs. While tendering reports of Forensic Taxicology Analysis, Trace Chemistry Analysis and latent Finger Print Examination (Exh:PAA, Exh:PBB and Exh:PCC), the learned prosecutor closed the prosecution's evidence. The appellant reiterated his innocence while refuting the prosecution's evidence, in his statement under Section 342, Cr.P.C. Without examining him under Section 340(2), Cr.P.C. the appellant produced Gulshad as (DW-1) and Zakir Ali (DW-2) alongwith documents *i.e.* Birth Certificate, school attendance certificate and medical report about age assessment (Mark- DA to Mark-DC) in his defence. The learned trial Court on the conclusion of trial, convicted and sentenced the appellant as aforesaid.

4. Arguments heard and record perused.

5. The prosecution's case consists of

(i) last seen allegedly furnished by Rehmat Ali (PW-2) and Muhammad Faisal (PW-3),

(ii) extra judicial confession allegedly made by the appellant before Muhammad Ramzan (PW-8) and Ahmad Ali (PW).

(iii) Identification Parade to establish the identity of the appellant as the real perpetrator, conducted under trie supervision of Nauman Mubashir, Judicial Officer (PW-13). Besides, Rehmat Ali (PW-2) and Muhammad Faisal (PW-3) also joined the identification proceedings.

(iv) Medical evidence furnished by Dr. Muhammad Tdrees (PW-12) and Forensic Reports (Exh:PAA to Exh:PCC), and

(v) recoveries allegedly affected on pointing out of the appellant in presence of witnesses Muhammad Shafique (PW-1) and Malik Raja (PW-6) *i.e*. shawl (P-1) and pair of shoes seized through recovery memos. (Exh:PB and Exh:PC), however, the other recoveries are allegedly affected from the crime scene and not on pointing out of the appellant.

The prosecution's evidence has been evaluated in the light of case law reported as *"Naveed Asghar and 2 others versus The State*" (PLD 2021 Supreme Court 600) wherein, the august Supreme Court of Pakistan has defined the standards required for evaluation of circumstantial evidence which for ready reference is reproduced as under:

> *14. The settled approach to deal with the question as to sufficiency of circumstantial evidence for conviction of the accused person is this: If, on the facts and circumstances proved, no hypothesis consistent with the innocence of the accused person can be suggested, the case is fit for conviction of the accused person on such conclusion: however, if such facts and circumstances can be reconciled with any reasonable hypothesis compatible with the innocence of the*

appellant, the case is to be treated one of insufficient evidence, resulting in acquittal of the accused person. Circumstantial evidence, in a murder case, should be like a well-knit chain, one end of which touches the dead body of the deceased and the other the neck of the accused. No link in chain of the circumstances should be broken and the circumstances should be such as cannot be explained away on any reasonable hypothesis other than guilt of accused person. Chain of such facts and circumstances has to be completed to establish guilt of the accused person bevond reasonable doubt and to make the plea of his being innocent incompatible with the weight of evidence against him. Any link missing from the chain breaks the whole chain and renders the same unreliable: in that event, conviction cannot be safely recorded, especially on a capital charge. Therefore, if the circumstantial evidence is found not of the said standard and quality, it will be highly unsafe to rely upon the same for conviction; rather, not to rely upon such evidence will a better and a safer course."

The complainant (PW-1) is not an eye-witness of the occurrence. His statement recorded in Court although in line with (Exh:PA), on the basis of which formal FIR (Exh:PA/1) was lodged, discloses that on 16.12.2015 at about 05.30 PM, he along with Muhammad Sharif (given up PW), Malik Raja (PW-6) and other persons of the area set out in search of his missing minor daughter, Gulshad and Faisal(PW-3) told as they met in the way that they had seen an unknown person while taking *Mst.* Sadia Shafique towards the fields of Taj Muhammad Wattoo. In lieu of said Gulshad PW, the prosecution has produced Rehmat Ali (PW-2) [his name did not figure as witness in FIR] for making a narration regarding the last seen, identification parade and about certain recoveries. The evidence of PW-2 and PW-3 cannot be relied upon for a variety of reasons *i.e.*

"Rehmat Ali PW-2 is closely related to the complainant (PW-1) i.e. paternal cousin. The deceased was his niece. He made no effort to save the minor. His name had not been cited as a witness in the FIR

(Exh:PA/1). Therefore, his evidence regarding his participation in Identification Parade conducted under the supervision of Mr. Nauman Mubashir, Judicial Officer (PW-13) for identifying the appellant as accused is of no worth, hence his evidence is discarded and excluded to the extent of last seen and identification parade."

Although, similarly, Muhammad Faisal (PW-3) has made is examination-in-chief in line with PW-2, still his evidence is also liable to be rejected for the reason that he had not disclosed the features of the accused, who allegedly abducted the minor (deceased) in his statement under Section 161, Cr.P.C. The complainant (PW-1) during cross-examination stated that PWs [PW-2 and PW-3] had told him about the description of the accused but he could not describe the same in his statement Exh:PA. Contrary to the above, Faisal (PW-3) deposed that he or his companion PW did not disclose about the description (Hulia) of the accused. Nadeem Anwar SI (PW-10) during cross-examination admitted it as correct that PWs Faisal and Rehmat Ali also did not mention the facial features of accused in their statements recorded under Section 161, Cr.P.C. In these circumstances, due to irreconcilable contradictions in evidence of PWs, the same cannot be relied upon to sustain conviction. The prosecution in the above facts, has made an abortive attempt to establish the identity of the appellant, which amounts to over doing on its part. Needless to reiterate that PW-1 is not an eye-witness of the occurrence, his participation in proceedings of identification parade to establish the identity of the appellant is of no worth at all rather it fortifies the impression that the appellant had been shown to the PWs. Nauman Mubasher, Judicial Officer (PW-13) during his cross-examination admitted it as correct that prior to conducting the identification parade proceedings accused Muhammad Arshad raised objection before him that complainant party belongs to his village, who are previously known him and that they had taken his snaps at the police station. Moreover, PW-2 was earlier familiar with the accused/appellant as he deposed during cross-examination that the house of accused Muhammad Arshad was at a distance of 4/5 acres from the place of

abduction; they made no effort to rescue the girl; the house of the accused was situated in the western corner of their chak; the aqcused party resides in the corner side of their chak and he has been seeing the family of accused in the chak from their childhood. Muhammad Faisal (PW-3) deposed that complainant and the accused used to shop from the shop of Ashraf Rehmani. He further stated that the accused and his family also reside in their chak for the period of last more than 10-years. Muhammad Shafique, complainant (PW-1) during cross-examination deposed that father of the accused namely Waris resides in the adjoining Abadi of their chak. Thus identification of the appellant during I.D parade is worthless.

6. The next piece of evidence, which the prosecution has brought on record pertains to extra judicial confession. Muhammad Ramzan (PW-8) appeared in the witness box to establish that the appellant had made extra judicial confession regarding his guilt for committing murder of the deceased before him and Ahmad Ali, PW. Needless to say that none of the PWs has made any effort to overpower him to produce him before the police. He was allowed to go escort free. Even otherwise, it has been held by the apex Court in various judgments that extra judicial confession is weak type of evidence and such like confession can easily be procured whenever direct evidence of crime is not available. Until and unless extra judicial confession is not corroborated by any other independent piece of evidence, no reliance can be placed thereon and it would not be safe to maintain conviction of appellant on basis of such type of evidence. Reliance is placed upon case titled *"Sajid Mumtaz and others versus Basharat and others"* (2006 SCMR 231), *"Sarfraz Khan vs. Stae and 2 others"* (1996 SCMR 188), *"Nizam-ud-Din versus. The State"* (2010 P Cr. L.J 1730) and *"Imran alias Dully and another versus The State and others"* (2015 SCMR 155).

7. All the above discussed genres of the prosecution has been disbelieved and discarded, therefore, mere medical evidence would be of no help for advancing the cause of prosecution, therefore, the discussion thereof is dispensed with.

8. So far as recoveries allegedly affected on pointing out of the appellant in presence of witnesses Muhammad Shafique (PW-1) and Malik Raja (PW-6) *i.e.* shawl (P-1) and pair of shoes seized through recovery memos. (Exh:PB and Exh:PC respectively) and the other recoveries allegedly affected from the crime scene by the I.O. during investigation are concerned, the items are of common in nature and can easily be procured from the market. As per recovery memo. Exh:PR, school Card of the petitioner was also recovered from the spot in presence of witnesses Muhammad Sharif and Malik Raja (PW-6). Muhammad Sharif PW has not been produced in the witness box. However, Malik Raja (PW-6) during his examination-in-chief, did not utter a single word about the recovery of school card of the appellant at the spot. The complainant (PW-1) during cross-examination stated that his witnesses namely Sharif and Malik Raj had told him that school identity card of the accused Muhammad Arshad was found at the place of recovery of dead body of his deceased girl. He further deposed that the said identity card was found at the spot on 17.12.2015. Malik Raja (PW-6) deposed that he does not know if school identity card with picture of the accused Muhammad Arshad was taken into possession by the police at that occasion. He further stated that he did not get recorded in his statement under Section 161, Cr.P.C. that along with other articles, school identity card of accused Muhammad Arshad was also taken into possession by the police. Confronted with Exh:DB where it is recorded that school identity card of accused Muhammad Arshad was taken into possession from the spot by the police. Hence, the evidence of both the aforesaid PWs regarding recovery of School Identity Card of the appellant is not reliable. So far as the preparation of two molds with plaster of paris one of bare foot and one of shoe worn P-9/1-2, seized *vide* recovery memo. (Exh:PM) by the I.O in presence of aforesaid PWs is concerned, suffice it to observe that according to report of Punjab Forensic Science Agency, Lahore, (Exh:PBB), no testing was performed on item 1 (apparent mold of foot impression said to be recovered from the crime scene, in a sealed and labeled

parcel) and was transferred to Latent Finger Print Department, whereas, comparison of item 2 to item 3.1 revealed similar class characteristics and corresponding individualizing characteristics. For conclusion statement in the aforesaid report is reproduced as under:-

Conclusion Statement

> A conclusion of "similar class characteristics" indicates that the imprint/impression could have been created by the submitted source. However, there is insufficient detail expressed within the imprint/impression to indicate a specific item as the source. Other similarly manufactured items may produce an imprint/impression that is indistinguishable from the examined imprint/impression.
>
> A conclusion of "corresponding individualizing characteristics" indicates that the imprint/impression was created by the submitted source. There is sufficient detail expressed within the imprint/impression, in the form of individualizing characteristics, to conclude that a specific item is the source of the imprint/impression. Individualizing characteristics are created by wear over time and/or by the interaction between the source and its environment and are observed as random, non-manufactured change of the item's surface. Because of this, over time, even similarly manufactured items will not display the same individualizing characteristics."

According to PFSA report (Exh:PCC), after complete examination, no friction ridge detail was found in the mold of foot print (Item No. 6). Hence, comparison of foot impression cannot be conducted. The above referred reports are not completely favouring the prosecution's case, even otherwise, the reports of PFSA are just corroboratory piece of evidence and not pinpoint the actual culprit, therefore, when other incriminating prosecution's evidence has been disbelieved/discarded the same, cannot be relied upon in case of capital punishment.

9. For what has been discussed above, the prosecution has failed in proving the guilt of the appellant through cogent, confidence inspiring, trust worthy and unimpeachable evidence. The basic principle of law is that conviction must be based on evidence beyond any shadow of doubt because the damage resulting from erroneous sentence is irreversible, therefore, while extending the benefit of doubt to the appellant, the instant criminal appeal is accepted. The conviction and sentence recorded through the impugned judgment dated 28.02.2017 by the learned Trial Court is set-aside and the appellant is acquitted of the charges levelled against him. He is confined in jail, therefore, he be released forthwith, if not required in any other case.

10. As far as Criminal Revision No. 458 of 2017 *(Muhammad Shafique vs. Muhammad Arshad and another)* is concerned, for the reasons mentioned hereinabove, the instant criminal revision petition having no substance, stands dismissed.

(A.A.K.) **Appeal accepted.**

PLJ 2023 Cr.C. (Note) 182

[Lahore High Court, Multan Bench]

***Present*: ANWAARUL HAQ PANNUN, J.**

MUHAMMAD SABIR--Petitioner

versus

STATE etc.--Respondents

Crl. Misc. No. 8733-B of 2022, decided on 5.1.2023.

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

----S. 497--Prohibition (Enforcement of Hadd) Order, (4 of 1979), Arts. 3 & 4--Distilled liquor--Post arrest bail, grant of--Allegedly 101 liters distilled liquor alongwith distilling articles were recovered out of the possession of the petitioner, at the time of his arrest--There is nothing on record to show that the petitioner was selling the liquor--Offence under Art.4 of the Prohibition (Enforcement of Hadd) Order, 1979, is bailable whereas the offence under Art.3 of Order ibid does not fall within the ambit of prohibitory clause--The petition in hand is allowed. [Para 4] A

Mr. M. Qadir Asif Toor, Advocate for Petitioner.

Mr. Muhammad Abdul Wadood, Addl. P.G. for State.

Date of hearing: 5.1.2023.

ORDER

By means of instant petition, the petitioner has prayed for the grant of post-arrest bail in a case registered *vide* FIR No. 356, dated 31.10.2022, offence under Arts. 3 & 4 of the Prohibition (Enforcement of Hadd) Order, 1979, registered at Police Station Saddar Mailsi, District Vehari.

2. Precisely the allegation against the petitioner is that on the aforesaid date, on spy information, a raid was conducted and petitioner was

caught red handed while manufacturing/distilling illicit liquor and huge quantity *i.e.* 101 liters liquor along with distilling articles were recovered from his possession.

3 Heard. Record perused.

4. Allegedly 101 liters distilled liquor along with distilling articles were recovered out of the possession of the petitioner, at the time of his arrest. The quantity of the liquor might have been retained for the purpose of sale but there is nothing on record to show that the petitioner was selling the liquor. Offence under Art. 4 of the Prohibition (Enforcement of Hadd) Order, 1979, is bailable whereas the offence under Art.3 of Order ibid does not fall within the ambit of prohibitory clause of Section 497, Cr.P.C., hence in absence of any material factor brining the case of the petitioner into an exception justifying the refusal of concession of bail to him, he is entitled to the prayed for relief. The petitioner is behind the bars since his arrest and it is settled by now that nobody can be detained in jail by way of advance punishment. Liberty of a person is also a precious right which cannot be curtailed for an indefinite period without any cogent reasons. However, his culpability would be determined by the learned trial Court after recording of prosecution's evidence.

5. In view of above, the petition in hand is allowed subject to furnishing bail bonds by the petitioner in the sum of Rs. 2,00,000/- (two lacs) with two sureties in the like amount to the satisfaction of learned trial Court and he is admitted to post arrest bail. The above observations are just tentative in nature and would not be taken as conclusive.

(K.Q.B.) **Bail allowed.**

2023 Y L R 1222

[Lahore]

Before Anwaarul Haq Pannun, J

NASIR SOHAIL AABID and others---Petitioners

Versus

Mst. AISHA BIBI through L.Rs. and others---Respondents

Civil Revision No. 1745 of 2010, heard on 25th March, 2022.

Specific Relief Act (I of 1877)---

----Ss. 42 & 54---Civil Procedure Code (V of 1908), S.115, O.XIV, Rr. 1, 2 & O. XVII, R.3---Suit for declaration and injunction--- Striking of defence---Preliminary issue---Mixed question of law and fact---Determination---Improper valuation of suit---Petitioners/plaintiffs were aggrieved of order striking of their defence by two Courts below on the ground that they had failed to produce their evidence on preliminary issue---Validity---If any issue had raised mixed question of law and facts, then for its decision, evidence was required to be led---Such issue could not be treated as preliminary or legal issue---Trial Court after framing issues had already offered parties to produce their evidence---Order in question treated a preliminary issue necessitating recording of piecemeal evidence where Trial Court acted in exercise of its jurisdiction illegally and with material irregularities---Entire evidence built thereon had to crumble---Lower appellate court also failed to take notice of such fact and failed to exercise its jurisdiction, vested with him by law to rectify wrong committed by Trial Court---Both the Courts below failed to consider such aspect of the case and on erroneous and wrong assumption dismissed suit of petitioners/plaintiffs---Issue of improper valuation was not considered as a formal defect and a suit could not be thrown away on the ground of improper valuation because valuation of subject matter of suit,both for the purposes of jurisdiction and payment of court fees, could be corrected by

Court after recording of evidence---High Court in exercise of revisional jurisdiction under S. 115, C.P.C. set aside judgments and decrees passed by two courts below and remanded the matter to Trial Court for decision afresh---Revision was dismissed, in circumstances.

I.C.I.C. v. Mian Rafiq Saigol and others PLD 1996 Lah. 528;

Irshad Ali v. Sajiad Ali and 4 others PLD 1995 SC 629 and Sardar Muhammad Kazim Ziauddin Durrani and others v. Sardar Muhammad Asim Fakhuruddin Durrani and others 2001 SCMR 148

rel.

Rana Rashid Akram Khan and M. Shuja ul Hakeem for Petitioners.

Malik Tariq Ali Jindran for Respondents.

Date of hearing: 25th March, 2022.

JUDGMENT

ANWAARUL HAQ PANNUN, J.---Precisely, necessary facts for the decision of this civil revision petition are that plaintiffs (hereinafter called as the petitioners) filed a suit for declaration along with recovery of possession besides Rs.24,000/- as mesne profit since the years 1991-92 to 1998-99 against the defendants (hereinafter called as the respondents) with regard to the land measuring 12-Kanals 10-marlas, bearing Khewat No.14 min, Khatuni No.50, Square No.68, Killa No.7(Western) 24 min, 25(8-Kanals), situated at Chak No.284/GB, Tehsil and District Toba Tek Singh, with their averments in the plaint that despite being legal heirs of Ghulam Rasool son of Muhammad Din and owners of the disputed property, they have been deprived of their due share out of the disputed land on the basis of impugned mutation No.524 dated 27.02.1991, attested against facts and law and result of collusion, hence liable to be cancelled. While submitting their written statement, respondents Nos. 1 and 2, raised a number of preliminary objections and controverted the averments of the plaint on facts, with the assertion that the late Ghulam Rasool had sold

disputed property to respondent No.1 Mst. Aisha, who, after receiving sale consideration of Rs.3,00,000/-, transferred the disputed property to the vendee and delivered the possession through the impugned mutation No.524 dated 27.02.1991 and prayed for dismissal of the suit. Respondents Nos. 3, 6 and 7, however filed their conceding written statement. Out of pleadings, learned Civil Judge, Toba Tek Singh, framed the following issues on 23.04.2001:-

1. Whether the plaintiffs have no cause of action or locus standi to file this suit? OPD
2. Whether the plaintiffs suit is barred by time? OPD.
3. Whether the suit has not been properly valued for the purposes of course and jurisdiction of so what is the correct valuation? OPD
4. Whether the suit is bad due to mis-joinder of parties?OPD
5. Whether the plaintiffs are estopped to sue by their words and conduct? OPD
6. Whether the suit is hit by section 11, C.P.C. and liable to dismissal? OPD
7. Whether the suit is not maintainable in its present form? OPD
8. Whether the defendants Nos. 1 and 2 are entitled to get special costs under section 35-A, C.P.C., if so, to what extent? OPD
9. Whether sale mutation No.534 dated 27.2.1991 in favour of defendant No.1 is against low and facts, collusive, based on fraud and liable to cancellation? OPP
10. Whether the plaintiffs being legal heirs of deceased Ghulam Rasool son of Muhammad Din are owners of the suit land? OPP
11. Relief.

The record of suit appended with this petition reflects that after framing the issues, as usual, the parties were directed to produce their respective

evidence, to shed the onus of proof lying on their shoulders in the light of relevant issues. On three dates of hearing i.e. 14.07.2001, 13.10.2001 and 02.11.2001, evidence of the plaintiffs was not present, however on 02.11.2001, the petitioners moved an application seeking permission to introduce certain amendments in para No.9 of the plaint, which was contested by the respondents through their reply. In the meanwhile, the suit was withdrawn from the Court of learned Civil Judge Toba Tek Singh and entrusted to the learned Senior Civil Judge, Toba Tek Singh, vide order dated 02.01.2002, passed by the learned District Judge, Toba Tek Singh, accordingly notice pairve were ordered to be issued to the respondents and till 13.04.2002, the suit remained pending for service of the respondents. The suit from 06.05.2002 to 08.04.2006, remained fixed for evidence of the plaintiffs. The case also remained fixed from 09.09.2006 to 29.03.2007, for arguments on application for amendment in plaint, which ultimately was disposed of by the learned trial Court, vide its order dated 29.3.2007, with the observation that "the issue regarding the valuation of the suit has become the mixed question of law and facts keeping in view the respective contention of the parties, therefore, the same cannot be decided without recording the evidence of the parties, therefore, I hereby put the onus of the above mentioned issue No.3 upon both the parties, as such, the issue No.3 is hereby amended in the following manner:-

> "Whether the suit has not been properly valued for the purpose of court fee and jurisdiction if so what is the correct valuation? OP Parties."

Again on 12.04.2007, an application for correction of the valuation of the suit for the purpose of court fee and affixation thereof accordingly was filed by the defendants/respondents, which was decided by the learned trial Court, vide its order dated 06.09.2007 while treating issue No.3 as preliminary issue, directed the plaintiff to adduce the evidence first, upon the said issue. Thereafter, despite availing sufficient opportunities, the

petitioners failed to produce their evidence, consequently, the learned trial Court was pleased to proceed under Order XVII, Rule 3, C.P.C. and struck off rights of the petitioners to produce their evidence and dismissed the "suit" for lack of evidence with costs, vide its judgment and decree dated 18.11.2008. The petitioners being aggrieved, filed an appeal, which was also dismissed by learned Addl. District Judge, Toba Tek Singh, vide its judgment and decree dated 04.04.2009. Hence this revision petition.

2. Learned counsel for the petitioners contends that in absence of evidence, the trial Court at the most should have ordered the petitioners to make good deficiency of court fee, while deciding the preliminary issue against him and the provision of Order XVII, Rule 3, C.P.C. could have been applied with a different effect and suit as such could not have been dismissed. He further argued that the lower appellate Court has also failed to exercise its jurisdiction properly.

3. Learned counsel for the respondents contends that since the petitioners despite availing sufficient opportunities could not produce his evidence thus the learned trial Court has rightly closed their right to produce evidence while invoking the provision of Order XVII, Rule 3, C.P.C. and dismissed the suit. He has resisted the instant civil revision petition.

4. Arguments heard and file perused.

5. It may be observed that the affirmation of material proposition of facts or law by one party (in the plaint) and explicit denial thereof (in written statement) at the outset as the case may be, give rise to issues or an issue as the case may be. The propositions of law or facts which plaintiff proceeded to allege in order to show a right to sue or a defendant alleges in order to constitute his defence, are known as material propositions. Each material proposition affirmed by one party and denied by the other forms the subject of a distinct issue. Order XIV, Rule 1, C.P.C. specified two kinds of issues i.e.

(1) Issues of facts,

(2) Issues of law.

The Court at the first hearing of the suit, after reading the plaint and the written statement, if any and after examination of the parties as may appear it to be necessary and their assertion upon all the material proposition as of a facts or of law, which the parties are at variance and thereupon, proceeded to frame and record the issues on which the right decision of the case appears to depend. The Court however, is not required to frame and record issues where it finds at the first hearing of the suit that the defendants have made no defence. After having arisen the issues both of law and facts in the same suit, if the court is of the opinion that the case or any part thereof may be disposed of on issue of law only, it may try those issues first and for that purpose if it thinks fit, may postpone the settlement of issues of facts till the determination of issues of law. Needless to observe that the Court has power to examine witnesses a document before framing issues. Similarly, in addition to what has been stated above, the Court is also possessed with the power to amend and strike out the issues or framed additional issues on such terms as it thinks fit at any stage before passing a decree. Such amendments or framed additional issues, subject to the opinion of the Court, may be necessary for determining the controversy between the parties. Similarly, the Court at the same time, is also vested with the power to strike out any issue which appears to it having been wrongly framed or introduced at any stage before the final decision.

6. It is well settled by now that if some evidence is required to be recorded for decision of a preliminary issue, it must be tried and decided along with other issues on merits. In this case, issue No.3 which pertains to suit valuation, out of framed issues, was ordered to be treated as preliminary issue. The trial court offered the parties to produce evidence, on the said issue. It clearly indicates that the subject issue is not purely an

issue of law. This Court as well as apex Court of Pakistan in various cases observed that if an issue raises a mixed question of law and facts, then, for its decision, evidence is required to be led, such issue cannot be treated as a preliminary/legal issue. Furthermore, the apex Court in case reported as "I.C.I.C. v. Mian Rafiq Saigol and others" (PLD 1996 Lahore 528) observed that:--

> "a mixed question of law and facts, which require resolution after recording of evidence, which is overlapping and also affects the issues on merits as well, should be decided together and piecemeal decision of such issues should be avoided."

Reliance may also be placed upon case reported as "Irshad Ali v. Sajjad Ali and 4 others" (PLD 1995 SC 629).

7. In the facts and circumstances, noticed hereinabove and the discussion made so far, in my view, in the present case, since issue No.3 being mixed question of law and facts, could not have been decided without recording evidence. The learned trial Court after framing issues had already offered the parties to produce their evidence, therefore, the order dated 6.9.2007 treating issue No.3 as preliminary issue, necessitating recording of piecemeal evidence, shows that the Court had acted in exercise of its jurisdiction illegally and with material irregularities, hence the entire edifice built thereon has to crumble. The learned first appellate Court has also failed to take notice of this fact and as such, has failed to exercise its jurisdiction, vested with him by law to rectify the wrong committed by the learned trial Court. Both the learned Courts' below have failed to consider this aspect of the case and on erroneous and wrong assumptions, dismissed the suit of the petitioner. Moreover, it is established that the issue of improper valuation is not considered as a formal defect and a suit cannot be thrown away on the ground of improper valuation because the valuation of the subject-matter of the suit, both for the purposes of jurisdiction and payment of court-fee

can be corrected by the Court after recording evidence. It has been held by the august Supreme Court of Pakistan in case reported as "Sardar Muhammad Kazim Ziauddin Durrani and others v. Sardar Muhammad Asim Fakhuruddin Durrani and others" (2001 SCMR 148) that:-

> "11. As far as improper valuation of the subject-matter of the suit is concerned it also does not tantamount to constitute formal defect because the valuation of the subject-matter of the suit both for the purposes of jurisdiction of the Court and payment of court-fee can be corrected by the Court after recording evidence and if it comes to the conclusion that deficient court-fee has been paid on the plaint then it can call upon the plaintiffs/ petitioners to make the deficiency good in exercise of its jurisdiction conferred upon it by section 149, C.P.C. because the question of payment of court-fee is a matter between the subject and State as it has nothing to do with opponents as held in the case of Siddique Khan v. Abdul Shakoor Khan and another (PLD 1984 SC 289). Similarly if the Court comes to conclusion that the valuation of the subject matter is more than its pecuniary jurisdiction then either it can proceed with the matter considering that if it has jurisdiction because such determination has taken place during the pendency of trial of the suit or if the Court forms an opinion otherwise then it can transfer the case through administrative Judge to Court of competent jurisdiction. However, for such defect which again is a latent in its nature suit cannot fail."

8. For the afore-discussed reasons, by setting aside the impugned judgments and decrees dated 18.11.2008 and 04.04.2009, passed by the learned courts' below, the case is remanded to the learned trial Court with the direction to decide the same afresh in the light of the observations made hereinabove, expeditiously. This revision petition is accordingly allowed.

MH/N-26/L **Case remanded.**

2023 Y L R 1691

[Lahore]

Before Anwaarul Haq Pannun, J

ZEESHAN IFTIKHAR alias SHANI---Appellant

Versus

The STATE and others---Respondents

Criminal Appeal No. 14750 and Criminal Revision No. 14749 of 2022, heard on 8th December, 2022.

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

----Ss. 302(b), 386, 440, 427 & 34---Qatl-i-amd, extortion by putting a person in fear of death or grievous hurt, mischief committed after preparation made for causing death or hurt, mischief causing damage to the amount of fifty rupees, common intention---Appreciation of evidence---Benefit of doubt---Delay of twelve hours in conducting post-mortem examination of dead body of the deceased---Effect---Accused was charged that he along with his co-accused committed murder of the son of complainant by firing due to non-payment of Bhatta and also made indiscriminate firing, causing damage to mirrors, screens etc. of a vehicle, which created a sense of terror and panic in the area---According to postmortem report as well as Medical Officer, the death occurred at 02.10 a.m.; he received dead body in dead house at 04.10 a.m.; the police provided him the relevant documents for autopsy at 10.50 a.m. and consequently he conducted postmortem at 11.00 a.m.---According to the opinion of said witness, death in this case occurred due to injury No.1 inflicted by firearm, which severely injured both the lungs and blood vessels, and led to hemorrhagic shock and death---Both the injuries were ante mortem---Injury No. I was sufficient to cause death in ordinary course of nature---Probable time that elapsed between injuries and death was 10 to 20 minutes and between death and post mortem it was within 12 hours---Said delay in conducting post mortem examination over the dead

body of the deceased, in the given circumstances of the present case, when the mortuary was situated within the bounds of the city, was an intriguing feature to create doubt about the claim regarding promptness in lodging the FIR by the complainant and casted serious suspicion about the correctness and veracity of the prosecution's version---Circumstances established that the prosecution had badly failed to prove its case against the accused---Appeal against conviction was allowed, in circumstances.

Nazeer Ahmad v. Gehne Khan and others 2011 SCMR 1473 rel.

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

----Ss. 302(b), 386, 440, 427 & 34---Qatl-i-amd, extortion by putting a person in fear of death or grievous hurt, mischief committed after preparation made for causing death or hurt, mischief causing damage to the amount of fifty rupees, common intention---Appreciation of evidence---Benefit of doubt---Presence of eye-witnesses at the relevant time of occurrence doubtful---Accused was charged that he along with his co-accused committed murder of the son of complainant by firing due to non-payment of Bhatta and also made indiscriminate firing, causing damage to the mirrors, screens etc. of a vehicle, which created a sense of terror and panic in the area---As per complainant, the distance between his residence and the show-room/place of occurrence was 10 to 12 K.M., whereas the distance inter se the house of the complainant and house of eye-witness was about 15/16 K.M, within the radius of the Municipal Area of City---Admittedly, eye-witness was nephew/Bhanja of complainant and his residence was also situated at a distance of 7/8 K.M. from the place of occurrence---Both the witnesses as such were closely related to each-other and the deceased---Said witnesses apparently had deposed in unison while recording their examination-in-chief that on the day of occurrence at evening time, they had gone to purchase a vehicle from the showroom of Mr. "Y"---As per Sun Calculator of Pakistan available on the internet, on the day of occurrence the time of sun-rise in said city was 06:02 a.m. and sun-set at 6:23 p.m.---Admittedly, all the

witnesses were residing within the municipal limits of the city---Instead of returning to their homes, when they could not find out a vehicle of their choice, the claim of prosecution witnesses that they all apparently aimlessly remained busy during that prolonged interregnum in conversation with each other up-till 01.45 a.m. (late night), which were not usually the business hours, palpably appeared to be an unnatural and preposterous attempt by the witnesses to establish their presence at the relevant time at the place of occurrence---As such the presence of both the eye-witnesses at the relevant time of occurrence seemed to be highly doubtful, therefore, conviction could not be sustained merely on the strength of their parrot like narrations---Prosecution had failed to prove other corroboratory limbs i.e. recovery and motive, and the charges under Ss. 386/ 440/34, P.P.C. against the accused before the Trial Court---Circumstances established that the prosecution had badly failed to prove its case against the accused---Appeal against conviction was allowed, in circumstances.

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

----Ss. 302(b), 386, 440, 427 & 34---Qatl-i-amd, extortion by putting a person in fear of death or grievous hurt, mischief committed after preparation made for causing death or hurt, mischief causing damage to the amount of fifty rupees, common intention---Appreciation of evidence---Benefit of doubt---CCTV footage, evidence not sent to Forensic Laboratory--- Effect--- Accused was charged that he along with his co-accused committed murder of the son of complainant by firing due to non-payment of Bhatta and also made indiscriminate firing, causing damage to the mirrors, screens etc. of a vehicle, which created a sense of terror and panic in the area---In the present case, another piece of evidence which could have been beneficial to the prosecution's case, comprising of CCTV footage i.e. CD and USB, obtained from the Manager of the Bank, seized by the Investigating Officer through recovery memo. and attested by witnesses, had already been discarded by

the Trial Court being inconsequential as the Investigating Officer did not send the said recovered items to the Forensic Science Agency for getting expert opinion about their authenticity---Circumstances established that the prosecution had badly failed to prove its case against the accused---Appeal against conviction was allowed, in circumstances.

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

----Ss. 302(b), 386, 440, 427 & 34---Qatl-i-amd, extortion by putting a person in fear of death or grievous hurt, mischief committed after preparation made for causing death or hurt, mischief causing damage to the amount of fifty rupees, common intention---Appreciation of evidence---Benefit of doubt---Concealments and suppressing of facts by the witnesses---Effect---Accused was charged that he along with his co-accused committed murder of the son of complainant by firing due to non-payment of Bhatta and also made indiscriminate firing, causing damage to the mirrors, screens etc. of the vehicle, which created a sense of terror and panic in the area---Upon perusal of record, it appeared that the complainant in connivance with the police while suppressing the real facts, which had a material bearing upon the case, made an abortive attempt to portray an appropriate story of the occurrence---Right from the registration of case up to the making of the statements of witnesses in the Court, the so-called eye-witnesses had left no stone unturned to conceal the presence of Mr. "Y", the proprietor of the show-room and receiving of his injuries at the time of occurrence---Such concealment and suppression made by the complainant party had been un-earthed by the defence while exercising its right of cross-examination---First Investigating Officer, while facing the cross-examination deposed that Mr. "Y" was the owner of the show-room---Though initially said witness negated a suggestion put by the defence that Mr. "Y" was injured during this occurrence, he however, voluntarily stated that he became injured prior to the occurrence of this case---Defence had ably and readily suggested to the said witness that volunteer portion of his statement was incorrect---Said witness,

however, admitted that the Medico-Legal Certificate of Mr. "Y" was annexed with the police file---Said witness further admitted it to be correct, in response to a fruitful suggestion made by the defence that according to Medico-Legal Certificate annexed with the police file, the time of medical examination of Mr. "Y" was 03.49 a.m. on 27.03.2018.---Similarly, said witness further stated that the injury statement of Mr. "Y" prepared by Moharrir/Head Constable was also annexed with the police file---In addition to that, second Investigating Officer had also stated that he knew that Mr. "Y" was the owner of show-room/place of occurrence---Said Mr. "Y" had been injured during the occurrence and he had got Medico-Legal Certificate from the hospital---Statements of the two Investigating Officers, left no room to doubt that Mr. "Y" (injured) was actually an eye-witness of the alleged occurrence---Presence of said person at the spot being a proprietor of the showroom was natural and his medical examination by way of Medco-Legal Certificate issued through the police had further consolidated his presence---However name of said person was not shown as a witness in the calendar of witnesses attached with the report under S. 173, Cr.P.C., by the police with mala fide---In such circumstances, by not producing Mr. "Y", the injured witness of the occurrence in the Court, the prosecution was guilty of suppression of real facts and withholding of the best evidence---Thus, the self harming act of the prosecution, for retaining for its cards quite close to its chest, had given rise to a serious doubt about the veracity and correctness of the prosecution's version, the benefit of which irresistibility had to be extended to the defence---Circumstances established that the prosecution had badly failed to prove its case against the accused---Appeal against conviction was allowed, in circumstances.

Mst. Zarsheda v. Nobat Khan PLD 2022 SC 21; Jehangir v. Mst. Shams Sultana and others 2022 SCMR 309; Muhammad Naeem Khan and another v. Muqadas Khan (decd) through L. Rs. and another PLD 2022 SC 99 and Muhammad Jabran and others v. The State 2020 SCMR 1493 rel.

(e) Criminal trial---

----Benefit of doubt---Principle---Single instance causing a reasonable doubt in the mind of the Court entitles the accused to the benefit of the doubt not as a matter of grace but as a matter of right.

Muhammad Akram v. The State 2009 SCMR 230 rel.

Muhammad Ahsan Bhoon, Syed Ali Zahoor Karmani, Irfan Riaz Gondal and Anees Ahmad Alvi for Appellant.

Ms. Rahila Shahid, Deputy District Public Prosecutor and Muhammad Nawaz Chaudhary, Assistant Advocate General for the State.

Waqar Hassan Mir for the Complainant.

Date of hearing: 8th December, 2022.

JUDGMENT

ANWAARUL HAQ PANNUN, J.---This single judgment shall decide both the above titled matters, arisen out of the judgment dated 08.02.2022, passed on the conclusion of trial in case/FIR No. 431, dated 27.03.2018, registered for offence under Sections 302/386/427/34, P.P.C. at Police Station Madina Town, Faisalabad, whereby the learned Addl. Sessions Judge, Faisalabad, found the appellant guilty of committing "Qatl-e-Amd" of Irtaza' son of the complainant, hence convicted him under Section 302(b), P.P.C. and sentenced to undergo Rigorous Imprisonment for life along with compensation of Rs.6,00,000/- payable to the legal heirs of the deceased under Section 544-A of Cr.P.C. and in default thereof to further undergo Simple Imprisonment for a period of six months with the benefit under Section 382-B, Cr.P.C. The appellant, has however been acquitted of the charges under Sections 386/440/34, P.P.C. The co-accused Ihsan Aziz while extending him the benefit of doubt, has also been acquitted of the charge, in toto.

2. The prosecution's case is based on the complaint in writing (Exh:PA) submitted by Zaheer-ud-Din Babar, PW-1, on the basis of which formal FIR (Exh:PA/1) was registered that on 26.03.2018 at evening time, the complainant along with his son Irtaza, Tahir Mehmood and Shah Zaib Gull, in order to purchase a vehicle, arrived at Yasir Ikram Motors, Susan road, Faisalabad. They found no vehicle of their choice, out of a large number of vehicles they checked. While sitting there, they however remained busy in mutual conversation with each-other. At about 1.45 a.m. (night), the accused/ appellant Zeeshan Iftikhar, Muhammad Ahsan Jutt, since acquitted, along with their two unknown accomplices, armed with firearms, came there. After alighting from his vehicle, the appellant made a demand from Irtaza for the payment of "Bhatta", who declined the same, which ensued into an altercation between them. The appellant after taking out a rifle from his vehicle made a straight fire shot hitting on inner and outer side of right arm of Irtaza, the accused/appellant made second fire shot while Irtaza tried to run backward, which hit on the right side of his chest under the right armpit, after receiving injuries, Irtaza, fell on the ground. The indiscriminate firing in the meanwhile made by all the accused persons, caused damage to the mirrors, screens etc. of the vehicles, bearing Registration Nos. FSK/495, FSK/8100, FDK/1632, 5966/LOG, FDX/4445, 9738/FSP, FS/111, BZ/803, 7514/LEC and 3550/LEB, which had been parked there. Many bullets, while crossing through the shutters/shades of shops, hit on wall of room. The firing, created a sense of terror and panic in the area. Either by fleeing away or by hiding themselves behind shutters, the people present there succeeded to save their lives. Some persons while running away even left their shoes at the place of occurrence. The motive behind the occurrence was that prior to the occurrence, the accused persons had demanded "Bhatta" from the deceased, who refused to succumb to their demand and due to non-fulfilment of their demand, they nourished a grudge against the deceased and thus committed the alleged occurrence. Despite the injured Irtaza was shifted to Civil Hospital, Faisalabad, he succumbed to his injuries.

3. On conclusion of usual investigation and submission of challan, when confronted with the charges, the appellant pleaded not guilty and claimed trial. The prosecution had produced as many as 12 PWs to bring the charge at home. While tendering Forensic DNA and Serology Analysis Report and Firearms and Tool-marks Examination report issued by Punjab Forensic Science Agency, Lahore as Exh:PX and Exh:PY, the learned Prosecutor closed the prosecution's evidence. While refuting the prosecution's evidence, in his statement under Section 342, Cr.P.C, the appellant reiterated his plea of innocence and alleged his involvement falsely in the case. Without examining him under Section 340(2), Cr.P.C. the appellant produced Muhammad Wasiq, Building Inspector, FDA as DW-1 and the document Exh:DE and Exh:DF as his defence. The learned trial Court on the conclusion of trial acquitted the co-accused Ihsan Aziz and convicted and sentenced the appellant as aforesaid.

4. Arguments heard. Record perused.

5. It may be observed that while acquitting the appellant of the charge under Sections 386 and 440, P.P.C., the learned trial Court, for good reasons, had already disbelieved the prosecution's story qua the alleged motive behind the occurrence. The alleged recoveries of Toyota Corolla Car P-8 bearing Registration No. LED-9705, seized through recovery memo Exh:PJ and Kalashnikov P-9, seized through recovery memo Exh:PK, allegedly made on pointing out of the appellant from his house, had also been discarded. The prosecution's case therefore presently rests upon ocular account and medical evidence. Dr. Javaid Iqbal, Demonstrator (PW-8) conducted postmortem examination over the dead body of Irtaza deceased, compiled the postmortem report Exh:PN and observed following injuries on the body of the deceased Irtaza:--

1.a) A firearm wound of entry 1 1/2 cm x 1 1/2 cm on posterior outer, just below the shoulder part of right arm. Tattooing marks were present.

1.b) A firearm wound of exit 1 cm x 1 cm on inner side, upper part of right arm, 3 cm from roof of armpit.

1.c) A firearm re-entry wound 1 cm x 1 cm, 3 cm from roof of armpit on outer part right side of chest.

2. A firearm wound of entry 1 1/2 cm x 1 cm, it was 4 cm below the injury No.1(a) on outer and upper part of right arm, tattooing marks were present around it.

According to postmortem report as well as Dr. Javaid Iqbal (PW-8), the death occurred on 27.3.2018 at 2.10 a.m., he received dead body in dead house at 4.10 a.m., the police provided him the relevant documents for autopsy at 10.50 a.m. and consequently he conducted postmortem at 11.00 a.m. According to his opinion, death in this case occurred due to injury No.1 inflicted by firearm, severely injured both the lungs and blood vessels, which led to hemorrhagic shock and death. Both the injuries were ante mortem. Injury No.1 was sufficient to cause death in ordinary course of nature. The probable time that elapsed between injuries and death was 10 to 20 minutes and between death and post mortem was within 12 hours. The above noted delay in conducting post mortem examination over the dead body of the deceased, in the given circumstances of this case, when the mortuary was situated within the bounds of the city Faisalabad, is an intriguing feature, to create doubt about the claim regarding promptness in lodging the FIR by the complainant and cast serious suspicion about the correctness and veracity of the prosecution's version. Reliance in this regard is placed upon the case titled "Nazeer Ahmad v. Gehne Khan and others (2011 SCMR 1473) wherein it has been held that delay in having post mortem conducted adversely reflected on the credibility of prosecution's version.

6. The ocular account has been furnished by the eye-witnesses i.e. complainant Zaheer-ul-Din Babar (PW-1), the father and Shah Zaib Gull (PW-2), a cousin of Irtaza deceased only, Tahir Mehmood, PW, another close relative of the deceased has however been given up being unnecessary. Since the occurrence took place on 26.03.2018 at 1.45 a.m. at a show-room

established by Yasir Ikram as its proprietor under the name and style of "Yasir Ikram Motors", which is situated at Susan road, Faisalabad, as per prosecution's own case, therefore, as a natural corollary, it (place) has given rise to certain unavoidable serious implications having material bearing upon the decision of this case. It is an established principle for dispensation of criminal justice that if the prosecution's case rests on ocular account, the witnesses must establish their presence at the spot at the relevant time. The Court while appraising the evidence furnished by eye-witnesses, has to see as to whether the presence of the witnesses at the relevant time and place was natural or in absence thereof whether they have given some plausible reasons/explanation for their presence at the spot while seeing the occurrence. It is not safe to rely upon merely parrot like narration of the events/occurrence by witnesses without satisfying the judicial conscience of the Court regarding presence of eye-witnesses at the relevant time at the spot for sustaining the conviction in a case consisting upon ocular account. In the instant case, after going through the evidence of both the eye-witnesses, I am of the considered view that their presence at the place of occurrence at relevant time is quite doubtful for the reasons recorded below. As per complainant (PW-1), the distance in between his residence and the show-room is 10 to 12 K.M., whereas the distance inter se the house of the complainant and PW-2 Shah Zaib's house is about 15/16 K.M, within the radius of the Municipal Area of City Faisalabad. Admittedly, Shah Zaib PW-2 is nephew/Bhanja of PW-1. His residence is also situated at a distance of 7/8 K.M. from the place of occurrence. Both the PWs i.e. PW-1 and PW-2 as such are closely related to each-other and the deceased. They apparently have deposed in unison while recording their examination-in-chief that on 26.3.2018 at evening time, they i.e. Irtaza, Tahir Mehmood, Shah Zaib Gull and Zaheer-ul-Din Babar, had gone to purchase a vehicle at Yasir Ikram Motors situated at Susan road Faisalabad. It is important to note that as per Sun Calculator of Pakistan (Faisalabad, Sunrise and Sunset times) available on the internet, on the day of occurrence i.e. 27.3.2018, the time of sunrising in Faisalabad is at 06:02 a.m. and sun-setting at 6:23 p.m. According to PW-

2, despite checking a number of vehicles, they found none of their choice. The occurrence took place at about 1.45 a.m. (late night) on 27.3.2018. In the afore stated facts, my judicial conscience has compelled me to ponder on in-depth, as to whether the explanation offered by the prosecution's witnesses to establish their presence at the time of occurrence that they all were busy in conversation with each-other despite they found no vehicle of their choice at the show-room is a natural and justifiable reason to rely upon their evidence for sustaining conviction recorded by the learned trial Court or not. Admittedly, all the PWs were residing within the municipal limits of the city Faisalabad. Instead of returning to their homes, when they could not find out a vehicle of their choice, the claim of prosecution witnesses that they all apparently aimlessly remained busy during this prolonged interregnum in conversation with each other up-till 1.45 a.m. (late night), which are not usually the business hours, palpably appears to be an unnatural and preposterous attempt by the witnesses to establish their presence at the relevant time at the place of occurrence. The epilogue of above discussion is that the presence of both the eye-witnesses at the relevant time of occurrence seems to be highly doubtful, therefore, conviction cannot be sustained merely on the strength of their parrot like narrations. It is important to point out that in addition to above, another piece of evidence which could have been beneficial to the prosecution's case, comprising over the CCTV footage i.e. CD (P-16) and USB (P-17), obtained from the Manager of the Summit Bank, seized by the I.O. Ashfaq Mujahid Inspector (PW-12) through recovery memo (Exh:PH) attested by Shah Zaib Gull and Tahir Mehmood PW had already been discarded by the learned trial Court being inconsequential as the I.O. did not send the said recovered items to the Punjab Forensic Science Agency, Lahore for getting expert opinion about their authenticity. There is yet another strong reason to discard the prosecution's story. Upon perusal of record, it appears that the complainant in connivance with the police while suppressing the real facts, which had a material bearing upon the case made an abortive attempt to portray a besuiting story of the occurrence. It has been noted that right from the

registration of case up to the making of their statements in the Court, the so-called eye-witnesses have left no stone unturned to conceal the presence of Yasir Ikram, the Proprietor of the show-room and receiving of his injuries at the time of occurrence. Such concealment and suppression made by the complainant party, has been un-earthed by the defence while exercising its right of cross-examination. Ashfaq Muhajid Inspector, the first Investigating Officer (PW-12), while facing the cross-examination deposed that Yasir Ikram was the owner of the show-room. Though initially he negated a suggestion put by the defence that Yasir Ikram was injured during this occurrence, he however, voluntarily stated that he became injured prior to the occurrence of this case. The defence has ably and readily suggested to this PW that volunteer portion of his statement is incorrect. He, however admitted that the medico-legal certificate of Yasir Ikram was annexed with the police file. He further admitted it to be correct, in response to a fruitful suggestion made by the defence that according to Medico-Legal Certificate annexed with the police file, the time of medical examination of Yasir Ikram was 3.49 a.m. on 27.03.2018. Similarly, he further stated that the injury statement of Yasir Ikram prepared by Syed Izhar Hussain Shah Moharrir/Head Constable of Police Station of Madina Town Faisalabad is also annexed with the police file. In addition to above, Ameer Muhammad Inspector (PW-10) has also stated that "I know that Yasir Ikram was the owner of show-room/place of occurrence. It is correct that Yasir Ikram had injured during the occurrence and he had got medico legal Certificate from the Hospital. It is correct that FIR was lodged under Sections 302/427/34, P.P.C. It is correct that I did not summon Yasir Ikram injured PW to join the investigation. It is correct that on 19.4.2018. Yasir Ikram joined the investigation. I do not remember that either Yasir Ikram endorsed his earlier statement allegedly recorded on 27.3.2018. He further deposed that it is correct that I had recorded in my case diary that Yasir Ikram owner of the show-room endorsed his statement already recorded on 27.3.2018 by Ashfaq Mujahid SI/ previous Investigating Officer." Out of the statements of the I.Os. i.e. PW-10 and PW-12, the above quoted excerpts, leave no room that

Yasir Ikram injured was actually an eye-witness of the alleged occurrence. His presence at the spot being a proprietor of the show-room was natural. His medical examination by way of MLC issued through the police, had further consolidated his presence. His name was not shown as a witness in the calendar of witnesses attached with the report under Section 173, Cr.P.C. by the police with mala fide. In such circumstances, it is held that by not producing Yasir Ikram, the injured PW of the occurrence in the Court, the prosecution is guilty of suppression of real facts and withholding of the best evidence. It is well settled that in case the best piece of evidence lying with a party is withheld, an adverse inference as required under Article 129(g) of Qanun-e-Shahadat Order, 1984 can be drawn against that party for withholding such evidence, on the ground that had such witness been produced, he would have not supported the case of the relevant party. Thus, the self-harming act of the prosecution, for retaining its cards quite close to its chest had given rise to a serious doubt about the veracity and correctness of the prosecution's version, the benefit of which irresistibility has to be extended to the defence. Reliance may be placed upon case reported as "Mst. Zarsheda v. Nobat Khan "(PLD 2022 SC 21), "Jehangir v. Mst. Shams Sultana and others"(2022 SC MR 309, "Muhammad Naeem Khan and another v. Muqadas Khan (decd) through L. Rs. and another "(PLD 2022 SC 99) and "Muhammad Jabran and others v. The State" (2020 SCMR 1493).

7. While dealing with the criminal matters at Bench, it has been noticed with concern that being oblivious of their fundamental and foremost duty of dispensing with the justice to the litigants, after fulfillment of the requirements of a fair trial, sometimes the trial Courts instead of adopting a proactive approach prefer to sit idol while deciding the cases and only depend upon the material/ evidence so produced by the parties. Needless to observe that the Courts being bastion of justice are enjoined upon to exercise their jurisdiction in accordance with the statutory provisions of law. However, the Courts while exercising such powers vested with them are permitted to absorb the changing realities of life, and as such the same should be reflected through their decisions. Needless to observe that unless a

society as a whole is innately and zealously desirous to seek benevolence of justice to concretize its foundations, the belligerent factions like the litigants by exploiting the loopholes and the weaknesses of the system, continue to take advantage in their favour. It is observed with anguish that for countless reasons with the passage of time, instead of treading valiantly on the hard and bumpy path to occupy an honourable place in the comity of civilized and developed nations, we as a society are victim to stagnation. Such a state of affair has resulted into a gradual decay almost in all walks of life. It is the lesson of history if one intends to learn that neither any individual nor any nation can make advancement without sheer hard work and without adhering to best guiding norms of life. Unless a society as a whole has its firm belief in the benevolence of justice in every field of life as a virtue, the judicial system under any constitution and law alone cannot create an egalitarian society, i.e. the ultimate aspiration of the humans irrespective of their religion, creed and caste. However, the Courts while exercising their jurisdiction with a progressive outlook and proactive role can make a contribution for sustaining of, otherwise a dwindling society. It may further be observed that it is expected from the Courts with bona fide and a firm belief that the courts will not deter in exercising their jurisdiction in a progressive manner to cater justice. The status of the litigants is always of a justice seeker only. The litigants under their respective persuasions can adopt and exercise all possible options including the tactics available to them while taking refuge behind the technicalities to attain their goals. It is the sacred duty of the Courts only to dispense with the justice to the litigants. Under Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973, to have a fair trial, is the fundamental right of the litigants while following the enabling provisions of the Qanun-e-Shahadat Order, 1984 and the Code of Criminal Procedure, 1898, during trial. In this backdrop, a reference to Section 540, Cr.P.C. may not be out of context, which upon its bare reading reflects that where some evidence is essential for just decision of case, it is obligatory upon the Court to exercise its discretionary power even suo-motu while guarding itself against the exploitation of exercise of such power by

the litigants in the light of guiding principles in the ends of justice. There is no dearth of case law elaborating the guiding principle for exercising powers in this regard. Reliance may be placed upon case reported as "Sajid Mehmood v. The State "(2022 SCMR 1882), "Chairman, NAB v. Muhammad Usman and others "(PLD 2018 SC 28), "Nawabzada Shah Zain Bugti and others v. The State" (PLD 2013 SC 160), "Shahbaz Masih v. The State" (2007 SCMR 1631) and "Muhammad Murad Abro v. The State through A.G. Bcdochistan" (2004 SCMR 966). Examining the facts of the case in the light of above observations, it is held that in the instant case not only the prosecution but also the learned trial Judge despite availability of sufficient material and reasons that the evidence of injured Yasir Ikram, the proprietor of the show-room, whose presence was natural at the time of occurrence was essential to the just decision of the case, failed to exercise its power under Section 540, Cr.P.C. Such failure in exercise of power under Section 540, Cr.P.C. has occasioned in creating a lacuna and serious doubt regarding the veracity of the prosecution's story which had left no option except to extent benefit in favour of the defence.

8. In the above background, after finding themselves being in a cauldron, the argument of learned Prosecutor assisted by learned counsel for the complainant that in the attending circumstances of this case, since the defence has also not come forward with a clear-cut and consistent version, therefore, following the principles laid down in the case titled as Syed Ali Bepari v. Nibaran Mollah and others" (PLD 1962 SC 502), the Court should form its own opinion about the occurrence, had failed to impress being in-apt in the above discussed facts and circumstances of the instant case, hence, repelled. As it is the prosecution to prove its case which had failed, therefore, the defence evidence, needs no discussion.

9. Since the ocular account, when the prosecution had already failed to prove other corroboratory limbs i.e. recovery and motive, and the charges under Sections 386/440/34, P.P.C. against the appellant before the trial

Court, has also failed to satisfy the judicial conscience of the Court for sustaining the conviction.

10. For what has been discussed above, in my judicial estimation, the prosecution has badly failed to prove its case against the appellant. It is cardinal principle of criminal jurisprudence that a single instance causing a reasonable doubt in the mind of the court entitles the accused to the benefit of doubt not as a matter of grace but as a matter of right. In this context, reliance is placed on the judgment reported as Muhammad Akram v. The State (2009 SCMR 230), wherein the Hon'ble Supreme Court has held as under:--

> "The nutshell of the whole discussion is that the prosecution case is not free from doubt. It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

Therefore, this appeal is allowed, the conviction and sentence recorded by the learned trial court against the appellant (Zeeshan Iftikhar alias Shani son of Iftikhar) through the impugned judgment dated 08.02.2022 is set aside and he is acquitted of the charge. The appellant is in jail, he shall be released forthwith, if not required in any other case.

11. As far as Criminal Revision No.14749 of 2022 (Zaheer-ul-Din Babar v. Zeeshan Iftikhar, etc.) is concerned, for the reasons mentioned hereinabove, the instant criminal revision petition having no substance, stands dismissed.

JK/Z-4/L **Appeal allowed.**

2024 P Cr. L J 596

[Lahore]

Before Anwaarul Haq Pannun, J

MUHAMMAD RAMZAN---Petitioner

Versus

The STATE and 4 others---Respondents

Criminal Revision No. 33626 of 2023, decided on 29th May, 2023.

Criminal Procedure Code (V of 1898)---

----S. 466---Penal Code (XLV of 1860), Ss. 302 & 34---Qatl-i-amd, common intention---Release of lunatic pending trial---Scope---Application filed by the petitioner under S. 466(1), Cr.P.C., for declaring him lunatic and releasing him on bail after his medical examination from mental health institution was dismissed---Scope---Section 464, Cr.P.C, envisaged that, during an inquiry or a trial, if the Court has a reason to believe that the accused is of unsound mind and consequently incapable of making his defence, the fact of unsoundness of mind of accused shall be inquired into---While forming a prima facie tentative opinion, the Court may give due consideration to its own observations in relation to the conduct and demeanor of an accused person---Failure of party to raise such plea during trial did not debar the Court from forming an opinion "on its own" regarding the capability of accused person to face the proceedings of trial---Record showed that the Trial Court ably had asked numerous questions to accused, replied by him rationally and satisfactorily to form prima facie tentative opinion as to whether the accused was incapable of understanding the proceedings of trial or making his defence, therefore the Trial Court being legally not necessarily

obliged to hold any inquiry regarding his medical examination about his mental illness, unsoundness of mind and incapacity to stand trial, correctly refused his request and had rightly passed the impugned order, which called for no interference---Petition was dismissed accordingly.

Sofia Bano and another v. Home Department, Government of Punjab through its Secretary and others PLD 2021 SC 488 and Shahbaz Ahmad v. The State and others 2021 PCr.LJ 1100 rel.

Mohsin Ashfaq, Kamran Asif and Sher Zaman Cheema for Petitioner.

Ms. Rahila Shahid, Deputy District Public Prosecutor for the State.

Jalees Ahmad Mir and Muhammad Aqeel for the Complainant.

ORDER

ANWAARUL HAQ PANNUN, J.---By means of instant petition under section 435, Cr.P.C. read with section 439, Cr.P.C. the Order dated 18.03.2023 passed by the learned trial Court/Additional Sessions Judge, Gujranwala has been challenged whereby pending trial in case FIR No.557/22 dated 29.04.2022, offence under sections 302, 34, P.P.C., registered with P.S. Sabzi Mandi, Gujranwala, the application of accused Muhammad Younas under sections 464 to 466, Cr.P.C., for declaring him lunatic and releasing him on security or bail as per manner prescribed under sections 463 to 466, Cr.P.C. after his medical examination from mental health Institution, has been dismissed.

2. Arguments heard. Record perused.

3. In order to appreciate the contention of learned counsel for the petitioner that without seeking opinion of the Medical Board consisting of medical experts in the relevant field, the learned trial Judge passed the impugned order, thus has failed in exercising its jurisdiction, in the light

of case law reported as "Shahbaz Ahamd v. The State and others" (PCr.LJ 2021 Lahore 1100) cited by him, it will be appropriate to have a glance over sections 464 to 466, Cr.P.C. which arc reproduced in their verbatim for convenience:-

464. Procedure in case of accused being lunatic. (1) When a Magistrate holding an inquiry or a trial has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, the Magistrate shall inquire into the fact of such unsoundness, and shall cause

such person to be examined by the Civil Surgeon of the district or such other medical officer as the Provincial Government directs, and thereupon shall examine such Surgeon or other officer as a witness, and shall reduce the examination to writing.

(1A) Pending such examination and inquiry, the Magistrate may deal with the accused in accordance with the provisions of section 466.

(2) If such Magistrate is of opinion that the accused is of unsound mind and consequently incapable of making his defence, he shall record a finding to that effect and shall postpone further proceedings in the case.

465. Procedure in case of person [sent for trial] before Court of Sessions or High Court being lunatic. (1) If any person before a Court of Sessions or a High Court appears to the Court at his trial to be of unsound mind and consequently incapable of making his defence, the Court shall, in the

first instance, try the fact of such unsoundness and incapacity, and if the Court is satisfied of the fact, it shall record a finding to that effect and shall postpone further proceedings in the case.]

(2) The trial of the fact of the unsoundness of mind and incapacity of the accused shall be deemed to be part of his trial before the Court.]

466. Release of lunatic pending investigation or trial. (1) Whenever an accused person is found to be of unsound mind and incapable of making his defence, the Magistrate or Court, as the case may be, whether the case is one in which bail may be taken or not, may release him on sufficient security being

given that he shall be properly taken care of and shall be prevented from doing injury to himself or to any other person, and for his appearance when required before the Magistrate or Court or such officer as the Magistrate or Court appoints in this behalf.

(2) Custody of lunatic. If the case is one in which, in the opinion of the Magistrate or Court, bail should not be taken, or if sufficient security is not given, the Magistrate or Court, as the case may be, shall order the accused to be detained in safe custody in such place and manner as he or it may think fit, and shall report the action taken to the Provincial Government:

Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the Provincial Government may have made under the Lunacy Act, 1912.

(The Lunacy Act, 1912 has been repealed through the Mental Health Ordinance, 2001 ((No.VIII of 2001).

4. It may be reiterated that as a result of promulgation of Mental Health Ordinance, 2001, w.e.f. 20.02.2001, the Lunacy Act, 1912, stood repealed and after 18th Constitutional Amendment, in the Constitution of Islamic Republic of Pakistan, 1973, health now being the Provincial subject, further amendments have been made in the Ordinance ibid by way of Punjab Mental Health (Amendment) Act, 2014. Consequently, now the rules for carrying out the purpose of the Ordinance are to be made by the Provincial Government instead of Federal Government The provision of amended Section 59 is as follows: "(1) The Government may, by notification in the official Gazette, make rules for carrying out the purposes of the Ordinance."

5. Section 464, Cr.P.C. envisages that, during an inquiry or a trial, if the court, "has a reason to believe" that the accused is of unsound mind and consequently incapable of making his defence", the fact of unsoundness of mind of accused shall be inquired into. The trial of the fact of unsoundness of mind and incapacity of accused shall be deemed to be part of his trial before the Court. In Sofia Bano and another v. Home Department, Government of Punjab through its Secretary and others (PLD 2021 SC 488), a Larger Bench of the august Supreme Court of Pakistan restated the law as "Terms 'reason to believe' and "appears to the court" used in sections 464 and 465, Cr.P.C. are synonymous and refer to a tentative opinion which has to be formed for the purpose of deciding whether or not to enquire into the issue of capability of the accused to face trial as a question of fact". Furthermore, in the above cited case of "Shahbaz Ahmad v. The State and others" (2021 PCr.LJ Lahore 1100) it

has also been ruled by the Lahore High Court, Lahore that the terms "reason to believe" and appears to the court" in the context of sections 464 and 465, Cr.P.C. are to be interpreted as a prima facie tentative opinion of the court, which is not a subjective view based on impressions but one which is based on an objective assessment of the material and information placed before the court or already available on record in the police file and case file. While forming a prima facie tentative opinion, the court may give due consideration to its own observations in relation to the conduct and demeanor of an accused person. The failure of party to raise such plea during trial does not debar the court from forming an opinion "on its own" regarding the capability of accused person to face the proceedings of trial. In the same judgment, it has further been observed that "the court may rely on its own observations regarding the demeanor and conduct of accused either before or at the time of taking a plea against the charge or at any later stage. The court may note whether he/she is being represented by counsel or not and consider the material, if any, available on record which may persuade it to inquire into the capability of accused to face trial. The court may assess the mental health condition of an accused by asking him/her questions.

It is, therefore, observed that it does not necessarily become obligatory upon the court to embark upon conducting an inquiry regarding his mental illness and incapacity to face trial unless the court forms a prima facie tentative opinion that the accused may be incapable of understanding the proceedings of trial or make his/her defence. Contrary to what has been observed hereinabove, once the court has formed a prima facie tentative opinion that the accused may be incapable of understanding the proceedings of trial or make his/her defence, it becomes obligatory upon the court to embark upon conducting an inquiry by seeking opinion from

a medical board consisting of experts in the relevant field as required under the Mental Health Ordinance ibid as aforesaid to decide the issue of incapacity of the accused to face trial due to mental illness.

For the purpose of inquiring into such unsoundness of mind, the accused shall be caused to be examined by a Medical Board to be notified by the Provincial Government consisting of qualified medical experts in the field of mental health, as noted above, to examine the accused person and opine whether the accused is capable or otherwise to understand the proceedings of trial and made his/her defence. It must be a detailed and structured report with specific reference to psychopathology (if any) in the mental functions of consciousness, intellect, thinking, mood, emotions, perceptions, cognition, judgment and in sight. The opinion of the Medical Board must not be a mere diagnosis of a mental illness or absence thereof.

As a consequence of the inquiry, as noted above, the Magistrate or the Court shall have to record his findings to the effect that accused being of unsound mind, since is incapable of making his defence, hence, as a corollary, the proceedings of trial be postponed. During the pendency of such inquiry or trial, the court has to deal the accused in terms of section 466, Cr.P.C. Whenever, an accused person is found to be of unsound mind and incapable of making his defence, the Magistrate or the court under subsection (1) of section 466, Cr.P.C. as the case may be irrespective whether the case is one in which the bail may be taken or not, may release him on sufficient security being given "that the accused shall be properly taken care of and shall be prevented from doing any injury to himself or any other person ad for his appearance, as and when required as the Magistrate or the court may appoint in this behalf. However, under

subsection (2) of section 466, Cr.P.C. where the court or the Magistrate is of the opinion that the bail of the accused should not be taken, if sufficient security is not given to the Magistrate or the court as the case may be, shall order that the accused be detained in safe custody in such place and manner, as it may think fit under the law. A report, however, shall have to be made in this regard to Provincial Government by Court or Magistrate accordingly. Such order, under this provision, in case the court considers it appropriate that the accused be detained in a lunatic asylum, shall be made in accordance with such rules, made under relevant law.

6. It may be observed that since the insanity defence which may be claimed by an accused facing a charge in a trial, has duly been recognized through section 84 of P.P.C. by the Legislature, stating that nothing is an offence done by a person, who at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law, drawing a strength from the spirit of maxim "actus non facit ream nisi mens siti rea" an act is not criminal unless there is criminal intent, embodied by the legislature. It may be relevant to mention here that a trial of a case either under Chapter XX or XXI [Summary Trial] by a Magistrate or before High Court or Court of Sessions consisting of various procedural and substantive exercise including mainly the steps i.e. delivery of copies of statements of witnesses, option of pleading guilty of the charge by the accused or denial thereto while claiming trial, cross-examination over the witnesses either personally or through exercise of his right to be represented through a lawyer of his own choice, his examination under section 342, Cr.P.C, examination of the accused himself as his own witness under section 340(2) of Cr.P.C. and recording of evidence in his defence, requires his active participation, before deciding about the guilt or otherwise of the

accused facing the charge, which definitely cannot be undertaken by a person of unsoundness of mind. Needless to observe that a trial of an accused facing charge of an offence, entails either into his acquittal or conviction, give rise to forereaching consequences on his life including his progenies, if any and his other relations. In case of certain individuals, the role they are destined to play depending upon the situation and their importance, in view of globalization of the world, the consequences may affect the society or the world at large. Moreover, a right of fair trial guaranteed under Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973, which in unequivocal words ordains that for determination of his civil right of obligation or any criminal charge against him, a person shall be entitled to a fair trial and due process, therefore, every trial Magistrate or the Judge as the case may be, has been enjoined to perform a more sensitive duty as an adjudicator. This Court is quite certain that the legislature to achieve its above highlighted objects legislated the special provisions contained in Chapter XXXIV followed by the Mental Health Ordinance, 2001 amended up to date, to regulate the procedure to protect the interest of the lunatics and has vested the powers of rule making in the Provincial Government for carrying out the purposes of the Ordinance ibid. Any omission resulting into a mistaken prima facie tentative opinion

by a Court, about unsoundness of mind or otherwise of an accused

facing trial may cause a serious prejudice to the accused may vitiate his trial ultimately, bringing the entire exercise of trial to a nugatory therefore would amount to defeating the celebrated wisdom of the legislation.

7. In the light of above discussion and on perusal of the record, it has been found that the learned trial Judge while taking into consideration, the

law on the point as discussed above and the case law relied upon by the learned counsel for the petitioner in its true perspective, ably has asked numerous questions to accused Muhammad Younas alias Asad, replied by him rationally and satisfactorily to form his prima facie tentative opinion as to whether the accused is incapable of understanding the proceedings of trial or making his defence, therefore the learned trial court being legally not necessarily obliged to hold any inquiry regarding his medical examination about his mental illness, unsoundness of mind and incapacity to stand trial, correctly refused his request and has rightly passed the impugned order, which calls for no interference by this Court in exercise of its revisional jurisdiction. Learned counsel for the petitioner has failed to point out any impropriety or illegality in the impugned order. Hence, instant petition stands dismissed.

JK/M-82/L **Petition dismissed.**

2024 P Cr. L J 1289

[Lahore]

Before Anwaarul Haq Pannun, J

Mst. SAIRA FATIMA---Petitioner

Versus

The STATE and 3 others---Respondents

Crl. Misc. No. 31686 of 2023, decided on 30th May, 2023.

Penal Code (XLV of 1860)---

----S. 489-F---Criminal Procedure Code (V of 1898), S. 234---Issuing cheque dishonestly---Application for joinder of charges---Petitioner facing trials in more than one cases of the same nature, registered within a span of 12 months sought one trial by way of joinder of charges in all the cases---Application was declined by Trial Court---Revision was also dismissed---Validity---Joinder of charges as provided in S. 234, Cr.P.C, is procedural as well as directory and not mandatory---Joinder of charges could not be sought as a right either by the accused or the prosecution---Accused can not insist for joinder of charges unless it is shown that separate charges in different trials either will prejudice his/her case or will amount to an illegality including double jeopardy---Three prosecution witnesses had been recorded in one of the cases and a direction had already been issued by the Director General, Directorate of District Judiciary, to decide the case within two months---All the criminal cases, having different sets of witnesses i.e. the proposed evidence, had been lodged by different persons/complainants---Courts below had passed the impugned orders while taking into consideration the law on the point in its true perspective and had validly refused to exercise the discretion in favour of the petitioner, which called for no interference by the High Court---Petition was dismissed, in circumstances.

Mian Muhammad Nawaz Sharif v. the State through Chairman, National Accountability Bureau, Islamabad and another 2018 PCr.LJ 521 ref.

The State v. Mirza Azam Beg, P.C.S and another PLD 1964 (W. P.) Lahore 339; Shahadat Khan and another v. Home Secretary to the Government of West Pakistan and others PLD 1969 SC 158; Muhammad Sharif and others v. The State and others 2001 YLR 896; Eslam Wazir v. Nek Dar Khan and another 2022 PCr.LJ 249; Ahmad Khan v. Commissioner, Rawalpindi Division and another PLD 1965 (W. P.) Peshawar 65 and Mian Muhammad Nawaz Sharif v. The State through Chairman, National Accountability) Bureau, Islamabad and another 2018 PCr.LJ 521 rel.

Muhammad Aurangzeb Khan Daha and Muhammad Aqeel for the Petitioner.

Tariq Siddique, Addl. Prosecutor General.

Sher Zaman Cheema, with the Respondent.

ORDER

ANWAARUL HAQ PANNUN, J.---The petitioner, who is an accused of the charge that she without making arrangements with the bank ensuring that the cheques on its presentation, shall be honoured, had dishonestly issued cheques fully detailed in the FIR, for fulfilling her financial obligation to the complainant, when presented before the concerned bank, stood dishonoured, in the cases mentioned blow in paragraph No.2 of this order, by means of instant petition under Section 561-A Cr.P.C. has challenged the vires of order dated 06.03.2023 passed by learned Judicial Magistrate Section-30, Model Town, Lahore whereby her application under section 234 Cr.P.C. for joinder of charges was

dismissed as well as the order dated 03.05.2023 passed by learned Addl. Sessions Judge, Lahore whereby her revision has also been dismissed.

2. Facts necessary for disposal of instant petition are that the petitioner being an accused in the following o cases is facing the trial:-

i) FIR No.1253 dated 03.12.2020 under section 489-F, P.P.C, P.S. Gulberg, Lahore.

ii) FIR No.1266 dated 05.12.2020 under section 489-F, P.P.C, P.S. Gulberg, Lahore. -

iii) FIR No.2436 dated 25.11.2020 under section 489-F, P.P.C, P.S. Baghbanpura, Lahore.

The petitioner's application under section 234 Cr.P.C. requesting that since the petitioner is facing the trial in more than one cases of the same nature, registered within a span of 12 months from the first to the last, therefore, instead of separate trials, she may be tried by way of joinder of charges in all the aforesaid cases, at one trial, was dismissed vide order dated 06.03.2023. She filed criminal revision petition which also met the same fate vide order dated 03.05.2023. Hence, instant petition.

3. Learned counsel for the petitioner mainly argued that since all cases relate to dishonouring of cheques allegedly issued by the petitioner in the transaction connected to Bahar Trading Company, therefore, following the underlying spirit of section 234 Cr.P.C., all the cases may be ordered to be tried after joinder of charges by means of one trial by the single learned court, thus craved for acceptance of her application by setting aside the impugned order.

4. On the other hand, learned Prosecutor while relying upon case law titled Mian Muhammad Nawaz Sharif v. The State through Chairman, National Accountability Bureau, Islamabad and another (2018 PCr.LJ

Islamabad 521) has defended the impugned orders and thus has prayed for dismissal of instant petitioner.

5. Arguments heard. Record perused.

6. In order to appreciate the contention of learned counsel for the petitioner, it will be beneficial to reproduce sections 233 and 234 Cr.P.C. hereunder:-

> 233. Separate charges for distinct offences. For every distinct offence of which any person is accused there shall be separate charge, and every such charge shall be tried separately, except in the case mentioned in sections 234, 235, 236 and 239.
>
> 234. Three offences of same kind within one year may be charged together. (I) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, whether in respect of the same person or not, he may be charred with, and tried at one trial for, and number of them not exceeding three. (2). Offences are of same kind when they are punishable with the same amount of punishment under the same action of the Pakistan Penal Code or of any special or local law.
>
> Provided that, for the purpose of this section, an offence punishable under section 379 of the Pakistan Penal Code shall be deemed to be an offence of same kind as an offence punishable under section 380 of the said Code, and that an offence punishable under any section of Pakistan Penal Code or of any special or local law shall be deemed to be an offence of the same kind as an attempt to commit such offence, when such an attempt is an offence.

The phraseology of section 233 Cr.P.C. is quite vivid that except the cases mentioned in sections 234, 235, 236 and 239, for every offence of

which any person is accused of there shall be a separate charge and every such charge shall be tried separately. Section 234 of Cr.P.C., states that when a person is accused of more offences than one of the same kind committed within a span of twelve months from the first to the last of such offences, whether in respect of the same person or not, he may be charged with, and tried at one trial for, however, the number of such cases should not be exceeding three cases. It is evident from use of the word 'may be' that section 234 of Cr.P.C. is not directory in its nature rather the same is discretionary. Section 234 is merely permissive and not datory and does not in any way deprive the Court of ordering a separate trial. In case titled The State v. Mirza Azam Beg, P.C.S and another (PLD 1964 (W. P.) Lahore 339) this Court has held that section 234 Cr.P.C. is the first exception to the general rule of one trial for each distinct offencd. The principle underlying this section is that the offences of the same kind in criminal Court within a space of short period, namely, twelve months from the first to the last of such offences, may be tried together. This section lays down three limitations. They are, (1) that the offences must be of the same kind, (2) that they must have been committed within the space of one year, and (3) that more than, three offences should not be joined in the same trial yet it has been left to the discretion of the Court whether in facts and circumstances of commission of offences, framing of a single charge is proper or not. Therefore, the accused under this provision cannot insist for joinder of charges until and unless it is shown that the separate trials or charges shall prejudice his case to such an extent that the same would amount to an illegality. In case titled "Shahadat Khan and another v. Home Secretary to the Government of West Pakistan and others" (PLD 1969 SC 158), the Apex Court has held that under the Code of Criminal Procedure the rule laid down in section 233 Cr.P.C is that for every distinct offence of which any person accused of, there shall be a separate charge and every such charge shall be tried separately except in

the cases mentioned in sections 234, 235, 236 and 239, Cr.P.C. The general rule is clear enough. It may be observed that if the court finds no prejudice being caused to the accused or the charges are distinct and do not come stricto sensu within the parameters of section 239, Cr.P.C. read with section 234, Cr.P.C., the court must desist from the joinder of charges. It cannot be said that if several accused persons charged for committing the same offence in the course of the same transaction, are tried separately then the trial will, irrespective of any question of prejudice, be illegal. It may be reiterated that the directions in regard to joinder of three charges stated under section 234 Cr.P.C are not mandatory in the sense that it is not obligatory on the Magistrate not to try the offences separately, but it is entirely within the discretion of the Magistrate whether or not to resort to section 234 Cr.P.C. In case titled Muhammad Sharif and others v. The State and others (2001 YLR 896) the Hon'ble Sindh High Court held that the joinder of charges cannot be made as a matter of routine. If Court finds that no prejudice would be caused to the accused or the charges are distinct and do not come stricto sensu within the parameters of section 239, Cr.P.C. read with section 234, Cr.P.C. the Court must desist from the joinder of charges. It may further be stated that in case titled Eslam Wazir v. Nek Dar Khan and another (2022 PCr.LJ 249) the Hon'ble Peshawar High Court has held that Section 234, Cr.P.C. is discretionary in nature, which is evident from use of the word 'may be', and therefore same has been left to the discretion of the Court, for the reason that the Court shall see whether facts and circumstances of offences allow fuming of a single charge. In case titled Ahmad Khan v. Commissioner, Rawalpindi Division and another (PLD 1965 (W. P.) Peshawar 65) the Hon'ble Peshawar High Court has held that this brings me to the argument which was tried to be raised that it was cardinal principle of criminal jurisprudence that all the charges committed in the same transaction should be tried together with a view to preventing

the accused from running gamut of different trials. The argument is not only erroneous but opposed to the provisions of the Cr.P.C., namely, sections 233 to 240, which deal with joinder of charges. These sections contemplate that there should be a charge for each distinct offence and that it should be formulated with precision; that the precise charge framed is to be tried, and tried separately, as contemplated by section 233, except in cases mentioned in sections 234 to 236 and section 239 of Cr.P.C. It further held that sections 234 to 239 Cr.P.C are merely permissive and not mandatory, i.e. it is for the prosecution to try the accused on different offences in one trial as provided by those sections, but in case the prosecution decides to split the charges and try him separately on those charges the accused cannot insist on joinder of charges. In case titled Mian Muhammad Nawaz Sharif v. The State through Chairman, National Accountability) Bureau, Islamabad and another (2018 PCr.LJ 521) the Hon'ble Islamabad High Court has held that joinder of charges as provided in section 234, Cr.P.C. is procedural as well as directory and not mandatory. Joinder of charges cannot be sought as of its right either by the accused or the prosecution. Thus the accused cannot insist for joinder of charges unless it can be shown that separate charges in different trials either shall prejudice his case or would amount to an illegality including double jeopardy.

7. In one of the cases i.e. FIR No.2436/20, three prosecution witnesses have been recorded and a direction in this case had already been issued by the learned Director General, Directorate of District Judiciary to decide the case within two months. All the criminal cases, having different sets of witnesses i.e. the proposed evidence, had been lodged by different persons/complainants. In the circumstances, since both the courts below have passed the impugned orders while taking into consideration, the law on the point as discussed above in its true perspective and have validly refused to exercise their discretion in favour of the petitioner, which call

for no interference by this Court. Inherent power of High Court under Section 561-A Cr.P.C would be exercised only where such orders are necessary to give effect to any order under Criminal Procedure Code or to prevent abuse of process of any Court or otherwise to secure the ends of justice. The powers under Section 561-A Cr.P.C are not exercised in substitution of the powers under Section 439 Code of Criminal Procedure Code as the scope of both the provisions is quite distinct. Learned counsel for the petitioner except reiterating that the petitioner being lady is facing the rigors of the trial before different courts, therefore, her request may be acceded to, has failed to bring his case within the parameters requiring exercise of power under Section 561-A Cr.P.C. or that the resultant effect of order impugned, would be source of prejudice to the right of fair trial of' accused/petitioner, guaranteed under Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973, hence instant petition stands dismissed.

JK/S-43/L **Petition dismissed.**

PLJ 2024 Lahore (Note) 52

[Multan Bench, Multan]

***Present*: CH. ABDUL AZIZ AND ANWAARUL HAQ PANNUN, JJ.**

ZAHID HUSSAIN--Appellant

versus

STATE etc.--Respondents

I.C.A. No. 12 of 2024, decided on 13.2.2024.

Law Reforms Ordinance, 1972 (XII of 1972)--

----S. 3(2)--Constitution of Pakistan, 1973, Art. 199--Criminal Procedure Code, (V of 1898), S. 174--Application for exhumation of dead body--Dismissed--Criminal revision and writ petition were also dismissed--Remedy of appeal--Maintainability--When a remedy of appeal, review or revision against original order is available before any Court, Tribunal or Authority, then Intra Court Appeal is not maintainable--Order of revisional Court was assailed in petition under Article 199 of Constitution, ICA against order passed by Single Judge in Chambers was not maintainable--Appeal dismissed. [Para 2] A

2021 SCMR 1617 & 2019 SCMR 939 *ref.*

Malik Muhammad Zahid Kabir Khakhi, Advocate for Appellant.

Mr. Tariq Mehmood Dogar, Advocate for Respondents.

Mr. Sanam Farid Baloch, Assistant Advocate General, Punjab for State.

Date of hearing: 13.2.2024.

ORDER

Through the instant Intra-Court Appeal filed under Section 3 of the Law Reforms Ordinance, 1972, Zahid Hussain (appellant) has called in

question the vires of order dated 19.12.2023 passed by learned Single Judge in Chamber whereby W.P.No. 14940 of 2023 was dismissed.

2. At the very outset, we have noted that initially Zahid Hussain (appellant) approached Magistrate Section 30, Dera Ghazi Khan by way of filing application under Section 174 Cr.P.C. for exhumation of dead body of his sister *Mst.* Sajida Bibi which was dismissed by the Magistrate *vide* order dated 02.09.2023. The appellant assailed the order of Magistrate through Criminal Revision which too was dismissed by learned Additional Sessions Judge, Dera Ghazi Khan *vide* order dated 21.09.2023. In the backdrop of these facts, we have observed that according to the proviso of sub-section (2) of Section 3 of the Law Reforms Ordinance, 1972, when a remedy of appeal, review or revision against the original order is available before any Court, Tribunal or Authority, then Intra Court Appeal is not maintainable. In the instant case, since the order of revisional Court dated 21.09.2023 was assailed in the petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, hence the Intra- Court Appeal against the order dated 19.12.2023 passed by learned Single Judge in Chambers is not maintainable. Reliance in this context is placed upon the cases reported as *JS Bank Limited, Karachi and others v. Province of Punjab through Secretary Food, Lahore and others* (2021 SCMR 1617) and *SME Bank Limited through President Islamabad and others v. IzharUlHaq* (2019 SCMR 939).

3. For the foregoing reasons, the instant Intra-Court Appeal being not maintainable is dismissed.

(Y.A.) **Appeal dismissed.**

PLJ 2024 Lahore (Note) 59

[Multan Bench, Multan]

***Present*: ANWAARUL HAQ PANNUN, J.**

HABIB-UR-REHMAN--Petitioner

versus

ADDITIONAL DISTRICT JUDGE, etc.--Respondents

W.P. No. 3838 of 2022, decided on 6.12.2023.

Civil Procedure Code, 1908 (V of 1908)--

----O.VIII R. 1--Right of written statement was struck off--Concurrent findings--Direction to-- It is settled proposition of law that cases should be decided on merits and technicalities should be avoided which practice deprive a person from his valuable right of hearing--Subject to payment of cost Rs. 30,000/- by petitioner to respondents to make him conscious about his deliberate delay which he had been caused in disposal of suit filed by respondents, both impugned orders, passed by Courts below, were set aside and trial Court was directed that while granting permission to petitioner, afford him two clear-cut opportunities for submission of written statement as well as written reply--Petition disposed of. [Para 3] A & B

Mr. Muhamamd Faisal Bashir Ch., for Petitioner.

Date of hearing: 6.12.2023.

ORDER

Repeated calls, neither the private respondents nor their learned counsel, despite his name reflects in cause-list has entered appearance, even there is no intimation for such absence, therefore, respondents are hereby proceeded against ex-parte.

2. By means of instant constitutional petition, prayer has been made to set aside the impugned order dated 22.12.2021 passed by Civil

Judge Ist Class, Khanewal and order dated 22.02.2022 passed by Addl. District Judge whereby right of the petitioner to file written statement and written reply in a suit for possession through partition filed by the Respondents No. 3 to 5 against the petitioners with regard to the property *i.e.* H.No. 294 with shops area measuring 07 marlas situated in Colony No. 2 Khanewal was concurrently struck off/closed.

3. It is settled proposition of law that cases should be decided on merits and technicalities should be avoided which practice deprive a person from his valuable right of hearing. In view of above, keeping in this view the facts and circumstances of the case and in the interest of justice, subject to payment of cost Rs. 30,000/- by the petitioner/defendant to the respondents/ plaintiffs, to make him conscious about his deliberate delay which he has been causing in the disposal of suit filed by respondents, both the impugned orders, passed by the learned Courts below, are set aside and learned trial Court is directed that while granting permission to the petitioner, afford/provide him two clear-cut opportunities for submission of written statement as well as written reply after receipt of copy of this order and proceed further in the matter in accordance with law.

4. Disposed of accordingly.

(Y.A.) **Petition disposed of.**

PLJ 2024 Lahore (Note) 134

[Multan Bench, Multan]

***Present*: CH. ABDUL AZIZ AND ANWAARUL HAQ PANNUN, JJ.**

MUHAMMAD ARSHAD--Petitioner

versus

STATE etc.--Respondents

W.P. No. 15146 of 2023, decided on 12.3.2024.

Constitution of Pakistan, 1973--

----Art. 199--Criminal Procedure Code, (V of 1898), Ss. 35, 397 & 561-A--Control of Narcotic Substances Act, (XXV of 1997), S. 9(c)--Conviction in more than one criminal case--Conviction and sentence--Power of High Court--Petitioner was also convicted in another case--Sentences had been awarded to petitioner in two difference cases/FIRs under Section 9(c) of CNSA, 1997, tried and decided separately--Although sentences had an independent footing yet pertain to one and the same person--No doubt had intent of legislature to insert and confine the word "concurrent" in Code of Criminal Procedure bolds much significance with analogy drawn from Section 403, Cr.P.C.--As per Section 561-A read with Section 35 or Section 397, Cr.P.C. High Court was empowered to order multiple sentences awarded in same transaction/trial or in a separate and subsequent trial to run concurrently--Petition was dismissed. [Para 3, 4 & 5] A, B, C, E

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

----Ss. 35/397 & 561-A--As per Section 561-A read with Section 35 or Section 397, Cr.P.C. High Court is empowered to order multiple sentences awarded in same transaction/trial or in a separate and subsequent trial to run concurrently. [Para 4] D

1985 SCMR 153; 1986 SCMR 1627; 2014 SCMR 668;
2018 SCMR 418 *ref.*

Mr. Abdul Rehman Tariq Khand, Advocate for Petitioner.

Mr. Sannam Farid Khan, AAG for State.

Date of hearing: 12.3.2024.

ORDER

By means of instant constitutional petition under Art. 199 of the Constitution of Islamic Republic of Pakistan, 1973 read with Sections 35, 397 and 561-A, Cr.P.C. the petitioner has made the following prayer:

> *"Therefore, relying upon all above narrated submissions, it is most respectfully prayed that this writ petition may very kindly be accepted and the sentences awarded to the petitioner may very graciously be ordered to be run concurrently under Section 35, Cr.P.C., in the supreme interest of justice.*
>
> *Any other relief, which this Hon'ble Court deems fit, just and proper may also be granted to the petitioner".*

2. Arguments heard. Record perused.

3. Perusal of the record shows the petitioner was convicted and sentenced in case F.I.R No. 13 dated 15.01.2020, offence under Section 9(c) of the Control of Narcotic Substance Act, 1997 (hereinafter 'CNSA, 1997), registered at Police Station Ghazi Abad, District Sahiwal, vide judgment dated 20.04.2021 passed by the learned Addl. Sessions Judge, Chichawatni, as Under:-

> **Under Section 9(c) of CNSA**
>
> *Sentenced to undergo R.I. 04 years and 06 months with fine of Rs.20,000/- and in default thereof to further undergo Sl for five months. He was also extended the benefit of Section 382-B, Cr.P.C.*

Against which, the petitioner filed Crl. Appeal No. 358-J/2021 before this Court in which this Court reduced the sentence of the petitioner to that already undergone by him vide judgment dated 07.02.2023.

Similarly, the petitioner was also convicted in another case FIR No. 85/2021, dated 06.04.2021, under Section 9(c) of CNSA, 1997 registered at P.S. Ghazi Abad, District Sahiwal vide judgment dated 30.09.2021 passed by the learned Addl. Sessions Judge, Chichawatni and sentenced as under:-

Under Section 9(c) of CNSA

Sentenced to undergo R.I. 07 years and 04 months with fine of Rs.33,333/- and in default thereof to further undergo Sl for seven months and 10 days.

Against which, the petitioner filed Crl. Appeal No. 690-J/2021 before this Court in which this Court reduced the sentence of the petitioner to 05 years and 06 months R.I. and in default of payment of fine, to further undergo S.I. for a period of 05 months and 15 days vide judgment dated 15.06.2023. He was also extended the benefit of Section 382-B, Cr.P.C.

4. It has been noticed that the(sentences have been awarded to petitioner in two different cases/FIRs under Section 9(c) of CNSA, 1997, tried and decided separately yet the learned trial Court at the time of announcement of subsequent judgment of conviction and sentence dated 30.09.2021 ought to have given the petitioner the benefit as provided under Section 397, Cr.P.C. but while passing the subsequent judgment, this aspect has not been considered by the trial Court. Although the sentences have an independent footing yet pertain to one and the same person i.e. petitioner. No doubt the intent of legislature to insert and confine the word "concurrent" in Code of Criminal Procedure holds much significance with analogy drawn from Section 403, Cr.P.C. As per Section 561-A read with Section 35 or Section 397, Cr.P.C. this Court is empowered to order multiple sentences awarded in same transaction/trial or in a separate and subsequent trials to run concurrently. Guidance in this regard is sought from the dictates of law of

august Supreme Court of Pakistan in the cases titled *"Javed Sheikh Vs. The State"* (1985 SCMR 153), *"Muhammad Ittefaq Vs. The State"* (1986 SCMR 1627), *"Muhamad Asif Vs. State"* (2014 SCMR 668) and *Rahib Ali Vs. The State* (2018 SCMR 418). Apparently, it appears that neither the petitioner or his counsel nor the Prosecutor informed the Court that the petitioner had been tried in earlier crime of similar nature, has been sentenced and for this reason no direction or order to treat sentences of imprisonment awarded in separate and successive trial to turn currently was made.

5. Seeking guidance from the dictates of law of august Supreme Court of Pakistan, the instant constitutional petition is **accepted** as a consequence whereof it is directed that sentences of the petitioner in both the aforesaid cases shall run concurrently.

(K.Q.B.) **Petition accepted.**

PLJ 2024 Lahore (Note) 151

[Multan Bench, Multan]

***Present*: ANWAARUL HAQ PANNUN, J.**

DILDAR BALOCH--Petitioners

versus

JUDGE FAMILY COURT, D.G. Khan and 2 others--Respondents

W.P. No. 13137 of 2023, heard on 28.11.2023.

Family Courts Act, 1964 (XXXV of 1964)--

----Ss. 14(3) & 17-A--Constitution of Pakistan, 1973, Art. 199--Interim order for maintenance--Writ jurisdiction--Appeal--Family Court has jurisdiction to pass interim order for maintenance at any stage of proceedings in a suit for maintenance--Admittedly order impugned was an interim order regarding temporary arrangement about fixation of maintenance allowance of minor--The quantum of maintenance might be finalized after appraising evidence produced at trial--In presence of father of minor, grandfather of minor could not be burdened to provide maintenance to his grandson was misconceived--Interlocutory orders passed by Judge Family Court should not be assailed in constitutional jurisdiction--Section 14(3) of Act, 1964, bars an appeal or revision against an interim order passed by a Family Court--Orders at interlocutory stages would not be brought to higher Courts to obtain pragmatic orders as it tends to harm advancement of fair trial--Keeping in view status of parties and expenses of minor, rightly fixed quantum of interim maintenance allowance which did not call for any interference in writ jurisdiction. [Para 3 & 4] A, B, C, D, E, F, G

PLD 2011 Lahore 610 *ref.*

Mr. Muhammad Abdul Qayyum Baat, Advocate for Petitioner.

M/s. Faisal Aziz Choudhry and Malik Ali Muhammad Dhol, Advocates for Respondents No. 2 & 3.

Date of hearing: 28.11.2023.

JUDGMENT

Precisely, the facts of the case are that the plaintiffs/ respondents No. 2 & 3 filed a suit for recovery of maintenance allowance, dower, dowry articles and delivery charges against Muhammad Farhan and another, which was contested by the defendant/petitioner through written statement. The learned Judge Family Court, Dera Ghazi Khan, *vide* its order dated 10.07.2023 observed as under:

> *"Keeping in view the pleadings, the statements of the parties and the record of the case and after considering the needs of the Plaintiff No. 02, while making a tentative assessment of the financial status of the parties and to immune the Plaintiff No. 02 from the sense of deprivation and for respectable survival in the society, the interim maintenance allowance of Plaintiff No. 02 is fixed @ Rs.3000/- (Rupees Three Thousand only) per month from first date of appearance of Defendant No. 02 (06.03.2023) which defendant No. 02 is bound to pay on or before 14th of every month."*

2. Arguments heard and file perused.

3. It is straightaway observed that in order to face the financial challenges and to cover basic need of the minor i.e. food, clothing and shelter coupled with creating a stable, safe and healthy environment of the physical and moral development of the minor, the Family Court has the jurisdiction to pass interim order for maintenance at any stage of the proceedings in a suit for maintenance under Section 17-A of the West Pakistan Family Courts Act, 1964. The learned Judge Family Court, Dera Ghazi Khan, has passed the impugned order in pursuance of Section 17-A of the West Pakistan Family Courts Act, 1964 while adopting a pragmatic approach while fixing the

interim maintenance allowance of the minor. Admittedly the order impugned is an interim order regarding temporary arrangement about fixation of the maintenance allowance of the minor, however the quantum of maintenance may be finalized after appraising the evidence-produced at trial and after its merger into final order, the aggrieved party will have a right to agitate his grievance before the appellate Court. The argument of learned counsel for the petitioner that in presence of father of the minor, the grandfather of minor cannot be burdened to provide maintenance to his grandson is misconceived as it has been held in case reported as *"Ghafoor Ahmed Butt vs. Mst. Iram butt and 6 others"* (PLD 2011 Lahore 610) that *"Such an obligation or right is not limited in scope and cannot be excluded where the father, though alive, cannot or does not attend to the needs of his destitute minor children. This is what appears to have happened in the present case as the father of the minor children, alive and living in Saudi Arabia, is unwilling or is unable to discharge his obligation of maintaining his minor children. In the circumstances, the petitioner, being the paternal grandfather, must be burdened with the liability to support his minor grandchildren who have no means or source of income to take care of their basic needs. The paternal grandfather is bound to maintain his minor grand children in need regardless of whether or not they are orphans with the difference in the former case the paternal grandfather has the right to be reimbursed by the father of minors."* Since the determination of a grandfather's liability for providing maintenance to his grandchildren will depend on the specific circumstances of the case and the interpretation of Islamic legal principles by family judge but this shall be decided after recording of evidence. Moreover, it has been held in various judgments by this Court that interlocutory orders passed by the learned Judge Family Court should not be assailed in constitutional jurisdiction as the determination of adequacy or inadequacy of the quantum of maintenance would certainly require factual evidence or inquiry which cannot be made in the proceedings under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973. Section 14(3) of the

West Pakistan Family Courts Act, 1964, bars an appeal or revision against an interim order passed by a Family Court. It is also well settled by now that orders at interlocutory stages would not be brought to higher Courts to obtain pragmatic orders as it tends to harm the advancement of fair trial, curtailing remedies available under the law and even reducing the right of appeal.

4. There is no bar under the law to challenge the void ab-initio orders, which are without jurisdiction, but after perusal of the impugned order, the same can neither be termed as void, ab initio nor without jurisdiction and has not attained the status of a final order. The learned Judge Family Court, Dera Ghazi Khan, prima facie, while invoking the provision of Section 17-A of the West Pakistan Family Courts Act, 1964 and keeping in view the status of the parties and expenses of the minor, rightly fixed the quantum of interim maintenance allowance through the impugned order dated 10.07.2023, which does not call for any interference in writ jurisdiction. Consequently, this writ petition being bereft of merit and substance is hereby dismissed.

(K.Q.B.) **Petition dismissed.**

PLJ 2024 Cr.C. (Note) 70

[Lahore High Court, Lahore]

***Present*: ANWAARUL HAQ PANNUN, J.**

QAMAR RIAZ--Petitioner

versus

STATE, etc.--Respondents

Crl. Misc. No. 32064-B of 2021, decided on 29.7.2021.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 324, 452, 354, 109, 34, 337-F(v), 337-F(iii), 337-F(vi)--Bail after arrest, dismissal of--Petitioner, having been nominated in FIR with allegation of committing trespass into house of complainant while armed with fire-arms and making an attempt to commit murder of complainant and his daughter while making fire-shots with his pistol 30 bore hitting on their legs, duly corroborated by medical evidence coupled with statement of PWs, recovery of weapon of offence on his pointing out, he has been found connected with commission of offence during investigation, thus reasonable grounds do exist for believing that petitioner had committed offence, falling within prohibitory clause of Section 497, Cr.P.C.--Petition is dismissed.

[Para 3] A

Mian Parvez Hussain, Advocate for Petitioner.

Mr. Haroon Rasheed Ch., Deputy District Public Prosecutor for State.

Rai Ishfaq Ahmad Kharal, Advocate for Complainant.

Date of hearing: 29.7.2021.

ORDER

Through this petition, the petitioner seeks his release on post arrest bail in case/FIR No. 478 dated 30.06.2020, offence under Sections 324/452/354/109/34/337-F(v)/337-F(iii)/337-F(vi), PPC, registered at Police Station B-Division, Sheikhupura.

2. Arguments heard and record perused.

3. The petitioner, having been nominated in the FIR with the allegation of committing trespass into the house of the complainant while armed with fire-arms and making an attempt to commit murder of the complainant and his daughter namely *Mst.* Mafia, while making fire-shots with his pistol 30 bore hitting on their legs, duly corroborated by medical evidence coupled with the statement of the PWs, recovery of weapon of offence on his pointing out, he has been found connected with the commission of offence during investigation, thus reasonable grounds do exist for believing that the petitioner had committed the offence, falling within the prohibitory clause of Section 497, Cr.P.C., resultantly, the instant petition is dismissed.

(A.A.K.) **Petition dismissed.**

PLJ 2024 Cr.C. (Note) 73
[Lahore High Court, Lahore]

***Present*: ANWAARUL HAQ PANNUN, J.**

AJMAL SHAH--Petitioner

versus

STATE etc.--Respondents

Crl. Misc. No. 34261-B of 2023, decided on 20.6.2023.

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

----S. 498--Pakistan Penal Code, (XLV of 1860), Ss. 354, 452, 337-A(i), 337-A(iii), 148 & 149--Pre-arrest bail, grant of--Allegation of--Petitioner alongwith co-accused while armed with respective weapons--Although, as per F.I.R, petitioner allegedly gave a sota blow on nose of wife of complainant causing fracture to nasal bone yet as per Medco Legal Certificate, Medical Officer opined that *"possibility of fabrication cannot be ruled out"*--In present case, District Standing Medical Board was constituted but according to DSMR report aforesaid injured PW did not appear for her re-examination before Board--In such backdrop, possibility of his false implication with *malafide* and ulterior motive of complainant cannot be ruled out, thus case requires further inquiry--The culpability of petitioner coupled with sharing of common object would be determined by trial Court, after recording prosecution's evidence--The petitioner has already joined investigation and sending him behind bars would not be lucrative to prosecution--Bail allowed. [Para 5] A

Mr. Naila Mushtaq, Advocate for Petitioner.

Ch. Tanvir Ahmad, Deputy Prosecutor General for State.

Complainant in person.

Date of hearing: 20.6.2023.

ORDER

Report on behalf of District Police Officer, Jhang filed.

2. Through this petition, the petitioner Ajmal Shah seeks pre-arrest bail in case/FIR No. 186, dated 04.03.2023, offence under Sections 354/452/337-A(i)337-A(iii)/148/149, PPC, registered at Police Station Saddar, Jhang.

3. Precisely, the allegation against the petitioner is that he along-with his co-accused while armed with their respective weapons, in prosecution of their common object, made trespass into the house of the complainant, caused injuries to *Mst.* Shafqat Bibi *alias* Sakhawat Bibi with their respective weapons.

4. Arguments heard and record perused.

5. Although, as per F.I.R, the petitioner allegedly gave a sota blow on nose of *Mst.* Shafqat Bibi *alias* Sakhawat Bibi, wife of the complainant causing fracture to nasal bone yet as per Medco Legal Certificate, the Medical Officer opined that *"possibility of fabrication cannot be ruled out"*. In the present case, the District Standing Medical Board was constituted but according to the DSMR report, the aforesaid injured PW did not appear for her re-examination before the Board. In such backdrop, possibility of his false implication with *malafide* and ulterior motive of the complainant cannot be ruled out, thus case requires further inquiry. The culpability of the petitioner coupled with sharing of common object would be determined by learned trial Court, after recording prosecution's evidence. The petitioner has already joined the investigation and sending him behind the bars would not be lucrative to the prosecution. Resultantly, subject to his furnishing fresh bail bonds in the sum of Rs. 1,00,000/- (one lac) with one surety in the like amount to the satisfaction of learned trial Court, the ad-interim bail already granted to the petitioner is **confirmed** and instant petition stands **allowed**.

(A.A.K.) **Bail allowed.**

PLJ 2024 Cr.C. (Note) 75

[Lahore High Court, Lahore]

***Present*: ALI BAQAR NAJAFI AND ANWAARUL HAQ PANNUN, JJ.**

***Mst.* MAQBOOL TAHIRA and another--Petitioners**

versus

STATE etc. --Respondents

Crl. Misc. No. 37742-B of 2022, decided on 4.10.2022.

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

----S. 497(2)--Anti-Terrorism Act, (XXVII of 1997), S. 7--Pakistan Penal Code, (XLV of 1860), Ss. 324, 109, 148 & 149--Bail after arrest, grant of --Further inquiry--"Lalkara"-- The allegation against petitioners is that upon their instigation by way of raising a lalkara, their co-accused made firing resulting in injuries to three persons--The petitioners have not been shown to be armed with any weapon--In view of admitted civil litigation pending between parties and close relationship of petitioners with complainant possibility of their false implication in case cannot be ruled--Out, thus case against petitioners prima facie falls within purview of Section 497(2), Cr.P.C. and is one of further inquiry into their guilt--The question of vicarious liability of petitioners and applicability of Section 7 of Anti-Terrorism Act, 1997 against them can validly be determined by learned trial Court at time of trial--Hence, this petition is allowed. [Para 3] A

Rai Ashfaq Ahmad Kharal, Advocate for Petitioners.

Rai Akhtar Hussain, Additional Prosecutor General for State.

Mr. Muhammad Jawad Zafar, Advocate for Complainant.

Date of hearing: 4.10.2022.

ORDER

Through this petition, *Mst.* Maqbool Tahira and *Mst.* Bushra Khatoon, petitioners seek post-arrest bail in case F.I.R No. 292/2022 dated 23.05.2022, offences under Sections 324, 109, 148, 149, PPC and Section 7 of Anti-Terrorism Act, 1997, registered at Police Station Kotwali, Faisalabad.

2. Heard. Record perused.

3. The allegation against the petitioners is that upon their instigation by way of raising a lalkara, their co-accused made firing resulting in injuries to three persons. The petitioners have not been shown to be armed with any weapon. In view of admitted civil litigation pending between the parties and close relationship of the petitioners with the complainant the possibility of their false implication in the case cannot be ruled. Out, thus the case against the petitioners prima facie falls within the purview of Section 497(2), Cr.P.C. and is one of further inquiry into their guilt. The question of vicarious liability of the petitioners and applicability of Section 7 of Anti-Terrorism Act, 1997 against them can validly be determined by the learned trial Court at the time of trial. Hence, this petition is **allowed** and the petitioners are admitted to post-arrest bail subject to their furnishing of bail bonds in the sum of Rs. 100,000/- (Rupees one hundred thousand only) each with two sureties each in the like amount to the satisfaction of the learned trial Court.

(A.A.K.) **Petition allowed.**

PLJ 2024 Cr.C. (Note) 150
[Lahore High Court, Multan Bench]

***Present*: ANWAARUL HAQ PANNUN, J.**

MUHAMMAD HASHIM--Appellant

versus

STATE etc.--Respondents

Crl. A. No. 139 of 2019, decided on 22.11.2023.

Pakistan Penal Code, 1860 (XLV of 1860)--

----Ss. 377, 376(i)(iii) r/w 511--Allegation of rape--Conviction and sentence--Challenge to--The prosecution has miserably failed to prove its case against appellant beyond any shadow of doubt--It is settled principle of criminal law that accused cannot be convicted merely on basis of probabilities rather his guilt should be firmly proved by evidence produced in case--It is trite law that for case--Extending benefit of doubt, it is not necessary that there should be several circumstances, rather one reasonable doubt is sufficient to acquit an accused not as a matter of grace but as of right.

[Para 7] A & B

PLD 2021 SC 600.

Prince Rehan Iftikhar Sheikh, Advocate for Appellant.

Rana A.D. Kamran, Advocate for Complainant.

Mr. Muhammad Abdul Wadood, Addl. Prosecutor General for State.

Date of hearing: 22.11.2023.

ORDER

Muhammad Hashim, the appellant was sent up to face trial in a criminal case registered *vide* F.I.R No. 757 dated 25.11.2016, for offence

under Section 376(i), PPC, with Police Station Luddan, District Vehari, on a complaint in writing (Exh:PC) made by Muhammad Abbas (PW-4) with the allegation that on 24.11.2016 at about 8.00 a.m. the daughter of the complainant namely Munaza aged about 5/6 years and his son Muhammad Ahmad, students of Prep and one class respectively, were going to Govt. Primary School Zakirabad, when they reached near house of the accused/appellant, he took daughter of the complainant in his house on the pretext of giving her a toffee and thereafter committed rape with her. The occurrence was witnessed by Muhammad Abbas, complainant (PW-1), Muhammad Mushtaq (PW-5) and Muhammad Yousaf.

2. The prosecution examined as many as seven witnesses to prove the charge. On closure of the prosecution evidence, when examined under Section 342, Cr.P.C., the accused/appellant while refuting the prosecution's evidence professed his innocence and alleged his false involvement by stating as under:

> *"I and the complainant live in the same vicinity and being belong to opposite local groups, we are inimical to each other due to local party faction. There was a quarrel between our children and the children of the complainant which resulted in quarrel of the women folk and I admonished the ladies of complainant party and they felt insult. Hence, I was roped in this case due to the above said reason. I am innocent. The PWs Muhammad Aslam and Muhammad Mushtaq are real brothers and there is no other public witness to support the prosecution version. Both complainant Muhammad Abbas and PW Mushtaq are related interse, interested and they are inimical towards me, hence they have falsely deposed against me."*

The accused/appellant neither opted to examine him under Section 340(2) of Cr.P.C. nor he produce any evidence in his defense. On conclusion of the trial, the learned Addl. Sessions Judge, Vehari, *vide* its judgment dated 18.02.2019, convicted and sentence the appellant as under:

Under Section 377, PPC

"imprisonment for life along with fine of Rs. 1,00,000/-and in default of payment of fine, he shall further undergo R.I for one year."

Under Section 376(3) read with Section 511, PPC

"imprisonment for twelve years and six months R.I along with fine of Rs. 50,000/-and in default of payment of fine, he shall further undergo R.I for six months."

"Both sentences shall run concurrently except the sentence in lieu of fine. The convict shall also pay Rs. 2,00,000/-as compensation to the victim under Section 544-A, Cr.P.C. In default of payment of compensation, the convict shall undergo six month simple imprisonment. Benefit of Section 382-B, Cr.P.C. shall also be available to the accused."

3. Arguments heard and record perused.

4. As per contents of FIR, the alleged occurrence took place on 24.11.2016 at about 8.00 a.m., the matter was reported to the police by the complainant on 25.11.2016 at about 6.30 p.m. after lapse of more than 34 hours, the victim was brought for her medical examination at 8.15 p.m. and she was medically examined at 8.25 p.m. on 25.11.2016, after lapse of more than 36 hours and no explanation regarding above noted delay could have been brought on record.

5. The minor Muhammad Ahmad, who told to the witnesses that the accused/appellant took *Mst.* Munazza into his house on the pretext of giving her toffee was declared because of tender age as incompetent to give evidence. Muhammad Abbas, the complainant (PW-4) deposed that his son Muhammad Ahmad came to home and told in presence of Muhammad Musthaq (PW-5) and Muhammad Yousaf that the accused Hashim took Munazza to his home whereupon, he along with PWs rushed to his house and witnessed that the accused put off his shalwar as well as shalwar of his

daughter Munazza and was committing rape with her while his daughter was crying and upon seeing them, the accused fled away by taking his shalwar while scaling over the wall. Muhammad Mushtaq (PW-5) deposed on same lines as stated by the complainant (PW-4). During cross-examination, the complainant (PW-4) stated that accused Hashim has two brothers and father and all living in the same house where the accused is living. He also admitted it correct that Mukhtar brother of the accused Hashim is living in the same house along with his three daughters, two sons and his wife in the same house. Zawar brother of the accused is also married one and he has two daughters and three sons and his wife are living in the same house where his father Muhammad Hussain and accused Hashim is living. He further stated during cross-examination that when the police came at the spot the womenfolk of the house of Hashim accused, *i.e.* his mother, sister and families of his brothers were also present and appeared before the police. In view of aforesaid depositions of the complainant (PW-4), it is unbelievable that the accused/appellant committed sodomy with the alleged victim *Mst.* Munazza Bibi in the presence of other inmates of the house. Moreover, PW-4 during cross-examination stated that the house of the accused has boundary wall only on one side and there is no boundary wall on the side of North and south. PW-5 during cross-examination deposed that the house of the accused has boundary wall on all four sides but not very high and he told to the police that the accused succeeded to flee away while scaling over the wall of Northern side. PW-4 during cross-examination stated that as soon as they entered into the Courtyard of the house near main gate the accused fled away on seeing them. PW-5 during cross-examination stated that from the main entrance they saw the occurrence and upon seeing them the accused fled away. Muhammad Munir Khan SI (PW-6) during cross-examination admitted it correct that from the main gate or from near the main gate the PWs cannot see the occurrence because the door of the room is open towards east while the main door is on the North side and in this way from Northern one cannot see the occurrence. He further stated that during

occurrence, the PWs did not point out to him any place from where the accused has decamped from the place of occurrence. He further admitted it correct that as the point No. 2 is in front of the room of alleged place of occurrence and as the complainant was accompanied by two other PWs and they could catch hold the accused. The complainant (PW-4) further stated that they consulted their Advocate and with his consultation application Ex:PC was drafted by him and he signed the same. He further stated that the I.O took him and his PWs and proceeded to the place of occurrence and thereafter consulted preliminary inquiry from the public and then he registered this case. Muhammad Mushtaq (PW-5) during cross-examination stated that the I.O after receiving their application came to the place of occurrence and after conducting preliminary inquiry and investigation lodged the FIR. Contrary to the above, Muhammad Munir Khan S.H.O (PW-6) stated that it is incorrect to suggest that he lodged the FIR after visiting the place of occurrence and after conducting the preliminary inquiry and investigation.

The afore noted contradictions in the statements of PWs are sufficient to create doubt in a prudent mind about the veracity and truthfulness of the PWs.

6. So far as the medical evidence furnished by lady Dr. Mahrukh W.M.O (PW-7) is concerned, she on local examination observed two tears in anal region, one was 1 c.m. at 12'O Clock position and the other at 0.5 c.m. at 5'O Clock position and she did not find any bleeding rather evidence of seminal stains was found and according to her opinion, anal intercourse has been done with the victim. During her cross-examination, she stated that as it has not been mentioned that the tears are fresh, healing of healed, therefore, it is difficult to judge the duration of the injury is difficult. She further stated that she did not mention any injury upon anal sphincter volunteered the injury was present upon anal sphincter. According to report of Punjab Forensic Science Agency, Lahore (Exh:PL), no seminal material was

identified on the vaginal/anal swabs of *Mst.* Munazza Bibi, as such, the report being negative is not supported the prosecution's case. The complainant (PW-4) stated that there was no blood at the spot even there was no blood on the clothes of the victim, however some drops of seminal material were available on the clothes of the victim. He further deposed that *Mst.* Munazza victim had no injury or any sign of violence on her person however Shalwar and Qamis of the victim were smeared with semen but not with blood. Contrary to the above, PW-5 stated that the clothes of the victim were stained with blood and they did not observe whether any blood or semen were present on the floor of the room. Muhammad Munir Khan SI (PW-6) deposed that neither PWs informed him about any blood or semen present at the spot or on the body of victim nor about the presence of any mark of violence on her body. In view of above-said depositions, the medical evidence does not corroborate the prosecution's version.

7. For what has been discussed above, the prosecution has miserably failed to prove its case against the appellant beyond any shadow of doubt. It is settled principle of criminal law that accused cannot be convicted merely on the basis of probabilities rather his guilt should be firmly proved by the evidence produced in the case. Moreover, it is trite law that for extending benefit of doubt, it is not necessary that there should be several circumstances, rather one reasonable doubt is sufficient to acquit an accused not as a matter of grace but as of right. Moreover, weak or no defense of accused, is also no ground to hold him guilty of the offence. In this context, reliance is placed on the judgment reported as *"Naveed Asghar and 02 others vs. The State"* (PLD 2021 SC 600). Consequently, instant appeal is allowed, the conviction judgment dated 18.02.2019, passed by learned trial Court is set aside and the appellant Muhammad Hashim is acquitted of the charge by extending him the benefit of doubt. The appellant is confined in jail, he be released forthwith, if not required in any other case.

(A.A.K.) **Appeal allowed.**

PLJ 2024 Cr.C. (Note) 179

[Lahore High Court, Lahore]

***Present*: ANWAARUL HAQ PANNUN, J**

VIKKI MASIH--Petitioner

versus

STATE, etc.--Respondents

Crl. Misc. No. 86078-B of 2023, decided on 8.1.2024.

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

----S. 497--Control of Narcotic Substances Act, (XXV of 1997), S. 9(1)3(c)--Post-arrest bail, grant of--Allegation of--1460 grams charas was recovered from his possession--The culpability of petitioner would be determined by trial Court, after recording prosecution's evidence-- As far as criminal history of petitioner in other cases is concerned, same is no handicap to extend benefit of bail to petitioner, if his case otherwise is fit for further inquiry--The petitioner is behind bars since his arrest and his further incarceration would not be lucrative to prosecution--The investigation is already complete--The argument of Prosecutor that judgment of Hon'ble Supreme Court may be given prospective effect being on week pedestal cannot be sustained. [Para 4 & 5] B, C & D

2012 SCMR 573

Control of Narcotic Substances Act, 1997 (XXV of 1997)--

----S. 9(1)3(c)--Criminal Procedure Code, (V of 1898), S. 497--Under Section 9(1)(c) C.N.S Amendment Act, 2022, maximum sentence provided is 14 years but shall not less than nine years if quantity of charas extends from 1000 grams to 4999 grams, thus does not attract prohibitory clause of Section 497 Cr.P.C because for grant of bail, lesser sentence is to be considered at bail stage. [Para 4] A

2012 SCMR 573, 2020 PCr.LJ 657 *ref.*

Syed Afzal Shah Bokhari, Advocate for Petitioner.

Mr. Muhammad Akhlaq, DPG for State.

Date of Hearing: 8.1.2024.

ORDER

By means of instant petition, the petitioner has prayed for his release by way of grant of post-arrest bail in a case registered vide FIR No. 2420, dated 31.08.2023, offence under Section 9 (1)3(c) of the Control of Narcotic Substances Act, 1997, Amended Act, 2022 (herein after to be called as C.N.S Amendment Act, 2022), with Police Station Lorri Adda, Lahore.

2. Precisely the allegation against the petitioner is that on the aforesaid date, he was captured by the police contingents and on his personal search, 1460 grams Charas was allegedly recovered from his possession which was wrapped in a polythene shopping bag.

3. Heard. Record perused.

4. Under Section 9(1)(c) C.N.S Amendment Act, 2022, the maximum sentence provided is 14 years but shall not less than nine years if quantity of charas extends from 1000 grams to 4999 grams, thus does not attract the

prohibitory clause of Section 497 Cr.P.C because for grant of bail, lesser sentence is to be considered at bail stage. Reliance in this regard is placed upon *"Jamal-Ud-Din alias Zubair Khan versus The State"* (2012 SCMR 573), *"Arshad Nadeem and 2 others versus The State and another"* [2020 PCr.LJ 657 Lahore Multan Bench)]. The culpability of the petitioner would be determined by learned trial Court, after recording prosecution's evidence. Moreover, the Hon'ble Supreme Court of Pakistan vide order dated 22.11.2023 rendered in Criminal Petition No. 1192 of 2023 titled as *"Zahid Sarfraz Gill vs. The State"*, granted bail to accused from whom 1833 grams Charas was recovered wherein it has been observed as under:

> *"If the police and ANF were to use their mobile phone cameras to record and/or take photographs of the search, seizure and arrest, it would be useful evidence to establish the presence of the accused at the crime scene, the possession by the accused of the narcotic substances, the search and its seizure, it may also prevent false allegations being leveled against ANF/police that the narcotic substance was foisted upon them for some ulterior motives".*

5. As far as criminal history of the petitioner in other cases is concerned, the same is no handicap to extend the benefit of bail to the petitioner, if his case otherwise is fit for further inquiry. Reliance is placed on judgment reported as *Jamal ud Din alias Zubair Khan vs. The State* (2012 SCMR 573). The petitioner is behind the bars since his arrest and his further incarceration would not be lucrative to the prosecution. The investigation is already complete. The argument of learned Prosecutor that the judgment of Hon'ble Supreme Court may be given prospective effect being on week pedestal cannot be sustained. Resultantly, the petition in hand is allowed

subject to furnishing bail bonds by the petitioner in the sum of Rs. 100,000/- (rupees one lac) with one surety in the like amount to the satisfaction of learned trial Court and he is admitted post arrest bail. The above observations are tentative in nature and would not be taken as conclusive.

(A.A.K.) **Petition allowed.**

PLJ 2024 Cr.C. (Note) 199

[Lahore High Court, Lahore]

***Present*: ANWAARUL HAQ PANNUN, J.**

ANSAR ALI etc.--Appellants

versus

STATE, etc.--Respondents

Crl. A. Nos. 16326, 17012 & Crl. Rev. No. 17574 of 2019,
heard on 6.5.2024.

Pakistan Penal Code, 1860 (XLV of 1860)--

----Ss. 302(b), 109 & 34--*Qatl-e-amd*--Conviction and sentence--Challenge to--Appreciation of circumstantial evidence--Extra-judicial confession--Medical evidence--Recovery of weapon--Benefit of doubt--Alleged, last seen evidence furnished by PW-13 and PW-14 does not appear to be trust worthy and confidence inspiring and no reliance can be placed for recording conviction on it--Even otherwise, as per settled law, the evidence of last seen is always regarded as a weak type of evidence, which is not sufficient to award conviction--Even last seen is not corroborated with any unimpeachable evidence with any other piece of evidence--In absence of such corroboration, it is not safe to award conviction solely on basis of last seen evidence--Medical evidence alone cannot corroborate, as injury cannot speak of its author and it does not establish identity of accused--Moreover, postmortem report confirms death of deceased and report of Chemical Examiner/ Forensic Science Agency, verify presence or otherwise of human blood on weapon of offence but cannot pinpoint person who had committed occurrence--Even, recovery is just a corroboratory piece of evidence and when other incriminating prosecution's evidence has been disbelieved/discarded, same cannot be relied upon in case of capital punishment--Similarly, motive behind occurrence, as alleged by prosecution has already been

disbelieved by learned trial Court, while assigning cogent and valid reasons in impugned judgment, which are upheld--The prosecution has failed in proving guilt of appellants through cogent, confidence inspiring, trust worthy and unimpeachable evidence--The basic principle of law is that conviction must be sed on evidence beyond any shadow of doubt because damage resulting from erroneous sentence is irreversible, therefore, while extending benefit of doubt to appellants, both appeals are allowed.

[Para 6, 8, 9, 10 & 11] A, C, D, E & F

2003 SCMR 1466 and 2007 SCMR 525.

Extra-judicial Confession--

----Extra judicial confession is also a weak type of evidence--Such like confession can easily be procured whenever direct evidence of crime is not available--It is also not safe to rely upon such evidence for recording conviction. [Para 7] B

2006 SCMR 231 and 1996 SCMR 188.

M/s. Dost Muhammad Kahoot and Aasim Sohaib, Advocates along with Appellants.

Mr. Sirbuland Khan, Assistant Attorney General & Ms. Rahila Shahid, Deputy District Public Prosecutor for State.

Nemo for Complainant.

Date of hearing: 6.5.2024.

JUDGMENT

This single judgment shall decide the fate of titled criminal appeals filed under Section 410, Cr.P.C. by the convicts Ansar Ali and Muhammad Ashraf and criminal revision petition by the complainant/ petitioner Muhammad Ashraf, filed under Sections 435/439, Cr.P.C., seeking enhancement of the sentence awarded through the judgment dated

22.02.2019 to the appellants, impugned herein by both the parties, passed on conclusion of a trial in a case, registered vide case/F.I.R. No. 218, dated 18.08.2016, offence under Sections 302/109/34, PPC at Police Station Satghara, District Okara, by the Court of learned Addl. Sessions Judge, Okara, whereby the co-accused *Mst.* Asia Bibi, had been acquitted but the appellants/respondents Ansar Ali and Muhammad Ashraf have been convicted under Section 302(b), PPC read with Section 34, PPC and sentenced to life imprisonment as Ta'zir with a direction to pay compensation of Rs. 1,00,000/-each under Section 544-A, Cr.P.C. to the legal heirs of the deceased Ali Azmat and in default thereof to further undergo simple imprisonment for a period of six months, the benefit of Section 382-B Cr.P.C has however been extended.

3. Precisely, the prosecution's case, set out in the FIR (Exh.PA/1) registered on a complaint in writing (Exh:PA) by *Mst.* Asia Bibi (Since acquitted co-accused) is that on 18.08.2016, at about 9.15 p.m. her son Ali Azmat asked her by making a telephone call to open the door of home despite lapse of some time, her son did not come back, consequently, she became worried. She along with Ansar Ali (accused-appellant) and Ali Sher were in search of her son and as they reached nearby sugar cane crop of one Sardar Parvez, they found shoe of her son lying there, upon moving forward, they found the dead body of Ali Azmat in sugarcane crop, having wound on his temple near the left ear and abrasion on neck, blood was oozing from his nose. Upon raising hue and cry by them, many people gathered there. During investigation, Abdul Sattar (PW-3) submitted a written application (Exh:PB) while introducing a new story by nominating the appellants and *Mst.* Asia Bibi (since acquitted) as accused, alleging that on 25.08.2016 at 4:00 p.m., he alongwith Iqbal and Ramzan PWs was sitting in the Courtyard of his house, when Ansar and Ashraf accused came there; accused-appellant Ansar disclosed while making an extra judicial confession that he had illicit relations with Asia Bibi; when this fact had come to the knowledge of Ali Azmat, he and Asia Bibi became worried, so, he planned to remove Ali

Azmat from their way and joined Muhammad Ashraf accused in this plan; that on 17.08.2016, when Ali Azmat was coming from his hotel, as planned, he took Ali Azmat along with him; Ashraf accused also met him on the way; they led Ali Azmat to sugarcane crop of Sardar Parvez, where they had already placed hatchet and rope; he alarmed that he will teach a lesson to Ali Azmat for forbidding Asia Bibi from having her illicit relationship with him and inflicted multiple blows with blunt side of hatchet, hitting on temple, right eye and ankle of right arm of Ali Azmat, who fell down, then, Ashraf accused caught hold the legs of Ali Azmat and Ansar Ali strangulated Ali Azmat with rope. Ali Azmat succumbed to his injuries at the spot. They ran away. Asia Bibi lodged FIR by showing her as a witness; Naseer Ahmad and Manzoor had also seen him, Ashraf and the deceased while going towards sugarcane crop; they also took Q-Mobile phone of Ali Azmat. They requested for pardon.

3. After usual investigation, submission of challan and completion of ancillary proceedings under Chapter XXII-A of Cr. P.C, since the accused while denying the charge, claimed trial, the prosecution produced as many as **15 prosecution witnesses** and brought on record the documents Exh:PA to Exh: PU to prove the charge against them. After closure of prosecution evidence, the convict/ appellants along with his co-accused were examined under Section 342, Cr.P.C. wherein they pleaded their innocence. Neither the accused-appellants opted to appear as their own witnesses under Section 340(2), Cr.P.C. nor to produce evidence in their defence. On conclusion of trial, learned trial Judge as aforesaid convicted and sentenced the appellants and acquitted the co-accused *Mst.* Asia Bibi through the impugned judgment as alluded to in earlier para No. 1 of the judgment.

4. Arguments heard and record of the case has been perused.

5. The prosecution's case rests upon circumstantial evidence. There is no dearth of case law, offering guidance, for appraisal of circumstantial evidence in a criminal case, yet in the case reported as *"Naveed Asghar and*

2 others versus The State"(PLD 2021 Supreme Court 600), the august Supreme Court of Pakistan has standardized the guidelines for evaluation of circumstantial evidence which for ready reference is reproduced as under:

> *14. The settled approach to deal with the question as to sufficiency of circumstantial evidence for conviction of the accused person is this: If, on the facts and circumstances proved, no hypothesis consistent with the innocence of the accused person can be suggested, the case is fit for conviction of the accused person on such conclusion: however, if such facts and circumstances can be reconciled with any reasonable hypothesis compatible with the innocence of the appellant, the case is to be treated one of insufficient evidence, resulting in acquittal of the accused person. Circumstantial evidence, in a murder case, should be like a well-knit chain, one end of which touches the dead body of the deceased and the other the neck of the accused. No link in chain of the circumstances should be broken and the circumstances should be such as cannot be explained away on any reasonable hypothesis other than guilt of accused person. Chain of such facts and circumstances has to be completed to establish guilt of the accused person beyond reasonable doubt and to make the plea of his being innocent incompatible with the weight of evidence against him. Any link missing from the chain breaks the whole chain and renders the same unreliable; in that event, conviction cannot be safely recorded, especially on a capital charge. Therefore, if the circumstantial evidence is found not of the said standard and quality, it will be highly unsafe to rely upon the same for conviction; rather, not to rely upon such evidence will a better and a safer course."*

6. In the light of afore quoted principles for appreciation of circumstantial evidence, the evidence is scanned with able assistance of learned counsel for the parties. The occurrence in this case as described in Paragraph No. 2 of the judgment was unwitnessed. Firstly, the machinery of law was set into motion through the complaint in writing (Exh:PA)

by *Mst.* Asia Bibi (since acquitted co-accused) that some unknown accused had committed murder of her son Ali Azmat. Thereafter, Abdul Sattar put forth his version, as stated in preceding Paragraph No. 2 against the appellants and acquitted co-accused *Mst.* Asia Bibi (Exh:PB) on the strength of extra judicial confession, allegedly made by the accused-appellant Ansar Ali before him and Muhammad Ramzan (PW-4) and Muhammad Iqbal (PW-5). Naseer Ahmad (PW-13) and Manzoor Ahmad (PW-14) had furnished the last seen evidence that on 17.08.2016, at about 9.30 p.m. they saw the appellants while taking Ali Azmat deceased from Jaboka Bazar towards the sugarcane crop of Sardar Parvez. Naseer Ahmad (PW-13) is cousin whereas Manzoor Ahmad (PW-14) is uncle of Abdul Sattar (PW-3). It is strange to note that despite their close relationship with PW-3, they had not timely informed the complainant (PW-3) about the aforesaid factum of last seen. Even the complainant Abdul Sattar (PW-3) moved the application for registration of case (Exh:PB) on 26.08.2016, after unexplained delay of 08-days of lodging the F.I.R by *Mst.* Asia Bibi (since acquitted co-accused). PW-13 stated during cross-examination stated that he got recorded his statement before the police after 4/5 days of the occurrence, [the learned defence counsel requested for supply of said statement for the purpose of cross-examination but the learned ADPP after perusing the police file stated that no such statement of said PW was recorded by the I.O. 4/5 days after the occurrence, so it cannot be provided]. Manzoor Ahmad (PW-14) stated during cross-examination that he was informed by Abdul Sattar telephonically about the death of Ali Azmat deceased at about 11.45 p.m., he along with Naseer Ahmad, Iqbal, Ramzan, Abdul Sattar and other relatives reached at the place of occurrence at about 12.00 a.m. (night), police was already present there. The police did not record their statements. Muhammad Zubair retired SI/I.O. (PW-10) stated that on the same day (08.09.2016), Manzoor Ahmad, Naseer Ahmad PWs of Exh:PB of Abdul Sattar joined the investigation and made statements u/S. 161, Cr.P.C. about lastly seeing Ali Azmat deceased along with Ansar Ali and Muhammad Ashraf accused.

Strangely, he however did not see Abdul Sattar, Iqbal, Muhammad Ramzan, Naseer Ahmad and Manzoor Ahmad at his first visit at the place of occurrence. No application was submitted by Abdul Sattar PW for registration of case and Iqbal, Ramzan, Naseer and Manzoor Ahmad also did not record their statements prior to 27.08.2016. For the first time, on 08.09.2016, they appeared before him. Therefore, the alleged, last seen evidence furnished by PW-13 and PW-14 does not appear to be trust worthy and confidence inspiring and no reliance can be placed for recording conviction on it. Even otherwise, as per settled law, the evidence of last seen is always regarded as a weak type of evidence, which is not sufficient to award conviction. Even the last seen is not corroborated with any unimpeachable evidence with any other piece of evidence. In the absence of such corroboration, it is not safe to award the conviction solely on the basis of last seen evidence. It has also been held in case reported as *"Mst. Shamim and 2 others vs. The State and another"* (2003 SCMR 1466) that:

> *"Prosecution story being foundation on which edifice of the prosecution case was raised occupied a pivotal position in a case, it should, therefore, stand to reason and must be natural, convincing and free from any inherent improbability and it was neither safe to believe a prosecution story which did not meet said requirements nor a prosecution case based on improbable prosecution story could sustain conviction."*

A reference can be made to the case of *"Altaf Hussain vs. Fakhar Hussain and another"* (2008 SCMR 1103), wherein the august Supreme Court of Pakistan observed as under:

> *"It is settled principle of law that the last seen evidence is a weakest type of evidence unless corroborated with some other piece of evidence which is conspicuously missing in this case."*

7. The other piece of evidence, the prosecution has brought on record consists of extra judicial confession. Muhammad Ramzan

(PW-4) and Muhammad Iqbal (PW-5) reiterated about making of extra judicial confession by accused Ansar Ali as alluded to in Paragraph No. 2 of the judgment. Admittedly, Muhammad Ramzan (PW-4) is uncle, whereas Muhammad Iqbal (PW-5) is brother of Abdul Sattar (PW-3). Astonishingly despite their close relationship inter-se, they did not make any effort to overpower the accused to produce them before the police. They even raised no hue and cry and allowed them to go escort free. Hence, the conduct of these PWs being unnatural renders their evidence worth of no reliance. Extra judicial confession is also a weak type of evidence. Such like confession can easily be procured whenever direct evidence of crime is not available. It is also not safe to rely upon such evidence for recording conviction. Reliance is placed upon case titled *"Sajid Mumtaz and others versus Basharat and others"* (2006 SCMR 231), *"Sarfraz Khan vs. State and 2 others"* (1996 SCMR 188), *"Nizam-ud-Din versus The State"* (2010 PCr.LJ 1730) and *"Imran alias Dully and another versus The State and others"* (2015 SCMR 155).

8. Now coming to the medical evidence furnished by Asif Ali HR & Legal Officer DHQ Hospital Okara (PW-9) on behalf of Dr. Zain-ul-Abdeen who conducted autopsy, suffice it to observe that it may confirm the ocular account with regard to the receipt of injury and kind of weapon, but it cannot connect the accused with the commission of crime. It has been held by apex Court in case reported as *"Israr Ali vs. The State"* (2007 SCMR 525) that medical evidence alone cannot corroborate, as the injury cannot speak of its author and it does not establish the identity of the accused. Moreover, the postmortem report confirms the death of the deceased and report of Chemical Examiner/ Forensic Science Agency, verify the presence or otherwise of human blood on the weapon of offence but cannot pinpoint the person who had committed the occurrence.

9. Now coming to the recovery of weapon of offence *i.e*. hatchet (P-1) allegedly recovered on pointing out of the accused-appellant Ansar Ali, seized vide recovery memo Exh:PG. Although the report of PFSA, Lahore

(Exh:PT) is positive as the item 2.1 (Swab taken from the blade of Kulhari) contained human blood, but contrarily, the alleged recovery witness Muhammad Hussain 673/HC (PW-7) during the course of cross-examination admitted it correct that the alleged hatchet was neither blood stained nor had mud on it. Even otherwise, the report of Chemical Examiner/ Forensic Science Agency, verify the presence or otherwise of human blood on the weapon of offence but cannot pinpoint the person who had committed the occurrence. So far as the remaining recoveries mobile phone, Safa (handkerchief) are concerned, these are common in nature, which can easily be procured from the market and this fact is also admitted by the recovery witnesses (PW-7, PW-8 and PW-10) that the alleged Saafa is of general kind and is easily available in the Bazaar and Q-mobile can easily be purchased from the market. I.O (PW-10) also did not join the other inmates or the neighbourers during recovery proceedings thus clear violation of provision of Section 103, Cr.P.C. Even, the recovery is just a corroboratory piece of evidence and when other incriminating prosecution's evidence has been disbelieved/ discarded, the same cannot be relied upon in case of capital punishment.

10. Similarly, the motive behind the occurrence, as alleged by the prosecution has already been disbelieved by the learned trial Court, while assigning cogent and valid reasons in the impugned judgment, which are upheld.

11. For what has been discussed above, it is held that the prosecution has failed in proving the guilt of the appellants through cogent, confidence inspiring, trust worthy and unimpeachable evidence. The basic principle of law is that conviction must be based on evidence beyond any shadow of doubt because the damage resulting from erroneous sentence is irreversible, therefore, while extending the benefit of doubt to the appellants, both appeals (Crl. Appeal No. 16326 of 2019 and Crl. Appeal No. 17012 of 2019) are allowed. The convictions and sentence of the appellants Ansar Ali and Muhammad Ashraf, recorded through the impugned judgment dated

22.02.2019 by the learned Trial Court are set-aside and they are acquitted of the charges levelled against them. They are on bail. Their sureties are discharged from the liabilities of their bail bonds.

12. As far as Criminal Revision No. 17574 of 2019 *(Abdul Sattar vs. Ansar Ali, etc.)* is concerned, for the reasons mentioned hereinabove, since the convictions and sentence of the appellants/ respondents Ansar Ali and Muhammad Ashraf have been set aside, hence instant criminal revision petition has lost its relevance, therefore dismissed accordingly.

(A.A.K.) **Appeals allowed.**

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[Lahore High Court, Lahore]

***Present*: ANWAARUL HAQ PANNUN, J.**

MUDASSAR HUSSAIN and others--Appellants

versus

STATE, etc.--Respondents

Crl. A. No. 2623 & Crl. Rev. No. 2621 of 2021, heard on 2.5.2024.

Pakistan Penal Code, 1860 (XLV of 1860)--

----S. 302(b)--*Qatl-e-amd*--Conviction and sentence--Challenge to--Medical evidence--So far as case of appellant Mustansar Hussain is concerned, although, according to prosecution, he allegedly caused two blows of hatchet from its blunt side on middle and left side of head of deceased, yet, careful perusal of Postmortem Report of deceased clearly shows non-existence of any injury on head of deceased by Dr. M.O (PW-9), as such, to extent of appellant medical evidence is not in line with ocular account--During his cross-examination, PW-11 deposed that he got recorded in his application that accused Mustansar made two blows of blunt side of his hatchet one hitting left shoulder and other on left side of ribs of Shahid Hussain deceased--Confronted with where it is not so recorded-- PW-12 during cross-examination deposed that he got recorded in his statement u/S. 161, Cr.P.C. that accused made hatchet blow which hit on left shoulder of deceased--Confronted with where word left is not mentioned, (PW-13) also deposed in line with PW-12--The above excerpts from statement of PW-11 to PW-13 suggests that these witnesses had tried to bring their statements in line with medical evidence, such blatant improvements are nothing but an abortive attempt on their behalf, which has further diluted worth of their evidence to extent of appellant--

Prosecution has failed in proving guilt of appellant through cogent, confidence inspiring, trust worthy and unimpeachable evidence--**Held:** The basic principle of law is that conviction must be based on evidence beyond any shadow of doubt because damage resulting from erroneous sentence is irreversible--It is well settled law that a single instance causing reasonable doubt in mind of Court entitles accused to benefit of same not as a matter of grace but as a matter of right. [Para 5] A, B & C

2009 SCMR 230 and 2014 SCMR 749.

Ch. Imtiaz Hussain Bhatti, Advocate for Appellants.

Ms. Rahila Shahid, Deputy District Public Prosecutor for State.

M/s. Aasim Sohaib and Rai Zamir-ul-Hassan Kharal, Advocates for Complainant/Petitioner.

Date of hearing: 2.5.2024.

JUDGMENT

This single judgment shall decide the above noted Criminal Appeal filed by the appellants Mudassar Hussain, Mustansar Hussain *alias* Sheri, Tasawar Hussain and Umar Farooq, challenging their conviction and sentence and Revision Petition filed by the complainant/petitioner Mujahid Hussain for enhancement of sentence of the accused/appellants Mustansar Hussain and Mudassar Hussain, having arisen out of the judgment dated 12.12.2020, passed in a criminal case, bearing F.I.R No. 706, dated 12.11.2019, offence under Sections 302/324/337-A(i)/337-A(ii)/337-F(i)/337-L(2)/109/147/149, PPC, registered at Police Station Jalalpur Bhattian by the learned Addl. Sessions Judge/Judge under Juvenile Justice System Ordinance, 2018, Hafizabad. The appellants along with Bilawal Hussain, Qamar Zaman and Muhammad Hussain (since acquitted) were sent

up to face trial in the above referred case with the charge that on 12.11.2019, at about 7:00 p.m., the complainant along with Muhammad Hussain, Shahid Imran (PWs) and Shahid Hussain (deceased) were present in the Haveli of their maternal grandfather namely Sher Muhammad, suddenly, accused Tasawar Hussain, Mudassar, Qamar Zaman, Bilawal, Umar Farooq, while armed with Sotas, Mustansar while armed with hatchet, Abdul Waheed armed with Danda along with three unknown persons came in their Haveli and started abusing; Shahid Hussain (deceased) forbade them, upon which accused Mustansar Hussain raised *lalkara* to teach them lesson for forbidding them from stopping of the cattle from destroying crops and cutting & stealing away the crops; accused Mustansar Hussain gave two blows of hatchet from blunt side, hitting on the middle and left side of head of Shahid Hussain (deceased); the accused Mudassar gave Sota blow hitting on forehead of Shahid Hussain (deceased), who while sustaining injuries, fell on the ground and became unconscious; all the accused started beating him with their weapons, in fallen condition; Shahid Imran and Muhammad Hussain PWs tried to rescue Shahid Hussain deceased, upon which, accused Umar Farooq inflicted a sota blow on the head of Shahid Imran, injured PW, then accused Tasawar Hussain inflicted a sota blow on the thumb of hand of Shahid Imran, the accused Umar Farooq and Qamar Zaman inflicted sota blows on the body of Muhammad Hussain, injured PW. On their hue and cry, Nasar Hayat and Ehsan Ullah PWs attracted and they identified the assailants in the light of electric bulb. All the above mentioned accused committed the occurrence on the abetment of accused Muhammad Hussain whereby Shahid Hussain (deceased) succumbed to the injuries at the spot. The prosecution at trial examined as many as fourteen (PW-1 to PW-14) prosecution witnesses besides tendering documents Exh:PA to Exh:PZ and Exh:PAA to prove its charge. In the statement under Section 342, Cr.P.C., the appellants professed their innocence while refuting the prosecution's

evidence, stating their false involvement in the case. The appellants did not opt to appear as their own witnesses under Section 340(2), Cr.P.C. However, in defence evidence, they produced Dr. Shoaib Ahmad M.O as DW-1 and tendered certain documents Exh:DA to Exh:DE and Mark-DA to Mark-DF. On conclusion of the trial, the learned trial Court, *vide* its judgment dated 12.12.2020, while acquitting the co-accused Bilawal Hussain, Qamar Zaman and Muhammad Hussain, Abdul Waheed *alias* Chaman and Muhammad Hussain, convicted and sentenced the appellants as under:

> **The appellants Mustansar Hussain *alias* Sheri and Mudassar Hussain**
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> ***"(Under Section 302(b), PPC)*** *sentenced them imprisonment for life along with fine of Rs. 1,00,000/-to each convict and in default thereof, they shall further undergo SI for six months. Both convicts shall pay compensation of Rs. 2,00,000/-each to the legal heirs of the deceased under Section 544-A, Cr.P.C."*
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> **The appellant Umar Farooq**
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> **(Under Section 337-A(ii), PPC** *"sentenced to undergo one year imprisonment alongwith Arsh 5% of Diyat".*
>
> **(Under Section 337-A(i), PPC** *"sentenced to undergo one year imprisonment and to pay Daman".*
>
> **The appellant Tasawar Hussain**
>
> **(Under Section 337-F(i), PPC** *"sentenced to undergo one year imprisonment and to pay Daman."*
>
> *"All the sentences shall run concurrently. All the convicts are also given the benefit of Section 382-B, Cr.P.C."*

2. Arguments heard. Record perused.

3. So far as, the appeal of Appellants No. 3 & 4 namely Tasawar Hussain and Umar Farooq is concerned, suffice it to observe that according to the report submitted by the Superintendent District Jail Hafizabad bearing No. 2735 dated 02.04.2024, the appellants Tasawar Hussain and Umar Farooq, after serving out their sentence and depositing the amount of Arsh/Daman, etc. have been released from the jail on 18.01.2021. Moreover, learned counsel for Appellants No. 3 & 4 also did not press this appeal to the extent of Appellant No. 3 & 4. In view of this position, keeping in view the dictum laid down in case reported as *"Riaz Hussain versus The State, etc."* (2022 P Cr. LJ 1793), instant appeal to **their extent** is not further proceedable, as such, the same stands dismissed accordingly.

4. Now coming to the case of Appellant No. 1 Mudassar Hussain. According to the prosecution's case, the accused-appellant Mudassar gave sota blow on forehead of Shahid Hussain, the deceased. The prosecution has produced Mujahid Hussain, the complainant (PW-11) the injured witnesses Shahid Imran (PW-12) and Muhammad Hussain (PW-13) who had furnished the ocular account. The complainant Mujahid Hussain (PW-11) is brother, whereas Shahid Imran (PW-12) and Muhammad Hussain (PW-13) are maternal uncle of the deceased Shahid Hussain. Their presence along with the deceased at the relevant time at the place of occurrence *i.e*. "the Haveli of Sher Muhammad, maternal grandfather of the deceased as well as the injured PWs)" coupled with the fact that the aforesaid PWs and the accused being resident of the locality *i.e*. Kot Pehlwan, District Hafizabad, cannot be brushed aside, thus question of any misidentification or substitution of the accused/appellant does not arise and there is nothing on record to suggest, despite lengthy cross-examination by defence that the PWs have falsely implicated the appellant in this case by leaving the actual murderer. The presence of the aforesaid injured PWs at the relevant time at the spot has also been established as the co-appellant Tasawar Hussain and Umar Farooq, as

stated *supra*, have been released from the jail after serving out their sentence and depositing the amount of Daman etc. The appellant had caused fatal injury by inflicting sota blow on forehead of the complainant and as per post-mortem report (Exh.PN) compiled by Dr. Faisal Zulfiqar, the medical officer (PW-9), Injury No. 1 which was alleged caused by the appellant to the deceased *i.e. "a lacerated wound 2.5 cm x 1 cm "Y" shaped on left side front of forehead, bone exposed, eye swelled (cyanosed), bleeding from nose"* and Injury No. 6 were sufficient to cause death. The ocular account furnished by PW-11 and PW-13 is fully corroborated with the medical evidence. So far as the recovery of Sota P-12 allegedly recovered on pointing out of the appellant Mudassar from underneath a cot lying in a room of fodder cutting machine at his cattle shed seized through recovery memo Exh:PA is concerned, the same is inconsequential as the LO has not joined any person from the locality during recovery proceedings despite the fact that place of recovery is a joint haveli where the appellant along with his five brothers were residing. Moreover, Zafar Iqbal (PW-8) during cross-examination stated that there was no gate installed on the Haveli; there was no door installed in the alleged room from where alleged recovery was effected; alleged room from where alleged recovery was effected was easily accessible to everyone. Sota is easily available in the market. Amjad Husain SI/IO (PW-14) also admitted that no main gate was installed at the Haveli and no door was installed at the Kurh; place of recovery was easily accessible to every person; sotas are easily available in market. Hence, in view of this position, the recovery of sota P-12 on pointing out of the appellant Mudassar as stated supra is of no avail to the prosecution. The learned trial Court, while assigning cogent and valid reasons has rightly disbelieved the motive part of the occurrence. The learned trial Court, in the light of the principle of sifting the grain from the chuff, has delivered a well-reasoned judgment while extending the appellant mitigation on the basis of disbelieving the

motive part of the occurrence. The argument of learned counsel for the appellant that being a sudden flare the case of this appellant comes within the purview of Section 302(c) of PPC, has failed to impress because the place of occurrence is Haveli of the complainant where the accused-appellants came and committed the alleged occurrence; during investigation, the accused-appellants were found guilty by the I.O Amjad Hussain SI (PW-13) found the appellants guilty of commission of offence; the co-appellants namely Tasawar Hussain and Umar Farooq (Appellants No. 3 & 4) who caused injuries to the injured PWs Shahid Imran (PW-12) and Muhammad Hussain (PW-13) have been released from the jail after serving out their sentence and depositing the amount of Arsh/Daman etc. As stated supra. Therefore, in my view, the conviction and sentence awarded to the appellant Mudassar Hussain under Section 302(b), PPC by the learned trial Court is based upon well-settled principles of appreciation of evidence and the same is accordingly upheld.

5. So far as the case of the appellant Mustansar Hussain is concerned, although, according to the prosecution, he allegedly caused two blows of hatchet from its blunt side on the middle and left side of head of Shahid Hussain deceased, yet, careful perusal of Post-mortem Report of the deceased Shahid Hussain (Exh:PN) clearly shows non-existence of any injury on head of the deceased Shahid Hussain by Dr. Faisal Zulfiqar, M.O (PW-9), as such, to the extent of appellant Mustansar Hussain *alias* Sheri, the medical evidence is not in line with the ocular account. This fact is also admitted by the learned Prosecutor as well as learned counsel for the complainant. The appellant Mustansar Hussain is real brother of co-appellant Mudassar Hussain, so possibility cannot be ruled out that he has falsely been implicated in this case in order to widen net. Moreover, Mujahid Hussain (PW-11) Shahid Imran (PW-12) and Muhammad Hussain (PW-13) had made dishonest improvements while recording their statements before the learned

trial Court in a clear departure to their earlier statements recorded under Section 161, Cr.P.C. which have duly been confronted by the learned defense counsel. According to complaint (Exh:PB) of Mujahid Hussain (PW-11), the appellant Mustansar Hussain gave two blows from blunt side of hatchet hitting in the middle and left side of head of the deceased Shahid Hussain. Mujahid Hussain (PW-11) while recording his examination-in-chief stated that Mustansar accused made two blows of blunt side of his hatchet one hitting the left shoulder and other on left side ribs of Shahid Hussain (deceased). PW-12 and PW-13 also deposed on the same lines as deposed by PW-11. During his cross-examination, PW-11 deposed that he got recorded in his application Exh:PB that accused Mustansar made two blows of blunt side of his hatchet one hitting the left shoulder and other on left side of ribs of Shahid Hussain deceased. Confronted with Exh:PB where it is not so recorded. Shahid Imran, PW-12 during cross-examination deposed that he got recorded in his statement u/S. 161, Cr.P.C. that accused Mustansar made hatchet blow which hit on the left shoulder of Shahid Hussain deceased. Confronted with Exh:DA where word left is not mentioned, Muhammad Hussain (PW-13) also deposed in line with PW-12. The above excerpts from the statement of PW-11 to PW-13 suggests that these witnesses had tried to bring their statements in line with the medical evidence, such blatant improvements are nothing but an abortive attempt on their behalf, which has further diluted the worth of their evidence to the extent of appellant Mustansar Hussain. It has been held in case reported as *"Sardar Bibi and another versus Munir Ahmed and others"* (2017 SCMR 344) that:

> *"So the improvements and omissions were made by the witnesses in order to bring the case of prosecution in line with the medical evidence. Such dishonest and deliberate improvement and omission made them unreliable and they are not trustworthy witnesses. It is held in the case of Amir Zaman vs. Mahboob and others (1985*

SCMR 685) that testimony of witnesses containing material improvements are not believable and trustworthy. Likewise in Akhtar Ali's case (2008 SCMR 6) it was held that when a witness made improvement dishonestly to strengthen the prosecution's case then his credibility becomes doubtful on the well-known principle of criminal jurisprudence that improvement once found deliberate and dishonest, cast serious doubt on the veracity of such witness. In Khalid Javed's case (2003 SCMR 149) such witness who improved his version during the trial was found wholly unreliable. Further reference in this respect may be made to the cases of Mohammad Shafique Ahmad v. The State (PLD 1981 SC 472), Syed Saeed Mohammad Shah and another v. The State (1993 SCMR 550) and Mohammad Saleem v. Mohammad Azam (2011 SCMR 474).

In light of above discussion, it may be observed that the prosecution has failed in proving the guilt of the appellant Mustansar Hussain *alias* Sheri through cogent, confidence inspiring, trust worthy and unimpeachable evidence. The basic principle of law is that conviction must be based on evidence beyond any shadow of doubt because the damage resulting from erroneous sentence is irreversible. It is well settled law that a single instance causing reasonable doubt in the mind of the Court entitles the accused to the benefit of the same not as a matter of grace but as a matter of right. In this context, reliance in placed on the judgments reported as *Muhammad Akram vs. The State* (2009 SCMR 230) and *Muhammad Zaman v. The State and others* (2014 SCMR 749).

6. For what has been discussed above, Crl. Appeal No. 2623 of 2021 is dismissed to the extent of the appellants Mudassar Hussain, Tasawar Hussain and Umar Farooq, whereas, instant appeal to the extent of appellant Mustansar Hussain *alias* Sheri is allowed and he is acquitted of the charge,

while extending him the benefit of doubt. The appellant Mustansar Hussain *alias* Sheri is confined in jail, he be released forthwith, if not required in any other case.

7. As far as Criminal Revision No. 2621 of 2021 *(Mujahid Hussain vs. Mustansar Hussain, etc.)* is concerned, for the reasons mentioned hereinabove, the instant criminal revision petition having no substance, stands dismissed.

(A.A.K.) **Appeal dismissed.**

PLJ 2024 Cr.C. (Note) 227

[Lahore High Court, Multan Bench]

Present: **CH. ABDUL AZIZ AND ANWAARUL HAQ PANNUN, JJ.**

GHULAM AKBAR--Appellant

versus

ZULFIQAR ALI etc.--Respondents

Crl. A. No. 516 & M.R No. 47 of 2020, decided on 27.2.2024.

Pakistan Penal Code, 1860 (XLV of 1860)--

----S. 302(b)--Qatl-e-amd--Conviction and sentence--Challenge to--Modification in quantum of sentence--Place of occurrence and time of occurrence have not been denied by accused--Presence of both witnesses at place of occurrence is neither improbable nor can be doubted and merely on account of their relationship with deceased, their evidence cannot be discarded in absence of any inconsistency or inherent infirmity in their deposition--Even in their cross-examination both eye-witnesses remained consistent on all material aspects of prosecution's case and their evidence is fully supported by medical evidence--Plea of substitution taken on behalf of appellant remained unproved--Even otherwise, substitution of accused in such like murder case by complainant is a rare phenomenon--Even after exclusion of recovery, there remains sufficient evidence in form of confidence inspiring and trustworthy ocular account fully supported by medical evidence against appellant therefore, his conviction under Section 302(b), PPC being based upon well-settled principles of appreciation of evidence is maintained--It is not a case of capital sentence as there are certain extenuating circumstances in favour of appellant to warrant lesse sentence--Appellant in peculiar circumstances of this case deserves benefit of doubt to extent of his sentence one out of two provided u/S. 302 (b), PPC--It is well-recognized principle by now that accused is entitled for benefit of doubt as an

extenuating circumstance while deciding his question of sentence. [Para 10 & 12] A, B, D & E

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

----Art. 75--Criminal Procedure Code, (V of 1898), S. 510--Prosecution has failed to bring on record original report of Punjab Forensic Science Agency and has merely produced photocopy of said report which is inadmissible in evidence being against mandate of Section 510, Cr.P.C--According to Article 75 of Qanun-e-Shahadat Order, 1984, a document must be proved by primary evidence whereas Article 76 thereof provides some exceptions under which secondary evidence may be permitted to be given in place of original--The proof of loss of a document is a condition precedent for granting permission to lead secondary evidence--In present case, neither any application was submitted nor permission obtained for producing photocopy of report of Punjab Forensic Science Agency as secondary evidence--As far as motive in this case is concerned, strained relations between parties has not been denied.

[Para 11] C

2011 SCMR 429, 2008 SCMR 688 and 2014 SCMR 1034.

Mr. Muhammad Usman Sharif Khosa, Advocate assisted by *Mr. Qaisar Abbas*, Advocate for Appellant.

Mr. Adnan Latif, Deputy Prosecutor General for State.

Mr. Abdul Rehman Ahmad Rizwan Sadozai, Advocate assisted by Ms. *Saima Kanwal*, Advocate for Complainant.

Date of hearing 27.2.2024.

JUDGMENT

Anwaarul Haq Pannun, J.--Ghulam Akbar, appellant along with his co-accused namely Akhtar Abbas, Ansar Abbas and Azhar Abbas was tried in a Complaint Case pertaining to case F.I.R No. 83/2018 dated 28.04.2018,

registered at Police Station B-Division, Dera Ghazi Khan, in respect of offence under Sections 302, 34, PPC. On conclusion of trial, learned trial Court *vide* its judgment dated 7.11.2020 has convicted the appellant under Section 302(b), PPC and sentenced him to **death** on two counts with a compensation of Rs. 200,000/- each under Section 544-A, Cr.P.C. to the legal heirs of each deceased, recoverable as arrears of land revenue, and in default of payment of compensation to undergo six months S.I., whereas co-accused Akhtar Abbas, Ansar Abbas and Azhar Abbas were acquitted of the charges.

Murder Reference No. 47 of 2020 for confirmation or otherwise of death sentence awarded to the appellant Ghulam Akbar shall also be disposed of through this single judgment.

2. Initially, complainant Zulfiqar Ali (PW-4) got registered F.I.R No. 83/2018 (Ex.PD/1), under Sections 302, 34, PPC at Police Station B-Division, Dera Ghazi Khan, but during the investigation co-accused Akhtar Abbas, Ansar Abbas and Azhar Abbas were declared innocent by the police. Feeling aggrieved of the investigation, the complainant preferred a Private Complaint (Ex.PK). As per contents of the complaint, on 28.04.2018 at 11:00 a.m. the complainant along with his brother Umer Siraj, father Naseer Muhammad and mother Musarrat Wazir Bibi was present at his house situated in Sajjad-Abad Colony; meanwhile, the accused Ghulam Akbar, Akhtar Abbas, Ansar Abbas and Azhar Abbas while armed with pistols entered into the house of the complainant; accused Ghulam Akbar raised *lalkara* that he will not let alive the father and the mother of the complainant for quarrelling with his sisters and daughter and for not letting them to rehabilitate; he made successive fires with his pistol hitting the father and mother of the complainant who succumbed to the injuries at the spot; rest of the accused extended threats of dire consequences to the complainant and his brother, thereafter, all the accused persons decamped while brandishing their weapons.

3. Motive behind the occurrence, as stated by the complainant, was that two sisters and one daughter of accused Ghulam Akbar are wives of the complainant and his two brothers respectively, but due to some estrangement/disunity they left the houses of their husbands and are Living in the house of their parents.

4. All the accused were summoned by the learned trial Court and they were formally charge-sheeted under Sections 302, 459, 114, 34, PPC, to which they pleaded not guilty and claimed trial. The complainant produced as many as ten witnesses to prove charge against the accused whereas one CW was examined by the learned trial Court.

Dr. Aiman Javed, WMO (PW-9) and Dr. Muhammad Tanvir Hussain (PW-10) conducted postmortem examinations on the dead bodies of the deceased; Ghulam Akbar, S.I (CW-1) conducted investigation of this case, whereas Zulfiqar Ali, complainant (PW-4) and Umer Siraj (PW-5) furnished the ocular account.

5. On 28.04.2018 at 03:55. P.m., post-mortem examination on the dead body of Musarrat Wazeer deceased was conducted and the doctor (PW-9) found the following injuries:

1. *There is an oval lacerated wound of about 1cm x 1.5cm with inverted margins present on the right pterion. Blackening present but no burning seen at the time of examination. This is the wound of entry.*
2. *There is oval lacerated wound of 2cm x 2.5cm with everted margins and dribbling of blood from the wound present on the left temporal bone 3cm above the mastoid process and 2cm posterior lateral to the left ear.*

In her opinion, cause of death was damage to vital organ i.e. brain due to Injury No. 1 caused by firearm, which was sufficient to cause death in

ordinary course of nature. Probable time elapsed between injuries and death was 02 to 03 minutes and between death and postmortem 05 to 06 hours.

On the same day i.e. 28.04.2018 at about 04:00 p.m., post-mortem examination on the dead body of Naseer Muhammad deceased was conducted and the doctor (PW-10) found the following injuries:

1. *A lacerated wound of about 1.2cm x 1.6cm oval shaped present on right side of head about 4cm above right ear, burning and blackening were present, having Collar of abrasion towards frontal side, margins were inverted, going deep in. It was an entry wound.*

2. *A lacerated wound of about 2.5cm x 2cm present below left ear just Icm below left ear, margins are everted. It was an exit wound. Injury No. 1 and 2 were inter connected.*

4. *A lacerated wound of about 2cm x 1.2cm present on left side of front of neck, burning blackening were present, margins were inverted, Collar of abrasion was on medial side, entry wound was going deep in.*

4. *A lacerated wound of about 2.5cm x 2.5cm was present on back of neck, margins were everted. It was exit wound of Injury No. 3.*

5. *A lacerated wound of about 1.5cm x 1cm present on left arm 3cm lateral to shoulder joint, margins were inverted, burning and blackening were present, abrasion collar was on upper margins, it was entry wound. I pellet was recovered from wound.*

In his opinion, Injuries No. 1 and 2 caused damage to brain which is vital organ and Injuries No. 3 and 4 ruptured blood vessels which are major vessels for supplying blood to the brain and these injuries were sufficient to cause immediate death in ordinary way of life. Probable time elapsed

between injuries and death was immediate and between death and postmortem 04 to 07 hours.

6. Learned counsel for the complainant after tendering in evidence certified copy of DNA & Serology Report (Exh.PO), certified copies of Firearms & Tool Marks Examination (Exh.PP & Exh.PP/1), certified copy of Latent Finger Print Examination Report (Exh.PQ), certified copies of Trace Chemistry Analysis Reports (Exh.PR & Exh.PR/1), report of Emergency Service Rescue-1122 (Exh.PS), certified copy of divorce document of Umer Siraj (Exh.PT & Exh.PT/1) and certified copy of divorce document of Zulfiqar Ali (Exh.PU & Exh.PU/1) closed the prosecution's case.

7. Thereafter, statement of the accused under Section 342, Cr.P.C. was recorded, in which he refuted all the allegations levelled against him and professed his innocence. While answering to question *(Why this case is against you and why the PWs have deposed against you?),* the appellant replied as under:

> *"It was a blind murder. I have been involved in this case due to mere suspicion. The PWs are inter se related and they have deposed falsely against me."*

The accused/appellant neither opted to appear as his own witness under Section 340(2), Cr.P.C. nor produced any defence evidence.

8. We have heard the learned counsel for the parties at length, have given anxious consideration to their arguments and have also scanned the record with their able assistance.

9. The occurrence in this case took place at about 11:00 a.m. and the matter was reported to the 'police at 12:05 a.m. i.e. just after about one hour of the occurrence. Postmortem examinations of both the deceased were also conducted on the same day at 3:55 p.m. and 04:00 p.m. respectively. In view of such prompt reporting of the matter to the police, we are of the view that

there is no question of any consultation or deliberation on the part of the complainant.

10. The ocular account in this case has been furnished by two witnesses i.e. PW-4 Zulfiqar Ali and PW-5 Umer Siraj. Both the PWs are the sons of the deceased and at the time of occurrence they were present at their home along with the deceased. Moreover, both the PWs have reasonably explained their presence at the time and place of occurrence. Even otherwise, place of occurrence and the time of occurrence have not been denied by the accused. Therefore, the presence of both the witnesses at the place of occurrence is neither improbable nor can be doubted and merely on account of their relationship with the deceased, their evidence cannot be discarded in the absence of any inconsistency or inherent infirmity in their deposition. In this context, reliance is placed on the judgment reported as *Khizar Hayat vs. The State* (2011 SCMR 429). The firearm injuries on the persons of the deceased have specifically been attributed to the appellant. We have noted that even in their cross-examination both the eye-witnesses remained consistent on all material aspects of the prosecution's case and their evidence is fully supported by the medical evidence. We have also observed that the plea of substitution taken on behalf of the appellant remained unproved. Even otherwise, substitution of accused in such like murder case by the complainant is a rare phenomenon. Reliance is placed on *Khalid Saif Ullah vs. The State* (2008 SCMR 688).

11. Recovery of pistol .30-bore from the appellant is of no avail for the prosecution as in this case the prosecution has failed to bring on record the original report of the Punjab Forensic Science Agency and has merely produced photocopy of the said report (Exh.PP), which is inadmissible in evidence being against the mandate of Section 510, Cr.P.C. According to Article 75 of Qanun-e-Shahadat Order, 1984, a document must be proved by primary evidence whereas Article 76 thereof provides some exceptions under which secondary evidence may be permitted to be given in place of the original. The proof of loss of a document is a condition precedent for

granting permission to lead secondary evidence. In the present case, neither any application was submitted nor permission obtained for producing photocopy of the report of the Punjab Forensic Science Agency as secondary evidence. As far as motive in this case is concerned, strained relations between parties has not been denied.

12. Keeping in view all above, we are of the considered view that even after exclusion of recovery, there remains sufficient evidence in the form of confidence inspiring and trustworthy ocular account fully supported by medical evidence against the appellant Ghulam Akbar, therefore, his conviction under Section 302(b), PPC being based upon well-settled principles of appreciation of evidence is maintained. However, in our view it is not a case of capital sentence as there are certain extenuating circumstances in favour of appellant to warrant lesser sentence. Therefore, we are convinced that the appellant in the peculiar circumstances of this case deserves benefit of doubt to the extent of his sentence one out of two provided under Section 302 (b), PPC. It is well-recognized principle by now that accused is entitled for the benefit of doubt as an extenuating circumstance while deciding his question of sentence. Reliance is placed on *Ghulam Mohy-ud-Din alias Haji Babu and others vs. The State* (2014 SCMR 1034).

13. Resultantly, while maintaining the conviction of the appellant Ghulam Akbar under Section 302(b), PPC, his sentence is altered from death to imprisonment for life on two counts with the benefit of Section 382-B, Cr.P.C.; but the penalty of compensation and the sentence in default thereof awarded to him by the learned trial Court are maintained. With the above modification in the quantum of sentence, **Criminal Appeal No. 516 of 2020** is **dismissed**.

14. Death sentence of the convict Ghulam Akbar is **not confirmed** and **Murder Reference No. 47 of 2020** is answered in the Negative.

(A.A.K.) **Appeal dismissed.**

2024 Y L R 1321

[Lahore]

Before Anwaarul Haq Pannun, J

SAJJAD AHMAD---Petitioner

Versus

The STATE and others---Respondents

Criminal Miscellaneous No. 25688-B of 2023, decided on 12th June, 2023.

Criminal Procedure Code (V of 1898)---

----S. 498---Penal Code (XLV of 1860), Ss. 334, 337-A(i), 337-L(2) & 34---Itlaf-i-udw, shajjah-i-khafifah, causing hurt, common intention---Pre-arrest bail, refusal of---Petitioner was charged for giving a danda blow hitting the lips of the complainant, resulting into breaking/ itlaf of his teeth---Petitioner was nominated in the F.I.R with the specific role of inflicting a sota blow on the lips of the complainant causing itlaf/breaking of his teeth, which was duly corroborated with the Medico-Legal Certificate and the statements of the witnesses under S. 161, Cr.P.C.---Recovery of weapon of offence was yet to be effected from him---On account of failure of petitioner in showing any malafide either on the part of the complainant or the police for his false implication by way of registration of criminal case against him, he had not been able to make out a case for confirmation of his ad-interim pre-arrest bail---Petition was dismissed and ad-interim pre-arrest bail already granted to the petitioner was recalled, in circumstances.

Zahoor Ahmad and another v. The State 2005 YLR 1664 and Zulfiqar Ali v. The State and another 2007 YLR 361 ref.

Mian Asif Mumtaz for Petitioner.

Shehzad Sarwar and Muhammad Aqeel for the Complainant.

Sohail Majeed Khan, Advocate/ amicus curiae.

Tariq Siddique, Additional Prosecutor General and Rashida Parveen, Assistant District Public Prosecutor along with Hassan S.I. for Respondents.

ORDER

ANWAARUL HAQ PANNUN, J.---Through this petition under Section 498 of Cr.P.C, Sajjad Ahmad, the petitioner, after refusal to him the relief of grant of pre-arrest bail by the Court of the learned Addl. Sessions Judge, Bhakkar seeks pre-arrest bail in case/ FIR No.203 dated 27.02.2023, offence under Sections 334/337-A(i)/337-L(2)/34, P.P.C., registered at Police Station Saddar Bhakkar, District Bhakkar.

2. The prosecution's case as per FIR is that on 14.02.2023, at about 9/10 a.m. the petitioner Sajjad Ahmad along with his co-accused Sabir and Ajmal while armed with "danda" and "Kassies" respectively came at the fields of the complainant, extended threats, in the meanwhile Ajmal co-accused gave a Kassi blow from its wrong/blunt side on his right cheek, the petitioner Sajjad Ahmad gave a danda blow hitting on his lips, resulting into breaking/itlaf of his teeth and the blood started oozing, the complainant fell down, the co-accused Sabir also inflicted kassi

blow from its reverse side, hitting on middle finger of his right hand, there-after the accused persons also caused multiple injuries to him, upon his hue and cry, the witnesses attracted to the spot, upon seeing them, the petitioner along his co-accused ran away towards their houses.

3. Learned counsel for the petitioner at the outset contends that the injury allegedly caused by the petitioner to the injured Faiz Rasool has been declared by the Medical Officer as "Itlaf-i-tooth", since the jaw is an organ and not the single tooth, therefore, the provision of Section 337U,

P.P.C. is attracted, providing "Arsh" as a punishment instead of rigorous imprisonment, thus the offence under Section 334, P.P.C. is not made out, the provision has wrongly and with mala fide been applied to the facts and circumstances of the case, while relying upon case reported as "Zahoor Ahmad and another v. The State" (2005 YLR 1664), "Zulfiqar Ali v. The State and another" (2007 YLR 361), he prayed that the ad-interim pre-arrest bail already granted to the petitioner may be confirmed and instant bail petition may be accepted.

4. On the other hand, while opposing the above noted submissions, learned Addl. Prosecutor General for the state assisted by learned counsel for the complainant and learned Amicus curia have argued that in view of definition of "HURT" by way of Section 332, P.P.C. stating that "whoever causes pain, harm, disease, infirmity or injury to any person or impairs, disables [disfigures, defaces] or dismembers any organ or the body or part thereof of any person without causing his death, is said to cause hurt", the provision of Section 337U, P.P.C. quantifies the punishment only, thus in view of the injury caused by the petitioner, the provision of section 334, P.P.C. has rightly been invoked, providing the punishment of arsh besides imprisonment of either description for a term which may extend to ten years as ta'zir; the petitioner has been found guilty during investigation, recovery of weapon of offence is yet to be effected, in absence of any mala fide either on part of the police or the complainant, he is not entitled to the extra ordinary concession of pre-arrest bail, which is only meant for innocent person, therefore, the petition may be dismissed.

5. Arguments heard and record perused.

6. Before delving deep into the controversy, which in view of above noted divergent arguments made by both sides stands highlighted already, it appears to be necessary that the dictionary meaning of an "organ" may

be found out. According to Stedman's Medical Dictionary (27th Edition), Organ means:

> "Any part of the body exercising a specific function, as of respiration, secretion, or digestion."

Butterworth's Medical Dictionary (Second Edition) deals with the definition of an organ in an elaborate manner and also states different kinds of organs in the body. Relevant portion is reproduced as follows:

> "Organ. Any differentiated part devoted to a specific function."
>
> "Cement Organ. The embryonic tissue which deposits cement on the surface of a tooth."
>
> "Enamel Organ. A complex epithelial structure lying on the dental papilla, from which the enamel of a tooth is developed."

Literature on the subject of tooth and Butterworth's Medical Dictionary establishes that tooth is an ectodermal specialized organ. The ectoderm is one of the primary layers of cells that exist in an embryo. The ectoderm cells differentiate into cells that form a number of external structures such as skin, sweat glands, skin sensor receptors, and hair follicles. In addition, the ectoderm forms the external surfaces of the eyes (cornea and lens), teeth (enamel), mouth, and rectum, as well as the pineal and pituitary glands. Medical literature, so far, available on human anatomy educates that human body is a symmetrically interwoven composite whole of seventy eight (78) different organs and teeth are considered as one of the organ of the human body. It is also worth mentioning here that after considering a good quantum of available medical literature in the case of "Waqas Ahmed v. State, etc. (PLJ 2022 Cr.C 1385), my learned brother Muhammad Amjad Rafiq, J has already concluded that

> "tooth is an ectodermal specialized organ which is part of ectodermal appendages, as observed and declared through scientific studies

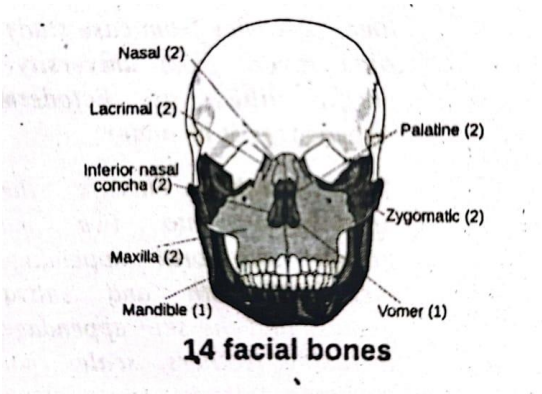
from time to time; reference from case study of Ajna Rivera from university of pacific tilted as Ectodermal Appendages is as under:

"We roughly classify these appendages into two main groups: the oral appendages, including teeth and salivary glands, and the skin appendages, including feathers, scales, hair, mammary glands, sweat glands, and oil glands."

Ajna was inspired from an article which explained it further;

"The development of ectoderm-derived appendages results in a large variety of highly specialized organs such as hair follicles, mammary glands, salivary glands, and teeth. Despite varying in number, shape, and function, all these ectodermal organs develop through conti-nuous and reciprocal epithelial-mesenchymal interactions, shar-ing common morphological and molecular features especially during their embryonic development."

The above reference/article and like others compose the tooth as an organ; the second thought that tooth is a bone does require due attention; anatomy of human being goes by saying that in total 206 bones of human body, tooth is not cited as such. Tooth being in the group of face anatomy could only be tracked from facial bones which are reflected through following diagram:



Teeth have not been marked as bones in above diagram. Another response as made available in the form of a scientific opinion, medically reviewed by Christine Frank, DDS - Written by Jaime Hemdon, MS, MPH, MFA and was updated on June 12, 2018, throws light on the subject, some excerpts are as follows-

"Teeth and bones look similar and share some commonalities, including being the hardest substances in your body; but teeth aren't actually bone. This misconception might arise from the fact that both contain calcium. More than 99 percent of your body's calcium can be found in your bones and teeth Approximately 1 percent is found in your blood. Despite this, the makeup of teeth and bones are quite different.

Bones are living tissue. They're made up of the protein collagen and the mineral calcium phosphate. This enables bones to be strong but flexible. Collagen is like a scaffolding that provides the bone's framework. The calcium fills in the rest. The inside of the hone has a honeycomb-like structure. It's called trabecular bone. Trabecular bone is covered by cortical bone. Because bones are living tissue, they're constantly being remodeled and regenerated throughout your life. The material never stays the same. Old tissue is broken down, and new tissue is created. When bone breaks, bone cells rush to the broken area to begin regeneration of tissue. Bones also contain marrow, which produces blood cells. Teeth do not have marrow."

It is further in the research article that teeth are not living tissue; they are comprised of four different types of tissue: i) Dentin ii) Enamel iii) Cementum iv) Pulp. The pulp is the innermost part of a tooth, it contains blood vessels, nerves, and connective tissue. The pulp is surrounded by dentin, which is covered by the enamel. Enamel

is the hardest substance in the body, it has no nerves. Though some remineralization of enamel is possible, it can't regenerate or repair itself if there is significant damage. The cementum covers the root, under the gum line, and helps the tooth stay in place. Teeth also contain other minerals, but do not have any collagen. No adverse opinion in the form of scientific study was brought on record to counter or nullify the above observation and declaration about status of teeth.

7. According to Terse Forensic Medicine Jurisprudence and Toxicology (5th edition), teeth have broadly been divided in two sets i.e. (i) Temporary teeth and (ii) Permanent teeth.

Temporary/Deciduous/Milk Teeth:

They are 20 in number. Generally, they begin to appear at about the age of 6 months and the process is completed by about the age of 2.5 years. The average child should have 8 teeth at the age of 1 year, 15 teeth at the age of 1.5 year and 20 teeth at the age of 2-2.5 years. Milk teeth start shedding from 6th-7th

year of the age, after the eruption of 1st permanent molar behind the 2nd temporary molar tooth. The period of mixed dentition persists till about 12 to 13 years of age.

Permanent teeth:

They are 32 in number and usually appear first in the lower and then in the upper jaw.

For further elaboration, a table is given hereunder to highlight the main differences between temporary teeth and the permanent teeth:-

TEMPORARY TEETH	PERMANENT TEETH
Small, narrow, light, and delicate	Big board heavy and strong except

except temporary molars which are longer than permanent premolars replacing them.	permanent premolars replacing temporary molars
Crowns: china-White in colour.	Crowns: Ivory-White in colour.
Junction of the crown with the fang often marked by a ridge.	Junction of the crown with the fang not so marked.
Neck more constricted.	Neck less constricted.
Edges serrated.	Edges not serrated.
Anterior teeth vertical	Anterior teeth usually inclined somewhat forward.
Molars are usually larger. Their crowns are flat and their roots smaller and also more divergent.	Bicuspids which replace the temporary molars are usually smaller. Their crowns have cusps which sharply differentiate them. The roots are bigger and less divergent.

Until a generation are two ago most people including the dentists were guilty of disregarding the value of deciduous teeth of children. The primary teeth were considered as simply a temporary phase in the more important process of acquiring a permanent dentition. Rarely did these teeth received adequate attention. The customary treatment was extraction of any deciduous tooth, if so diseased it by dis-functioning or pain to the child. One of the most common consequences of this philosophy of treatment or lack of it was a loss of space with the potential for crowding and malocclusion in the permanent dentition. This aspect of the matter has since been taken while enacting the provision of Section 337U by the

legislature, the detailed relevant discussion shall be made at the later stage of the judgment.

8. The hurt has been defined under Section 332, P.P.C., which reads as under:-

332. Hurt (1) "Whoever causes pain, harm, disease, infirmity or injury to any person or impairs, (disables or dismembers) any organ of the body or part thereof of any person without causing his death, is said to cause hurt."

[Explanation.-- Disfigure means disfigurement to face or disfigurement or dismemberment of any organ or any part of the organ of the human body which impairs or injuries or corrodes or deforms the symmetry or appearance of a person.]"

(2) The following are the kinds of hurt.

(a) itlaf-i-udw

(b) Itlaf-i-salahiyyat-i-udw

(c) Shajjah

(d) Jurh and

(e) All kinds of other hurts.

This "Explanation" was introduced in Section 332, P.P.C. vide Criminal Law (Second Amendment) Act XXV of 2011 dated 28.11.2011. From above, it emerges that hurt includes as stated above, causing pain, harm, disease, infirmity or injury to any person or impairing rendering disable or dismember any organ of the body or a part thereof. Section 332, P.P.C. is the hub and heart of the portion of Chapter XVI dealing with injuries to human body. Thus, the use of the word 'hurt' in any legal provision shall have the same meaning as provided under Section 332, P.P.C. The word "Hurt" runs like an umbilical cord and finds mentioned in almost all the

provisions commencing from Sections 332 to 337Z, P.P.C., which deal with offences of hurt to human body in Chapter XVI. It hardly needs any explanation as to how the face of a person, his facial outlook and his body symmetry gets deformed/de-shaped when he loses one or more of his teeth, thus shaking his confidence level and exposing him to the public ridicule.

9. In order to move ahead, in view of relevancy of the provisions of Sections 333 to 336 and 337U, P.P.C., in their chronological order, the same are reproduced hereunder:-

333. Itlaf-i-udw. Whoever dis-members amputates, severs any limb or organ of the body of another person is said to cause itlaf-i-udw.

334. Punishment for itlaf-i-udw. Whoever by doing any act, with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, causes itlaf-i-udw of any person, shall, in consultation with the authorized medical officer be punished with qisas, and if the qisas is not executable keeping in view the principles of equality in accordance with the Injunctions of Islam, the offender shall be liable to arsh and may also be punished with imprisonment of either description for a term which may extend to ten years as ta'zir".

335 Itlaf-i-salahiyyat-i-udw. Whoever destroys or permanently impairs the functioning, power or capacity of an organ of the body of another person, or causes permanent disfigurement is said to cause itlaf-i-salahiyyat-i-udw.

In commentary, scope is given that the offence covers (i) Permanent impairing of the power of any member or joint. (ii) Privation of sight of either eye, hearing of either ear, or of any member or joint. (iii) Cutting of any lip (iv) Uprooting of the hair of the head, eye,

brows, eye laches or any other part of the body (v) Deprivation of complete sight (vi) Privation of complete hearing (vii) Loss of sexual power (viii) Cutting of nose-part or whole (ix) Loss of tooth other than milk tooth (x) Loss of milk tooth if amounts to permanent loss of tooth (xi) Loss of one finger or thumb whether of hand or foot. These fall within the ambit of grievous hurt.

336 Punishment for itlaf-i-salahiyyat-i-udw. Whoever, by doing any act with the intention of causing hurt to any person, or with the knowledge that he is likely to cause hurt to any person, causes itlaf-i-salahiyyat-i-udw of any person, shall, in consultation with the authorized medical officer, be punished with qisas and if the qisas is not executable, keeping in view the principles of equality in accordance with the Injunctions of Islam, the offender shall be liable to arsh and may also be punished with imprisonment of either description for a term which may extend to ten years as ta'zir.

Upon making a comparative study of the provisions of Sections 333 and 335, P.P.C., defining the itlaf-i-udw and itlaf-i-salahiyyat-i-udw, it has become evident that dismemberment [according to Merriam Webster Dictionary, the word dismember is defined as to cut off or disjoin the limbs, members, or parts of as well as to break up or tear into pieces; Collins Dictionary as to cut or pull it into pieces as well as to break it up into smaller parts; Oxford Learners Dictionary as to cut or tear the dead body or a person or an animal into pieces as well as to divide a country, an organization, etc. into smaller parts however according to Cambridge Dictionary as to cut, tear or pull off the body], amputation [according to Merriam Webster Dictionary amputate is defined as to remove by or as if by cutting as well as to cut off; Collins Dictionary as to cut all or part of it off as well as to prune, lop off, or remove; Oxford Learners Dictionary as

to cut off; Cambridge Dictionary as the cutting off of a part of the body] and severance [according to Merriam Webster Dictionary the word sever is defined as to put or keep apart as well as to remove (something, such as a part) by or as if by cutting; Cambridge Dictionary as to break or separate, especially by cutting; Collin Dictionary as to sever something means to cut completely through it or to cut it completely off] of a limb and an organ of a person by another person, is necessary to constitute the offence of itlaf-i-udw within the mischief of Section 334, P.P.C. whereas destruction or permanent impairment of the functions, power or capacity of an organ of the body [the term permanently impair functioning, power or capacity of an organ of body definition according to Merriam Webster as to diminish in function, ability or quality as well as to weaken or make worse; Collins Dictionary as to reduce or weaken in strength, quality, etc. and to make or cause to become worse; diminish in ability, value, excellence, etc.; weaken or damage as well as to grow or become worse; lessen]of another person or causing a permanent disfigurement [according to Collins Dictionary disfigurement is something that spoils a person's appearance], are the necessary ingredients of itlaf-i-salahiyyat-i-udw, within the purview of Section 336, P.P.C., respectively. It will be important to observe that except the above highlighted difference between Sections 333 and 335, P.P.C., the remaining part of the provisions of sections 334 and 336 are similar in their nature and there is no difference therein so far as the quantum of punishment is concerned. Under both the provisions i.e. 334 and 336, P.P.C., the offences, in consultation with the authorized medical officer shall be punishable with qisas and if qisas is not executable, keeping in view the principles of equality in accordance with injunctions of Islam, the offender shall be liable to arsh and may also be punished with imprisonment of either description for a term which may extend to 10 years as Ta'zir.

337-U. Arsh for teeth. (1) The arsh for causing itlaf of a

tooth, other than a milk tooth shall be one- twentieth of the diyat.

Explanation. The impairment of the portion of a tooth outside the gum amounts to causing itlaf of a tooth.

(2) The arsh for causing itlaf of twenty or more teeth shall be equal to the value of diyat.

(3) Where the itlaf is of a milk tooth, the accused shall be liable to daman and may also be punished with imprisonment of either description for a term which may extend to one year.

Provided that, where itlaf of a milk tooth impedes the growth of a new tooth, the accused shall be liable to arsh specified in sub-section (1).

10. Upon casting a glance over the above quoted provision of Section 337U, P.P.C. it has become evident that it prima facie deals with (i) itlaf of a tooth other than a milk tooth [permanent tooth including the impairment of portion of a tooth outside the gum] which is punishable with arsh equal to one twentieth of diyat (ii) itlaf of a milk tooth shall be liable to daman and the accused may also be punished with imprisonment of either description for a term which may extend to one year (iii) itlaf of twenty or more teeth shall be punishable with arsh equal to the value of diyat (iv) itlaf of a milk tooth resulting into impeding the growth of a new tooth shall be punishable with arsh equal to one twentieth of the diyat. The use of word itlaf-i-udw has since been made in both the provisions of Sections 333 and 334, P.P.C., therefore, it can be held with great quantum of certainty that itlaf of a tooth, being an ectodermal specialized organ, is punishable under Section 334, P.P.C., the court however, shall have to take into consideration the explanatory and controlling position of the provision of Section 337U, P.P.C. while awarding punishment to a convict. The relevant and requisite traits have been embodied by the legislature in the shape of the provision of Section 337U, P.P.C. to

quantify the punishment in the light of discussion made hereinabove to be awarded to a convict.

11. The argument of learned counsel for the petitioner that according to facts and circumstances of the case "as the injury attributed to the petitioner as per Medico Legal Certificate is "Itlaf of a tooth", the offence under Section 337U, P.P.C., at the most is made out and the provision of Section 334, P.P.C. has wrongly been invoked as the teeth are not an organ and the same is only applicable if an organ or limb

was dismembered, amputated or severed", in the light of above discussion is held to be misconceived, hence repelled.

12. The matter can be viewed yet from another angle. According to Section 4(b) of the Code of Criminal Procedure Code, 1898 "Bailable Offence", means an offence shown as bailable in the second schedule, or which is made bailable by any other law for the time being in force; and "non-bailable offence" means any other "offence". As per Section 4(o) of the Code of Criminal Procedure Code, 1898 "offence" means any act or omission made punishable by any law for the time being in force. It also includes any act in respect of which a complaint may be made under section 20 of the Cattle Trespass Act, 1871. Section 28 of the Code of Criminal Procedure Code, 1898, provides that subject to other provisions of the Code, any offence

under the Pakistan Penal Code may be tried:

(a) by the High Court:

(b) by the Courts of Sessions; or

(c) by any other Court by which such offence is shown in the eighth column of the second schedule to be triable.

Having the force of law behind it, this schedule besides above also depicts in its column No.1, "the section", No.2, "the offences", No.3

"Whether the police may arrest without warrant or not", No.4 "whether a warrant or a summons shall be issued", No.5 "Whether a particular offence is bailable or not", No.6 "whether compoundable or not", No.7 "Punishment under the Pakistan Penal Code", For further clarification, the synopsis of the Schedule-II is reproduced hereunder:-

1	2	3	4
Section	Offence	Whether the police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance

5	6	7	8
Whether bailable or not	Whether compoundable or not	Punishment under the Pakistan Penal Code	By what Court triable

Undeniably, the offence under Section 334, P.P.C. is mentioned as a non-bailable offence in Schedule II of the Code of Criminal Procedure, 1898 whereas Section 337U, P.P.C. does not find mention therein as an offence, therefore, the argument of learned counsel that while treating Section 337U, P.P.C. as a penal provision and bailable, the petitioner may be allowed bail has been found to be without any legal basis and is liable to be repelled on this score. The case laws relied upon by the learned counsel for the petitioner to contend that jaw is an organ and not the teeth, in the light of above discussion, since does not advance the case of the petitioner, therefore, the same are held to be irrelevant.

13. The petitioner having been nominated in the FIR with the specific role of inflicting a sota blow on the lips of the complainant causing itlaf/breaking of his teeth, duly corroborated with the Medico Legal Certificate and the statements of PWs under Section 161, Cr.P.C, recovery of weapon of offence is yet to be effected from him, having been found involved with the commission of alleged offence during investigation and on account of his failure in showing any malafide either on the

part of the complainant or the police for his false implication by way of registration of criminal case against him, has not been able to make out a case for confirmation of his ad-interim pre-arrest bail.

14. For what has been discussed above, the petition is dismissed and ad-interim pre-arrest bail already granted to the petitioner, vide order dated 14.04.2023 is recalled. Previous surety of the petitioner is discharged from the liability of his bail bonds.

JK/S-15/L **Bail recalled.**

2024 Y L R 1915

[Lahore]

Before Anwaarul Haq Pannun, J

AKHTAR ALI---Appellant

Versus

THE STATE and others---Respondents

Criminal Appeal No. 15191 of 2011, decided on 7th May, 2024.

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

----Ss. 302(b), 324 & 34---Qatl-i-amd, attempt to commit qatl-i-amd, common intention---Appreciation of evidence---Delay of two days in lodging FIR---Consequential---Accused was charged that he along with his co-accused committed the murder of the maternal grandfather of the complainant by firing---Alleged occurrence took place on 01.08.2016 at about 9.00 a.m. whereas the matter was reported to the police with an inordinate delay of two days on 03.08.2016---Distance between the place of occurrence and Police Station was about 09 K.M.---Complainant was maternal grand-son whereas a witness was nephew of the deceased---Witnesses and the accused were residents of the same locality and already known to each-other, as such, in absence of any chance of misidentification of the accused persons, there existed no reason to delay, the registration of FIR---Explanation for inordinate delay of two days in lodging the FIR that the complainant remained busy in the treatment of his maternal grand-father/deceased was neither plausible nor convincing as another witness, who was nephew of the deceased, could have reported the incident to the police well within time in absence of the complainant---Appeal against conviction was allowed accordingly.

Mehmood Ahmad and 3 others v. The State and another 1995 SCMR 127; Rafaqat Ali alias Phakoo and others v. The State and others 2021 PCr.LJ 360; Bilal Ahmad v. The State and another 2022 MLD 1577;

Mst. Aziz Mai v. The State and others 2022 YLR 424 and Ahmad Nawaz and others v. The State and others 2016 PCr.LJ 1267 rel.

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

----Ss. 302(b), 324 & 34---Qatl-i-amd, attempt to commit qatl-i-amd, common intention---Appreciation of evidence---Presence of the witnesses at the spot at the time of occurrence doubtful---Accused was charged that he along with his co-accused committed murder of the maternal grandfather of the complainant by firing---Complainant during the course of cross-examination admitted that at the time of Medico-Legal Certificate injured was in his senses---Surprisingly despite capacity/ stability, victim did not opt to record his statement to the Investigating Officer---Police also did not make any effort to record his statement for reasons best known to it---Thus the noticeable/significant delay in lodging of the FIR; non-recording of statement of the injured (now deceased) who was firstly taken to the Police Station and then for Medico-Legal Certificate when according to medical evidence he was vitally stable at the time of Medico-Legal Certificate; familiarity of the parties to each other being residents of the same vicinity, pointed out to the possibility that the occurrence remained un-witnessed and time had been consumed in procuring and planting eye-witnesses and in cooking up a story for the prosecution---Furthermore, according to the Medico Legal Certificate of injured, (now deceased), it was the police, who had brought him to THQ Hospital for his medical examination on 01.08.2016 at 10.30 a.m. (the alleged day of occurrence)---As per invariable practice whoever brought an injured to the hospital, whether relative or friend, his name and particulars were mentioned in a specific column, meant for such purpose but in this case none of the witnesses or any other else were cited as companion of the injured (now deceased)---Moreover, Medical Officer, who conducted Medico-Legal Certificate, during his cross-examination, stated that when injured came in the hospital he was not accompanied by any private person---Hence, in view of such position, the presence of eye-witnesses at the spot at the relevant time of

occurrence seemed to be doubtful---Appeal against conviction was allowed accordingly.

(c) Criminal trial---

----Medical evidence---Scope---Medical evidence may confirm the ocular account with regard to the receipt of injury and kind of weapon, but it can not connect the accused with the commission of crime.

Israr Ali v. The State 2007 SCMR 525 rel.

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

----Ss. 302(b), 324 & 34---Qatl-i-amd, attempt to commit qatl-i-amd, common intention---Appreciation of evidence---Recovery of weapon of offence---Inconsequential---Accused was charged that he along with his co-accused committed murder of the maternal grandfather of the complainant by firing---Record showed that pistol .30-bore recovered on pointing out of the accused which was seized by the Investigating Officer through recovery memo duly attested by the witnesses, was inconsequential as no empty was seized by the Investigating Officer from the place of occurrence---Even otherwise the recovery was just a corroboratory piece of evidence and when other incriminating prosecution's evidence had been disbelieved/discarded, the same could not be relied upon in case of capital punishment---Appeal against conviction was allowed accordingly.

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

----Ss. 302(b), 324 & 34---Qatl-i-amd, attempt to commit qatl-i-amd, common intention---Appreciation of evidence---Motive not proved---Accused was charged that he along with his co-accused committed murder of the maternal grandfather of the complainant by firing---According to the prosecution, the motive behind the occurrence was that one day prior to the occurrence, the accused persons entered in the house of the complainant and gave beating to him and in that regard, complainant had moved an application at Police Station and due to said

grudge, the accused had committed the alleged occurrence---Motive was never conclusive proof of guilt of an accused rather just a factor for convincing the mind of a Court deciding the crime while keeping in view the rest of the evidence brought on record---Motive set up by the prosecution alone could not come to rescue the sinking boat of the prosecution---Appeal against conviction was allowed accordingly.

(f) Criminal trial---

----Benefit of doubt---Location---Scope---Conviction must be founded on unimpeachable evidence and certainty of guilt---Any doubt arising in the prosecution case must be resolved in favour of accused.

Muhammad Khan and another v. State 1999 SCMR 1220 rel.

(g) Criminal trial---

----Benefit of doubt---Principle---Single instance giving rise to a reasonable doubt in the mind of the Court entitles the accused to benefit of doubt not as a matter of grace but as a matter of right.

Muhammad Akram v. The State 2009 SCMR 230 and Tariq Pervaiz v. The State 1995 SCMR 1345 rel.

Aasim Sohaib, Asghar Ali Gill and Muhammad Aftab Fareed Janjoa for Appellant.

Fakhar Abbas, Deputy Prosecutor General and Sirbuland Khan, Assistant Attorney General for the State.

Akhtar Hussain Bhatti for Complainant.

Date of hearing: 7th May 2024.

JUDGMENT

ANWAARUL HAQ PANNUN, J.---The appellant Akhtar Ali, through this criminal appeal under Section 410 of Cr.P.C., has called in question the vires of judgment dated 18.02.2021, passed on conclusion of a trial in a private criminal complaint [which is based upon case/FIR No.635/2016 dated 03.08.2016, offence under Sections 324/34/302, P.P.C., registered at Police Station Hujra Shah Muqeem, Tehsil

Depalpur, District Okaral under Sections 302/34, P.P.C., titled as "Aamir Hassan v. Akhtar Ali and others", whereby the learned Additional Sessions Judge, Depalpur while acquitting the co-accused Muhammad Aslam, Liaqat Ali, Shakeel Ahmad, has convicted and sentenced the appellant Akhtar Ali as under:-

Under Section 302(b), P.P.C.

Sentenced to undergo imprisonment for life along compensation Rs.4,00,000/- payable to the legal heirs of deceased Muhammad Sharif under Section 544-A, Cr.P.C and in default thereof to further undergo SI for six months. Benefit of Section 382-B, Cr.P.C is extended to the convict.

2. The prosecution's story, as embodied in private complaint (Exh.PC) filed by Aamir Hassan (PW-2) is that on 01.08.2016 at about 9.00 a.m., when the complainant along with his maternal grandfather Muhammad Sharif, proceeding towards Hujra Shah Muqeem, reached near Rajba Pul in the area of Kalasen peerwal, by a Car, registration No. LEF 1419, suddenly, appellant Akhtar while armed with pistol .30 bore, Muhammad Aslam armed with Kalashnikov like rifle, Liaqat Ali and Shakeel Ahmad armed with repeater .12 bore, ambush on gun point, tried to stop the complainant's car, but the complainant, accelerated it, whereupon Liaqat Ali accused statedly raised lalkara, exhorting his co-accused to teach a lesson to the complainant for lodging an application against them at Police Station Hujra Shah Muqeem, whereupon, Akhtar, the appellant, made a straight fire with his pistol .30 bore hitting on right side of back of Muhammad Sharif, Muhammad Aslam accused made fire with his rifle hitting below number plate of car, Liaqat Ali and Muhammad Shakeel accused made aerial firing with their respective weapons. Besides the complainant, Muhammad Nawaz and Basharat Ali, the PWs had also witnessed the occurrence. The accused persons fled away while brandishing their weapons and making aerial firing. The motive behind the occurrence was that one day prior to this

occurrence, the accused persons while making a house trespass, gave him beating and in this regard he had moved an application at Police Station and due to said grudge the accused persons had committed the alleged occurrence. The complainant along with PWs brought Muhammad Sharif injured to Police Station Hujra Shah Muqeem, obtained docket and shifted him to RHC Hujra Shah Muqeem and then to the Jinnah Hospital, Lahore where on 15.08.2016 he succumbed to the injuries. The Investigating Officer, according to complainant, did not conduct the investigation fairly and justly, therefore, being dissatisfied with the investigation, he had to file a private complaint.

3. The learned trial court indicted the appellant and co-accused (since acquitted), to which they pleaded non-culpabilis and claimed trial. The prosecution in order to prove its case has produced as many as 05 prosecution witnesses (PW-1 to PW-5) and 09 CWs (CW-1 to CW-9). The learned Prosecutor after tendering reports of PFSA as Exh:PL to Exh:PN, closed the prosecution's evidence. The appellant along with co-accused when examined under Section 342, Cr.P.C, once again reiterate their innocence, however, they did not opt to record their statements under Section 340(2), Cr.P.C, or to produce evidence in their defence. On conclusion of the trial, learned trial Judge while acquitting the co-accused Muhammad Aslam, Liaquat Ali and Shakeel Ahmad, convicted and sentenced the accused-appellant as aforesaid.

4. Arguments heard. Record perused.

5. The prosecution's case has already been described in paragraph No.2 of the judgment which needs no reiteration. The accused-appellant allegedly made a fire shot with his pistol .30 bore, hitting on right side of back of Muhammad Sharif, who became injured. Later on, on 15.08.2016, Muhammad Sharif, the then injured succumbed to the injury at Jinnah Hospital, Lahore. The alleged occurrence took place on 01.08.2016 at about 9.00 a.m. whereas the matter was reported to the police with inordinate delay of two days on 03.08.2016. The distance

between the place of occurrence and police Station is about 09 K.M. Aamir Hassan, complainant (PW-2) is maternal grand-son whereas Basharat Ali is nephew of the deceased Muhammad Sharif. The deceased, PWs and the accused are residents of the same locality and already known to each-other, as such, in absence of any chance of misidentification of the accused persons, there existed no reason to delay, in the facts of the case, in registration of FIR. The explanation for inordinate delay of two days in lodging the FIR that the complainant remained busy in the treatment of his maternal grand-father Muhammad Sharif (deceased) is neither plausible nor convincing as another PW Basharat Ali (PW-3), who is nephew of the deceased Muhammad Sharif, could have reported the incident to the police well within time in absence of the complainant (PW-2). It has been held by the apex Court in case titled "Mehmood Ahmad and 3 others v. The State and another" (1995 SCMR 127) that:-

> "Delay of two hours in lodging the FIR in the particular circumstances of the case had assumed great significance as the same could be attributed to consultation, taking instructions and calculatedly preparing the report keeping the names of the accused open for roping in such persons whom ultimately the prosecution might wish to implicate."

Reliance may also be placed upon case reported as "Rafaqat Ali alias Phakoo and others v. The State and others" (2021 PCr.LJ 360), "Bilal Ahmad v. The State and another" (2022 MLD 1577), "Mst. Aziz Mai v. The State and others" (2022 YLR 424) and "Ahmad Nawaz and others v. The State and others" (2016 PCr.LJ 1267). Moreover, according to the application for registration of case Exh:PB, FIR Exh:PB/1 and the complaint Exh:PC, the complainant along with witnesses, took the injured Muhammad Sharif to Police Station Hujra Shah Muqeem, obtained docket and then took the injured (now deceased) through Police to RHC Hospital, Hujra Shah Muqeem. Perusal of column of Medico Legal Certificate of Muhammad

Sharif, injured (now deceased), Exh:PK i.e. General Physical Examination/ Symptoms: the then injured was shown as vitally stable. This fact is also confirmed by Dr. Ghulam Kazim (PW5) by stating that the injured was vitally stable. He again during his cross-examination deposed that the injured was stable and that he was able to make statement. He further stated that history of firearm was given by the patient himself and he did not make statement regarding the occurrence that how that occurred. Aamir Hassan, complainant (PW-2) during the course of cross-examination admitted it correct that at the time of MLC Muhammad Sharif injured was in senses. It is somewhat surprising that despite capacity/stability, he did not opt to record his statement to the I.O. The Police also did not make any effort to record his statement for the reasons best known to it. Thus the noticeable/significant delay in lodging of the FIR, non-recording of statement of the injured (now deceased) who was firstly taken to the Police Station and then for MLC when according to medical evidence as stated supra, he was vitally stable at the time of MLC, familiar of the parties to each other being resident of the same vicinity, would point out a possibility that the occurrence remained un-witnessed and time had been consumed in procuring and planting eye-witnesses and in cooking up a story for the prosecution. Furthermore, according to the Medico Legal Certificate of Muhammad Sharif, injured, (now deceased), (Exh:PK), it was the police, who had brought him to THQ Hospital Depalpur for his medical examination on 01.08.2016 at 10.30 a.m. (the alleged day of occurrence). It is an invariable practice that whoever brings an injured to the hospital, whether relative or friend, his name and particulars are o mentioned in a specific column, meant therefor but in this case none of the PWs i.e. the complainant Aamir Hassan (PW-2) and Basharat Ali (PW-3) or any other else were cited as companion of the injured (now deceased) Muhammad Sharif. It is trite that men may lie but documents do not. Moreover, Dr. Ghulam Kazim (PW-5), who conducted aforesaid MLC (Exh:PK), during his cross-examination stated that when Muhammad Sharif injured came in the hospital he was not accompanied by any private

person. Hence, in view of this position, the presence of eye-witnesses at the spot at the relevant time of occurrence, seems to be doubtful. The co-accused Muhammad Aslam, who according to prosecution made fire hitting backside of the vehicle beneath the number plate whereas other co-accused Liaqat Ali and Shakeel Ahmad made aerial firing have also been acquitted of the charge by extending them the benefit of doubt through the impugned judgment by the learned trial Court.6. Now coming to the medical evidence furnished by Dr. Adnan Latif (PW-4), who conducted autopsy of Muhammad Sharif and Dr. Ghulam Kazim (PW-5) who conducted MLC of Muhammad Sharif, deceased (then injured), suffice it to observe that it may confirm the ocular account with regard to the receipt of injury and kind of weapon, but it cannot connect the accused with the commission of crime. It has been held by apex Court in case reported as "Israr Ali v. The State" (2007 SCMR 525) that medical evidence alone cannot corroborate, as the injury cannot speak of its author and it does not establish the identity of the accused. Moreover, the postmortem report confirms the death of the deceased and report of Chemical Examiner/ Forensic Science Agency, verify the presence or otherwise of human blood on the weapon of offence but cannot pinpoint the person who had committed the occurrence.

7. So far as recovery of pistol .30 bore (P-4) allegedly recovered on pointing out of the accused/appellant, seized by the I.O through recovery memo. (Exh:CW2/A) duly attested by the PWs is concerned, it may be observed that the same is inconsequential in this case as no empty was seized by the I.O from the place of occurrence. Even, the recovery is just a corroboratory piece of evidence and when other incriminating prosecution's evidence has been disbelieved/ discarded, the same cannot be relied upon in case of capital punishment.

8. According to the prosecution the motive behind the occurrence was that one day prior to this occurrence, the accused persons entered in the house of the complainant and gave beating to him and in this regard he had moved an application at Police Station and due to said grudge, the

accused had committed the alleged occurrence. The motive is like a cricket pitch on which the players of one team run between the wickets to enhance their team's scores and the other side try hard to show the players of opposite team, their way to dressing room, therefore, as the motive has never been held to be a conclusive proof of guilt of an accused rather a factor for convincing the mind of a court deciding the crime while keeping in view the rest of the evidence brought on record. In order to prove its case by the prosecution, it has axiomatically been held consistently that since the motive cut either of the both sides, therefore, as observed hereinabove, the prosecution has failed to prove its case through reliable evidence. The motive as set up by the prosecution alone does not come to rescue the sinking boat of the prosecution.

9. For what has been discussed above, the prosecution has miserably failed to prove its case against the appellant beyond any shadow of doubt. The benefit of doubt has accrued in favour of accused as the Hon'ble Supreme Court of Pakistan has held in case titled "Muhammad Khan and another v. State" (1999 SCMR 1220), that it is axiomatic and universal recognized principle of law that conviction must be founded on unimpeachable evidence and certainty of guilt and hence any doubt that arises in prosecution case must be resolved in favour of accused. Moreover, it is cardinal principle of criminal jurisprudence that a single instance giving rise to a reasonable doubt in the mind of Court entitles the accused to the benefit of doubt not as a matter of grace but as a matter of right. Reliance is placed on case titled as "Muhammad Akrain v. The State" (2009 SCMR 230) and "Tariq Pervaiz v. The State" (1995 SCMR 1345). Consequently, the instant Appeal is allowed, the conviction judgment dated 18.02.2021, passed by learned trial Court is set aside and the appellant is acquitted of the charge by extending him the benefit of doubt. The appellant Akhtar Ali be released forthwith, if not required in any other case.

JK/A-35/L **Appeal allowed.**

2024 Y L R 1949

[Lahore]

Before Anwaarul Haq Pannun, J

LIAQUAT ALI alias Jajji and another---Appellants

Versus

THE STATE and others---Respondents

Criminal Appeal No. 14637 and Criminal Revision No. 16786 of 2021, heard on 10th May, 2024.

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

----Ss. 302(b) & 109---Qatl-i-amd, abetment---Appreciation of evidence---Promptly lodged FIR---No question of false implication---Ocular account supported by medical evidence---Accused was charged for committing murder of the brother of complainant by firing---Ocular account had been furnished by complainant and another witness---Admittedly, complainant was not an eye--witness of the alleged occurrence---Occurrence took place at 10.00 a.m. on 13.05.2014---Matter was reported to the police on the same day at 10.15 a.m. with promptitude---Accused being the sole accused had specifically been nominated in the promptly lodged FIR with described specific role---Complainant was brother and witness was uncle of the deceased---Complainant was not an eye-witness of the occurrence, however, he on receiving information of occurrence form witnesses, reached at the place of occurrence and found his brother lying in an injured condition, who shifted the injured under the police escort to hospital for his medical examination---Claim of eye-witness regarding his presence at the relevant time at place of occurrence in bazar/butcher's market could not be shattered by the defence---Moreover, it was a daylight occurrence and the parties were already known to each-other, therefore, no question of misidentification or substitution of the accused arose---It was not believable that the witnesses by leaving the actual murderer would falsely implicat the accused---Ocular account furnished by eye-witnesswas fully corroborated with medical evidence---Appeal against conviction was accordingly dismissed.

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

----Ss. 302(b) & 109---Qatl-i-amd, abetment---Appreciation of evidence---Recovery of weapon of offence on the pointation of accused---Accused was charged for committing murder of the brother of complainant by firing---Record showed that a weapon of offence was recovered allegedly on pointing out of the accused from a room of his house---Since the accused remained fugitive from law for about three years, therefore, recovery of weapon of offence on his pointing out vide recovery memo was irrelevant and inconsequential---However, the ocular account had been established---Appeal against conviction was accordingly dismissed.

(c) Criminal trial---

----Motive---Scope---If motive part of the prosecution case is not proved and hence excluded from consideration, the accused can still be convicted in presence of sufficient evidence in the form of ocular account duly supported by the medical evidence beyond any shadow of doubt.

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

----Ss. 302(b) & 109---Qatl-i-amd, abetment---Appreciation of evidence---Related witnesses, evidence of---Reliance---Accused was charged for committing murder of the brother of complainant by firing---Allegedly the eye-witness was close relative of deceased---Merely on account of relationship of the witnesses with the deceased, their evidence could not be discarded in the absence of any inconsistency or inherent infirmity in their depositions---Appeal against conviction was accordingly dismissed.

Khizar Hayat v. The State 2011 SCMR 429 rel.

Aasim Sohaib and Muhammad Irfan Malik for Appellant.

Fakhar Abbas, Deputy Prosecutor General along with Alam ASI for the State.

Kazim Ali Malik for Complainant.

Date of hearing: 10th May, 2024.

JUDGMENT

ANWAARUL HAQ PANNUN, J.---This single judgment shall decide, the above noted, Criminal Appeal, challenging his conviction and sentence

filed by the appellant Liaquat Ali alias Jajji, and Revision Petition filed by complainant Muhammad Irfan Haider for enhancement of sentence of the appellant, as both have arisen out of judgment dated 17.02.2021, passed on conclusion of trial in a criminal case, bearing FIR No.193, dated 13.05.2014, offence under Sections 302/109, P.P.C., registered at Police Station Sahiwal, District Sargodha by the learned Addl. Sessions Judge, Sahiwal, District Sargodha. Needless to reiterate that appellant was sent up to face trial in aforementioned case, according to prosecution, on 13.05.2014, at about 10.00 a.m. when Muhammad Rizwan Haider, the brother of the complainant reached at butcher's market (Mandi Qasaban), Sahiwal, suddenly, the appellant while armed with pistol .30 bore emerged, raised lalkara, made fire shots with his pistol, which hit on left side of his flank, and on left side of his hip, who upon receiving fire-shots fell down. Upon hearing firing and noise, Khalid Mehrnood and Asghar Ali who were passing by there by chance, witnessed the alleged occurrence and upon seeing them, the appellant while brandishing his pistol, fled away. The motive behind the occurrence was that upon forbidding the accused/appellant by his brother from doing the narcotic business in his Mohallah, exchange of abuses had taken place between them. It had further been alleged that the occurrence had taken place on the abetment of Muhammad Nawaz alias Bhappa and Noman alias Nomi. The FIR was lodged under Sections 324/109, P.P.C., however, the then injured Rizwan Haider died on 15.05.2014 at DHQ Hospital Sargodha, thereupon the offence under Section 302, P.P.C. was added.

2. The prosecution at trial examined as many as thirteen (PW-1 to PW-13) prosecution witnesses besides tendering certain documents including he reports of PFSA (Exh:PA to Exh:PT) to prove its charge. In his statement under Section 342, Cr.P.C, the appellant professed his innocence while refuting the prosecution's evidence, stating his false involvement in the case. The appellant did not opt to appear as his own witness under Section 340(2), Cr.P.C. or to produce evidence in his defense. On conclusion of the trial, the learned trial court, vide its judgriient dated 17.02.2021, convicted and sentenced the appellant as under:-

Under Section 302(b), P.P.C.

Sentenced to life imprisonment along with compensation of Rs.2,00,000/- payable to the legal heirs of the deceased under Section 544-A, Cr.P.C and in default thereof to further undergo SI for six months. The benefit of Section 382-B, Cr.P.C is extended to the convict.

3. Arguments heard. Record perused.

4. As it is evident from above facts that the prosecution's case mainly consists of ocular account, medical evidence, motive and a recovery of pistol allegedly recovered on pointing out of the appellant vide recovery memo. (Exh:PN). The ocular account has been furnished by Muhammad Irfan Haider, complainant (PW-7) i.e. the brother of the deceased Muhammad Rizwan and Muhammad Asghar (PW-10). Admittedly, Muhammad Irfan Haider, complainant (PW-7) is not an eye-witness of the alleged occurrence. The occurrence took place at 10.00 a.m. on 13.05.2014. The matter was reported to the police on the same day at 10.15 a.m. vide rapt No.04 i.e. with promptitude. The appellant being the sole accused has specifically been nominated in the promptly lodged FIR with above described specific role. Muhammad Rizwan Haider, brother of the complainant died on 15.05.2024 at DHQ Hospital Sargodha. Dr. Sohail Asghar, Medical Officer (PW-2) medically examined the deceased in an injured condition who was brought by Aurangzeb, a cousin of the injured and found the following injuries on his person:-

i) A firearm wound of entry measuring 1 x 1 cm on the left side of abdomen 8 cm lateral to the umbilicus with inverted margin.

ii) A firearm wound of entry measuring 1 x 1 cm on the left lateral side of thigh 6 cm below from the left hip joint.

On 15.05.2024, he also conducted the postmortem examination over the dead body of the deceased Muhammad Rizwan Haider. According to him, all injuries were ante mortem and inflicted by firearm and death had occurred due to injury No.1 leading to massive bleeding, cardiopulmonary collapse, shock and death. The complainant Muhammad Irfan Haider (PW-7) is brother and Asghar Ali (PW-10) is uncle of the deceased. The complainant (PW-7) as aforesaid is not an eye-witness of the occurrence, however, he on receiving information of occurrence form Asghar Ali and Khalid Mahmood PWs,

reached at the place of occurrence and found his brother Rizwan Haider lying in an injured condition, who shifted the injured under the police escort to hospital for his medical examination. The claim of Asghar Ali (PW-10) regarding his presence in at the relevant time at place of occurrence in bazar/butcher's market could not have been shattered by the defence. It was a daylight occurrence. The parties were already known to each-other. Therefore, no question of misidentification or substitution of the accused/appellant arises. Even it is not believable that the PWs by leaving the actual murderer had falsely implicated the appellant. The ocular account furnished by PW-10 is fully corroborated with medical evidence. I don't find any reason to differ with the findings of learned trial Court, which are based upon cogent and sound reasons i.e. "The date, time and place of occurrence is not disputed. The matter was reported to the police with promptitude. This is not a case of mistaken identity. Presence of eye-witnesses at the time of incident at the place of incident had been established who were in a position not only to watch the whole occurrence but also to identify the accused. Minor discrepancies in the prosecution evidence and technicalities are to be overlooked without causing any miscarriage of justice. Although it was argued by learned defense counsel that he was implicated in the case falsely due to enmity and complainant as well as eye-witnesses who are closely related to deceased have deposed falsely but mere relationship of PWs with the deceased is not enough to disbelieve or discard their evidence in the absence of serious enmity between the parties. Mere relationship does not make an independent witness, an interested one and deposition of such a witness who otherwise proved to be truthful witness cannot be discarded on such ground. Even otherwise, in such like cases when brother arrived at the place of occurrence and found his brother in injured condition along with PW-10 and thereafter his injured brother succumbed to the injuries at hospital substitution is rare phenomena. It does not appeal to prudent mind that real brother will substitute the actual culprit with an innocent person. The accused has not produced any cogent evidence to establish his enmity with the complainant party. The accused remained fugitive from law for considerable period of almost three years. The ocular account of occurrence furnished by the PWs is consistent and straight

forward." So far as recovery of weapon of offence allegedly made on pointing out of the appellant from a room of his house, seized by the I.O is concerned, it may be observed that since the appellant remained fugitive from law for about three years, therefore, recovery of weapon of offence on his pointing out vide recovery memo. (Exh:PN) is irrelevant and inconsequential. Since the learned trial Court while assigning cogent and valid reasons for want of sufficient evidence, has rightly disbelieved the motive part of the occurrence, therefore, I am constrained to approve such findings. It is trite a law that even if motive part of the prosecution case is excluded from consideration and in presence of sufficient evidence in the form of ocular account duly supported by the medical evidence beyond any shadow of doubt against the accused are sufficient to record conviction. The argument of learned counsel for the appellant that PW-10 being close relative of the deceased is a chance witness, has no substance as merely on account of relationship of the PWs with the deceased, his evidence cannot be discarded in the absence of any inconsistency or inherent infirmity in their depositions. In this context reliance is placed upon case reported as Khizar Hayat v. The State (2011 SCMR 429).

5. For what has been discussed above, the learned trial court, in the light of the principle of sifting the grain from the chuff, has delivered a well-reasoned judgment while extending the appellant mitigation on the basis of disbelieving the motive part of the occurrence. Therefore, in my view, the conviction and sentence awarded to the appellant Liaqat Ali alias Jajji under Section 302(b) P.P.C. by the learned trial court is based upon well-settled principles of appreciation of evidence and the same is accordingly upheld. Resultantly, Criminal Appeal No.14637 of 2021 being devoid of any force is hereby dismissed.

6. As far as Criminal Revision No.16786 of 2021 (Muhammad Irfan Haider v. Liaqat Ali alias Jajji, etc.) is concerned, for the reasons mentioned hereinabove, the instant criminal revision petition having no substance, stands dismissed.

JK/L-2/L **Appeal dismissed.**

PLJ 2025 Cr.C. (Note) 19

[Lahore High Court, Lahore]

***Present*: Anwaarul Haq Pannun, J.**

USMAN JAFFAR--Appellant

versus

STATE and another--Respondents

Crl. A. No. 68048 of 2021, heard on 16.10.2024.

Pakistan Penal Code, 1860 (XLV of 1860)--

----Ss. 302(b)/34--Qatl-e-amd--Conviction and sentence--Challenge to--Delay in post-mortem--Chance witness--Benefit of doubt--The motive, being a propelling force for commission of alleged offence in instant case, is of much significance even for believing presence of eye-witnesses at spot for sustaining conviction--In addition to above and in view of ages old established principle of criminal dispensation of justice that if prosecution, in a criminal case, alleges a specific motive behind occurrence/ commission of crime, particularly involving physical assault, duty cast upon prosecution, regarding proving same either through some direct evidence or existence of some circumstances, but in instant case, prosecution has failed to perform its said obligation--Hence, as stated supra, eye witnesses being closely related are chance witnesses, therefore, they cannot be believed without strong corroboration from any other reliable evidence--In my judicial estimation, prosecution has badly failed to prove its case against appellant--**Held:** It is cardinal principle of criminal jurisprudence that a single instance causing a reasonable doubt in mind of Court entitles accused to benefit of doubt not as a matter of grace but as a matter of right.

[Para 6 & 7] B, D & E

2009 SCMR 230.

Delay in Post-Mortem--

----The delay in conducting post mortem examination over dead body of deceased has exorbitantly caused serious suspicion about correctness and veracity of prosecution's version. [Para 5] A

2014 SCMR 1698.

Chance Witness--

----Needless to observe that a chance witness has to undergo strict scrutiny so as to qualify as a reliable witness. [Para 6] C

PLD 2021 SC 600 & 2017 SCMR 596.

M/s. Asim Sohaib and Asghar Ali Gill, Advocates for Appellant.

Rana Muhammad Imran Anjum, Deputy Prosecutor General for State.

Mr. Muhammad Akbar Khan, Advocate for Complainant.

Date of hearing: 16.10.2024.

Judgment

Through this criminal appeal under Section 410, Cr.P.C., the appellant Usman Jaffar, has impugned the judgment dated 29.09.2021, passed in a private criminal complaint under Section 302/34, PPC by the learned Addl. Sessions Judge Judge Juvenile Court (MCTC), Toba Tek Singh, after a thorough trial, whereby, Muhammad Sharjeel, the co-accused stands acquitted of the charge, whereas Usman Jaffar, the appellant has been convicted under Section 302(b), PPC and sentenced to imprisonment for life along with compensation of Rs. 1,00,000/-payable to the legal heirs of the deceased under Section 544-A, Cr.P.C. and in default thereof to further undergo Simple Imprisonment for six months, the benefit of Section 382-B, Cr.P.C., however has been extended to him.

2. The prosecution's case [as per private criminal complaint (Exh.PC) preferred by *Mst.* Naseem Bibi (PW-1) under Sections 302/34, PPC, Police Station City Toba Tek Singh titled as "Naseem Bibi versus Usman Jaffar and another"] is that on 15.11.2019, her son Asad Saleem told her that as a consequence of a squabble taken place one day prior to occurrence between him and the appellant Usman, the Appellant had threatened him with dire consequences; on 16.11.2019, at about 2.45 p.m. after school hours, she along with Asif Saleem, her son and Asad Saleem while on their way back to home, when, reached near National Bank Bhaleer Branch, suddenly Usman and Muhammad Sharjeel emerged, Muhammad Sharjeel accused caught hold Asad Saleem of his arms. Usman accused while raising *lalkara* that he will teach a lesson to Asad Saleem for exchanging hot words with him, gave fists and kicks blows including the sensitive parts and on other different parts of body of Asad Aleem, who fell down and succumbed. On hue and cry of complainant, her son Asif Saleem and other witnesses Zulfiqar Ali and Amir Javed attracted to the spot, the accused while raising *lalkara*s fled away. [The accused Sharjeel, since acquitted, was exonerated by the police even during investigation, thus being dissatisfied with such findings of police, the complainant had filed the private criminal complaint].

3. The trial had been had been held in the private complaint. The formal charge against the accused persons was framed, to which they pleaded not guilty and claimed trial. The complainant had produced as many as 04 PWs and 08 CWs, to prove the charge. The ocular account consists of *Mst.* Naseem Bibi, Complainant (PW-1), Muhammad Asif Saleem (PW-2) and Zulfiqar Ali (PW-3). Dr. Muhammad Qaiser Ghafoor (CW-7) conducted autopsy over the dead body of deceased Asad Saleem. According to his opinion, the cause of death was vasovagal shock leading to asphyxia, which is sufficient to cause death and was ante-mortem. Similarly, the investigation process and proceedings were testified by Amjad Ali SI (CW-6) and Akbar

Hayat Inspector (CW-8). After tendering attested copies of application under Sections 22-A/22-B, Cr.P.C. (*Mst.* Naseem Bibi vs. District Police Officer etc.), interim orders (Exh:PF&Exh:PG/1-4) and reports of PFSA (Exh:PD and Exh:PE), the complainant closed her evidence. The appellant, when examined under Section 342, Cr.P.C., refuted the prosecution's evidence and in response to a question as to "why this case and why the PWs have deposed against him", replied as under:-

"This is a false case against me. Firstly, complainant falsely involved me in F.I.R. then she filed false complaint against me after lapse of one year. I have no connection with the death of Asad Saleem deceased. The complainant, her son and her husband have deposed against me due to their inter se relations with the deceased due to enmity and on the asking of my opponents. No independent witness and the residents of the locality was produced during investigation or during trial against me. The police officials deposed against me being official witnesses just to favour the complainant.

I have no motive to commit the occurrence. Furthermore, during all the investigations and trial complainant failed to produce any witness in order to prove her motive against me, even she did not point out any alleged place of motive being part of occurrence I.O. categorically stated before the Court that the complainant did not produce any evidence regarding the motive nor he himself investigate the motive part of the occurrence. It was unseen and unattended occurrence, even the dead body was not attended by any one as the condition of the dead body at the time of post mortem was indicative of unattended dead body. At the time of inspection of dead body, the I.O. and the MO did not observe any sign of violence on the dead body after minute examination. The prosecution witnesses changed their version again and again just to show their presence but they remain failed to connect me with the alleged occurrence. In the days of occurrence I was student of 9th class

and my school is at the distance of about one kilometer from the school of deceased Asad Saleem. The closing time of both the schools were the same in those days and there was no chance of me and deceased to be present at place of occurrence at the given time by the prosecution.

The complainant and her husband Zulfiqar Ali PW changed their version again and again as per proceedings of Rescue 1122, one Ali Raza informed Rescue 112 through his Cell phone 0307-7062151 upon which the Rescue official responded this call where Zulfiqar PW stated that deceased Asad Ali was his step son and unknown boys quarrel with him. His statement was written by the official on their record which was thumb marked by Zulfiqar Ali PW. The dead body of deceased Asad Saleem was shifted to DHQ Hospital, Toba Tek Singh by the official of 1122 Rescue Service where Dr. Muhammad Zaman Akhtar received the dead body. I had produced the relevant record of Rescue 1122 Service in my defence.

During second investigation conducted by Muhammad Akbar Hayat Inspector of DIB Toba Tek Singh, the complainant and Zulfiqar Ali PW changed their versions which they were taken before the initial I.O. that deceased Asad Saleem died after receiving fist blows on his body and stated nothing that deceased received fist blows at the time of occurrence. Furthermore, before the second I.O. complainant and Zulfiqar did not depose that they accompanied the deceased at the time of occurrence. This shows that as it was unseen occurrence, the complainant and her husband changed their version again and again and deposed falsely."

The appellant did not examine himself under Section 340(2), Cr.P.C. He, however, had produced attested copies of report of Rescue 1122, Emergency Call form, Emergency Response Form of Rescue 1122 and statement of Zulfiqar Ali (Exh:DF to Exh:DI) as his defence evidence. The learned trial

Court, as aforesaid, convicted and sentenced the appellant. Hence, this criminal appeal.

4. Arguments heard. Record perused.

5. It may be observed that the case against the appellant hinges upon direct evidence, in the shape of ocular account, medical evidence and with a specific motive behind the occurrence. The ocular account has been furnished by *Mst.* Naseem Bibi, real mother (PW-1), Muhammad Asif Saleem, real brother (PW-2) and Zulfiqar Ali, step-father (PW-3). According to the complainant *Mst.* Naseem Bibi (PW-1), one day prior to the alleged occurrence a squabble, between the appellant and the deceased Asad Saleem, had taken place and as a consequence thereof, the appellant had extended threats to the deceased that he will be taught a lesson tomorrow and the appellant while executing his design had committed the murder, the detail of which has already been given in paragraph No. 2 of the judgment. It may be observed that nothing is available on record to depict the gravity or extent and cause behind the alleged squabble. Even the complainant had neither reported the said squabble and extension of threats to the police nor to the school administration/Headmaster/ Principal. She also did not make any effort to contact the appellant or any of his family elder as prevalent in society to patch up the matter. As per her own admission during cross-examination by the complainant *Mst.* Naseem Bibi, (PW-1), she or her son Asif Saleem did not accompany with Asad Saleem on 16.11.2019 at morning time for leaving/ dropping him in the school. She has further admitted that the inter se distance of place of occurrence and her residence to be about 3/3½ squares; she being a maid used to work in different houses. Muhammad Asif Saleem (PW-2) is labourer. He during his cross-examination stated that firstly he started labour with the Masson, thereafter he started his job in AK factory situated at Shorkot road Toba Tek Singh. He further deposed that

during the days, the occurrence had taken place, his mother and sister were employed in the said factory. Zulfiqar Ali (PW-3) has been employed as Naib Qasid at Govt. Municipal Degree College, Toba Tek Singh, which as per his own statement, is situated at a distance of about one K.M. away from the place of occurrence. He further admitted that *Mst.* Naseem Bibi and her daughter *Mst.* Anam are employees of AK Factory Shortkot road Toba Tek Singh, situated at the distance of 4 K.M. from his village Chak No. 327/JB Bhalair. He deposed that during the days of occurrence Asif Saleem PW used to drive motorbike Rickshaw to give pick and drop service to the female students. Even none of the PWs *i.e*. PW-1 (mother), PW-2 (brother) and PW-3 (step father) had made any effort to catch hold the appellant despite the fact that he was not armed with any lethal weapon. *Mst.* Naseem Bibi (PW-1) during her cross-examination admitted it as correct that his son Asif Saleem, his son Asad Saleem deceased, Amir Javed, Zulfiqar Ali and she herself were healthy and physically strong than the accused person. Such a strange and unnatural conduct of the said eye-witnesses is against the natural and ordinary human conduct in negation to the well-known adage that the blood is thicker than water, and as such creates doubt about the presence of the acclaimed eye-witnesses at the place of occurrence at the relevant time. Moreover, there is another noticeable aspect of the case that the complainant *Mst.* Naseem Bibi, as per application (Exh:PA), had alleged that the accused Usman along with unknown accused came in front of his son, unknown accused caught hold Asad Saleem's arms, Usman raised *lalkara* for teaching him a lesson for exchange of hot words and gave fist blows on front of body of his son who fell down and succumbed. However, in complaint Exh:PC followed her statement as PW-1, the complainant had made a conscious departure, from her previous statement, with *mala fide* by alleging that Usman gave fists and kicks blows to Asad Saleem, hitting on different parts in front of his body as well as on his sensitive parts. The post mortem

examination over the dead body of the deceased was conducted by Dr. Muhammad Qaiser Ghafoor, Medical Officer at DHQ Hospital Toba Tek Singh (CW-7) on 17.11.2019 at about 12.30 a.m. (night), after an inordinate delay of about 09/10 hours of the occurrence. He noted one injury *i.e.* Bullish discoloration, hard and coarse texturing of left testy seen. According to him, the probable time that elapsed within 12 hours between injury and death was immediate whereas between death and post mortem was nine to ten hours. According to his opinion, the cause of death was vasovagal shock leading to asphyxia which was enough to cause death of this person and that was ante-mortem in nature. Hence, apparently, it seems that the complainant's side, in order to bring the prosecution's case in line with the medical evidence has clearly made departure from her earlier statement. Undisputedly, the post-mortem examination over the dead body of the deceased was conducted **after the delay of about 9/10 hours of the occurrence**. The delay in conducting post mortem examination over the dead body of the deceased has exorbitantly caused serious suspicion about the **correctness and veracity of the prosecution's version.** Reliance in this regard is also placed upon the case titled *"Muhammad Rafique vs. The State* (2014 SCMR 1698) wherein their lordships have been pleased to observe as under:

"the F.I.R had been lodged with a noticeable delay and post-mortem examination of the deadbody had also been conducted with significant delay in the following afternoon. All these factors had pointed towards a real possibility that the murder in issue had remained unwitnessed and time had been consumed by the local police in procuring and planting eye-witnesses and in cooking up a story for the prosecution.

6. The motive, described above, being a propelling force for the commission of alleged offence in the instant case, is of much significance even for believing the presence of eye-witnesses at the spot for sustaining the

conviction. In addition to above and in view of ages old established principle of criminal dispensation of justice that if the prosecution, in a criminal case, alleges a specific motive behind the occurrence/commission of crime, particularly involving physical assault, the duty cast upon the prosecution, regarding proving the same either through some direct evidence or existence of some circumstances, but in the instant case, the prosecution has failed to perform its said obligation. Hence, in view of above, in absence of any other reason for presence of the PWs at the spot, such failure regarding proving of motive had also created a serious doubt about the presence of the PWs at the spot rendering their status to be one of the chance witnesses. Needless to observe that a chance witness has to undergo strict scrutiny so as to qualify as a reliable witness. Guidance to this effect can be sought from the cases reported as *"Naveed Asghar and 2 others v. The State"* (PLD 2021 SC 600) and *"Mst. Rukhsana Begum and others v. Sajjad and others* (2017 SCMR 596). After going through the evidence as discussed supra, I am of the considered view that presence of the eye-witnesses *i.e. Mst.* Naseem Bibi, complainant (PW-1), Muhammad Asif Saleem (PW-2) and Zulfiqar Ali (PW-3) is quite doubtful as they had failed to satisfy the Court about their presence at the relevant time at the Place of occurrence. Hence, as stated supra, the eye witnesses (PW-1 to PW-3) being closely related are chance witnesses, therefore, they cannot be believed without strong corroboration from any other reliable evidence.

7. For what has been discussed above, in my judicial estimation, the prosecution has badly failed to prove its case against the appellant. It is cardinal principle of criminal jurisprudence that a single instance causing a reasonable doubt in the mind of the Court entitles the accused to the benefit of doubt not as a matter of grace but as a matter of right. In this context, reliance is placed on the judgment reported as *Muhammad Akram vs. The*

State (2009 SCMR 230), wherein the Hon'ble Supreme Court has held as under:

"The nutshell of the whole discussion is that the prosecution case is not free from doubt. It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

Therefore, this appeal is **allowed**, the conviction and sentence recorded by the learned trial Court against the appellant Usman Jaffar through the impugned judgment dated 29.09.2021 is set aside and he is acquitted of the charge. The appellant is in jail, he shall be released forthwith, if not required in any other case.

(A.A.K.) **Appeal allowed.**

2025 Y L R 75

[Lahore (Multan Bench)]

Before Ch. Abdul Aziz and Anwaarul Haq Pannun, JJ

Nayyar Abbas---Appellant

Versus

The State and others---Respondents

Criminal Appeal No. 549 of 2023, heard on 13th February, 2024.

(a) Criminal trial---

----Police witnesses---Scope---Police Officials, in absence of any malice or grudge against the accused on their part, were as good witnesses of recovery as any respectable of the locality.

(b) Criminal trial---

----Recovery memo---Object and scope---One of the objects behind preparing the recovery memo. at the spot with its due attestation by the witnesses was to ensure the fairness of the process of recovery so as to exclude the possibility of fabrication, misappropriation or damage to the seized articles either to favour an accused or for his false implication---Recovery memo. must contain all relevant particulars of the things seized or taken into possession to establish its identity beyond any doubt---Requirement behind attestation of a recovery memo. by the marginal witnesses at the spot was part of an attempt to ensure that the recovery had transparently been effected as fulfillment of such requirements was necessary to exclude the possibility of false implication or any manipulation prompted by human weaknesses and to prevent the abuse of process of law and misuse of authority---Attestation of the recovery memo. by two witnesses acting as musheer also ensured that a single person at his whims might not abuse the process of law and misuse his authority---Preparation of such recovery

memo. was also necessary to prove the case by the prosecution at trial against the accused.

Zafar Khan and others v. The State 2022 SCMR 864 rel.

(c) Control of Narcotic Substances Act (XXV of 1997)---

----S.9(c)---Possession of narcotic substances---Appreciation of evidence---Recovery memo---Doubtful---Prosecution case was that 2250-grams charas was recovered from the possession of the accused---Record showed that recovery memo. of charas neither contained the number nor the date of the FIR nor the name of police station---Complainant had admitted that in recovery memo. there was no specific mention of place where the contraband was allegedly recovered from the accused---Furthermore, the recovery witness in his cross-examination had also deposed that he did not remember as to what case FIR number was written on the recovery memo. at the time when he signed the same---In view of such depositions of the witnesses, serious doubt was casted upon the authenticity of preparation of recovery memo.---Moreover, tenor of the testimonies of prosecution's witnesses clearly revealed the recovery memo. was prepared after registration of the FIR in the case, therefore, no legal sanctity could be attached to such document---Circumstances established that the prosecution had failed to prove its case against the accused beyond any shadow of doubt---Appeal against conviction was accordingly allowed.

Zafar Khan and another v. The State 2022 SCMR 864 and The State through Advocate-General, Khyber Pakhtunkhwa, Peshawar v. Fayaz Khan PLD 2019 FSC 21 rel.

(d) Criminal trial---

----Benefit of doubt---Principle---Single instance causing a reasonable doubt in the mind of the Court entitles the accused to the benefit of doubt not as a matter of grace but as a matter of right.

Daniel Boyd (Muslim Name Saifullah) and another v. The State 1992 SCMR 196; Gul Dast Khan v. The State 2009 SCMR 431; Muhammad Ashraf alias Acchu v. The State 2019 SCMR 652; Abdul Jabbar and another v. The State 2019 SCMR 129; Mst. Asia Bibi v. The State and others PLD 2019 SC 64; Muhammad Imran v. The State 2020 SCMR 857 and Muhammad Imtiaz Baig and another v. The State through Prosecutor General, Punjab, Lahore and another 2024 SCMR 1191 rel.

Ch. Umar Hayat, Assisted by Amer Manzoor, Muhammad Waqas Anjum and Syed Naeem Ali for Appellant.

M. Abdul Wadood, Addl. Prosecutor General and Malik Riaz Ahmad Saghla, Deputy Prosecutor General for the State.

Date of hearing: 13th February, 2024.

Judgment

Anwaarul Haq Pannun, J.---Nayyar Abbas, the appellant, was tried in criminal case registered vide FIR No.458/2022 dated 16.08.2022, offence under Section 9(c) of the Control of Narcotic Substances Act, 1997, at Police Station Qadirpur Raan, Multan, as allegedly recovery of two packets of charas total weighing 2250 grams was effected out of his possession.

2. After usual investigation, the appellant was sent up to face trial. Formal charge was framed against the appellant to which he pleaded not guilty and claimed trial. The prosecution examined five witnesses i.e. Sanobar Ali, ASI (PW-1/complainant), Muhammad Hanif, S.I (PW-2/Investigating Officer and transmitter of case property), Abdul Majeed, 2713/C (PW-3/witness of recovery memo. Exh.PA), Asif Sultan, 938/HC (PW-4/scribe of formal FIR and Moharrar of police station) and Abdul Razzaq, 1314/C (PW-5/transmitter of complaint Exh.PA) to prove the charge. Thereafter, statement of the appellant under Section 342, Cr.P.C was recorded, in which he refuted all the allegations levelled against him and professed his innocence. The appellant did not opt to appear as his own witness under

Section 340(2), Cr.P.C, however, he produced the documents (Ex.DA, Ex.DB and Mark-C) as his defence evidence. On conclusion of trial, the learned trial Court, vide its judgment dated 15.05.2023, has convicted the appellant under Section 9(c) of C.N.S.A, 1997 and sentenced him to five years and six months R.I. along with fine of Rs.25,000/- and in default thereof to further undergo five months and fifteen days S.I. Benefit of Section 382-B, Cr.P.C has, however, been given to the appellant.

3. Arguments heard. Record perused.

4. The legislature in its own enviable wisdom, while consolidating and amending the laws relating to criminal procedure, at the fag end of 19th Century, enacted the Code of Criminal Procedure (Act of V of 1898) which is commonly known as the Code. It came into force on the first day of July 1898. The Code provides a uniform law of procedure so far as criminal branch of administration of justice is concerned. The Code also contains in it the provisions specifying the procedure, including the mode and manner along with the authority for making search either of a person or a place besides enumerating the circumstances warranting such exercise. A police officer is authorized to search a person if arrested by him under a warrant providing for taking of bail or without warrant or by a private person. A search may be made of such person for placing in safe custody all articles other than necessary wearing apparels found upon him; a mode of searching of a woman has to be made, if necessary, by another woman with strict regard to decency; the police officer is also authorized to arrest any person without warrant, in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; the officer in-charge of a police station or a police officer making an investigation, having reasonable grounds for believing that anything necessary for the purpose of investigation into an offence which he is authorized to investigate, may be found in any place within the limits of police station, of which he is in-charge or to which he is attached and that

such thing cannot in his opinion otherwise be obtained without undue delay may after recording in writing the grounds of his belief and while specifying in such writing so far as possible, the thing for which search is to be made, make such search or cause such search to be made for such thing in any place within the limits of such police station; the officer incharge of police station is required another to issue search warrant. [Under Sections 51, 52, 54, 165 and 166, Cr.P.C. respectively]. The Chapter VII Part-D of Cr.P.C is comprised over General provisions relating to searches i.e. 101 to 105, out of which, the provision of Section 103, Cr.P.C specifically requires that whenever a search of a place is to be made by a police officer under this Chapter, two or more respectable inhabitants of the locality are required to attend and witness the search. He may issue an order in writing to them or any of them to associate with search, consequently the search shall be made in presence of such witnesses and a list of all things seized in course of said search and of places in which they are respectively found, shall also be prepared by such officer or other person and it shall also be signed by such witnesses. No person witnessing the search under this Section shall be required to attend the Court as a witness of search unless he has specifically been summoned by the Court. Moreover, the occupant of place searched or some person on his behalf shall in every instance be permitted to attend the search and a copy of list prepared and signed by the said witness shall be delivered to such occupant or person incharge of the close place allowing such search at his request. This provision of law has been subjected to interpretation by the Superior Courts. A judicial consensus has however emerged to the effect that Section 103, Cr.P.C is not stricto senso applicable where accused in pursuance of making of his disclosure, during investigation leads to some recovery. Similarly, in case, the recovery is effected from personal search of an accused or otherwise, by the police officer, the requirement provided for showing a reason for not doing so, association of two respectable persons of the locality may be dispensed with. Unless it is shown by the prosecution that in the circumstances of the case it was not

possible to have two musheer from the public, the requirement of two members of the public of the locality in recovery proceedings is mandatory. The police officials, in absence of any malice or grudge against the accused, on their part, had also been held to be as good witnesses of recovery as the respectable of the locality.

5. The United Nations (UN), International Organization was established on October 24, 1945. The United Nations (UN) was the second multi-purposes international organization established in the 20th century that was worldwide in scope and membership. Its predecessor, the League of Nations, was created by the Treaty of Versailles in 1919 and disbanded in 1946. According to its Charter, the UN aims:-to save succeeding generations from the scourge of war, .to reaffirm faith in fundamental human rights, to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom. In addition to maintaining peace and security, other important objectives include developing friendly relations among countries based on respect for the principles of equal rights and self-determination of peoples; achieving worldwide cooperation to solve international economic, social, cultural, and humanitarian problems; respecting and promoting human rights; and serving as a center where countries can coordinate their actions and activities toward these various ends. By and large all the nations/ countries after becoming its members and signing undertake to fulfil their obligations duly caste upon them being signatories of the charters protocols etc. Through certain International Conventions various steps have been taken by the members of the United Nations at various times. The convention against psychotropic substances done at Viena on 21st February 1971 followed by the Single Convention on Narcotic drugs done at New York on 30 March i.e. (i) The Single Convention on Narcotic Drugs done at New York on the 30th March, 1961, as amended by the 1972 Protocol done at Geneva on the 25th March, 1972; (ii) The Convention Against Psychotropic

Substances done at Vienna on the 21st February, 1971; (iii) The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances done at Vienna on the 20th December, 1988.

6. The legislature deeming it expedient to consolidate and amend the laws relating to narcotic drugs, psychotropic substances, [controlled substances] and control the production, processing and trafficking of such drugs and [to provide for forfeiture of property derived from or used in illicit traffic in narcotic drugs, psychotropic substances and controlled substances and to implement the provisions of the International Conventions on narcotic drugs, psychotropic substances and controlled substances]; passed a special law, having overriding effect on other laws on the subject, in the form of The Control of Narcotic Substance Act (XXV) of 1997 hereinafter to be called as "CNSA", and it received the assent of the President of Islamic Republic of Pakistan on 7th July, 1997 as required under Article 75 of the Constitution. Pakistan is an abiding member of the United Nations (UN). For achieving its object as aforesaid, behind the legislation, the provisions contained in Chapter III "SEARCH AND INVESTIGATION" of CNSA also provide a mechanism for conducting the proceedings viz-a-viz search and investigation. These provisions (20 to 24) distinctly deals with the power to issue warrants; entry, search, seizure and arrest without warrant; seizure and arrest in public place; stop and search conveyance; under cover and controlled delivery operations. However, under Section 25 of CNSA, except the provision of Section 103 of Cr.P.C, the remaining provisions of Code, have mutatis mutandis, been made applicable to all searches and arrest in, so far as, they are not inconsistent with the aforesaid Provisions of the ibid Act. It is important to point out that as a result of arrest of a suspect or search of a place, as aforesaid, committing or disclosing the commission of an offence under this Act, as a mandatory legal requirement, a document has to be prepared, showing the recovery made either from the possession or on pointing out of an accused. Such document also known as recovery memo. is deemed to be a foundational document particularly in case of theft and the

cases under CNSA, to undertake further investigation after registration of a formal FIR. One of the object behind preparing the recovery memo. at the spot with its due attestation by the witnesses is to ensure the fairness of the process of recovery so as to exclude the possibility of fabrication, misappropriation or damage to the seized articles either to favour an accused or for his false implication. The recovery memo. must contain all relevant particulars of the things seized or taken into possession to establish its identity beyond any doubt. The requirement behind attestation of a recovery memo. by the marginal witnesses at the spot is a part of an attempt to ensure that the recovery has transparently been effected as fulfillment of such requirements is necessary to exclude the possibility of false implication or any manipulation prompted by the human weaknesses and to prevent the abuse of process of law and misuse of authority. The attestation of the recovery memo. by two witnesses acting as musheer also ensures that a single person at his whims may not abuse the process of law and misuse his authority. The preparation of such recovery memo. is also necessary to prove the case by the prosecution at trial against the accused. The Hon'ble Supreme Court in the case of "Zafar Khan and others v. The State" (2022 SCMR 864) emphatically held as under:-

"In the cases of narcotic substances, recovery memo. is a basic document, which should be prepared by the Seizing Officer, at the time of the recovered articles, containing a list thereof, in presence of two or more respectable witnesses and memo. to be signed by such witnesses. The main object of preparing the recovery memo. at the spot and with signatures of the witnesses is to ensure that the recovery is effected in presence of the marginal witnesses, honestly and fairly, so as to exclude the possibility of false implication and fabrication. Once the recovery memo. is prepared, the next step for the prosecution is to produce the same before the Trial Court, to prove the recovery of the material and preparation of the memo. through the scribe and the marginal witnesses."

7. It may further be observed that the fulfillment of above emphasized mandatory requirement in preparation of a recovery memo., is also essential for framing of a charge by the Court. The framing of a proper charge against the accused under Chapter XIX of Cr.P.C, enables him to defend his position. It has rightly been held in case of "Mumtaz Ali and another v. The State" (2000 P Cr.L J 367[Karachi]) by an Hon'ble Division Bench that "the charge must contain all material particulars as to time, place as well as specific name of the alleged offence, the manner in which the offence was committed and the particulars of the accused so as to afford the opportunity to explain the matter with which he is charged. The purpose behind giving such particulars is that the accused should prepare his case accordingly and may not be mislead in preparing his defence." A defective charge seriously prejudice the cause of the accused. The fulfilment of abovesaid requirement is also relevant to achieve the objects deeply ingrained in the provision of Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973 as a one of the fundamental right, which requires that "For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.".

8. While taking into consideration the relevant provisions of law, i.e. Code of Criminal Procedure, 1898, Police Rules (22.16, 22.18, 22.70, 27.11, 27.12) of 1934, Qanun-e-Shahadat Order, 1984 (X of 1984), [The Lahore High Court Rules and Orders (civil and criminal) ("High Court Rules") Part-B of Chapter 24 of Volume III], [Control of Narcotic Substances (Government Analysts), Rules, 2011], rules and case law on the subject as to the case property and exhibition thereof, the Hon'ble Supreme Court of Pakistan in the case of "Ahmad Ali and others v. The State" (2023 SCMR 781) except the form of recovery memo., thus the same is being dealt with hereinafter, has exhaustively dealt with this subject. The Police Act of 1861, was one of such a piece of legislation, which was adopted through the adoption of Central Acts and Ordinances Order of 1949, repealed by the Police Order, 2002. The Police Rules 1934 framed under the Police Act, 1861 have

however been protected under Article 185 of the Police Order, 2002. Rule 22.16 of the Police Rules, 1934 ("the Police Rules") deals with the "Case property". Sub-rule (1) thereof requires, inter alia, that in certain circumstances, police shall seize weapons, articles and property in connection with criminal cases taking charge of property which is unclaimed i.e. when the officer in-charge of police-station forwards an accused person to a Magistrate or takes security for his appearance before such Magistrate under this section, he shall send to such Magistrate any weapon or other article which it may be necessary to produce before him, and shall require the complainant (if any) and so many of the persons who appear to such officer to be acquainted with the circumstances of the case as he may think necessary to execute a bond to appear before the Magistrate as thereby directed and prosecute or give evidence (as the case may be) in the matter of the charge against the accused; in the course of searches made in Police Stations; Search of arrested person; Search by Police Officer making an investigation; when officer incharge of Police Station may require another to issue search warrant; inspection of weight and measures; Powers to Police to seize property suspected to be stolen; and with regard to unclaimed property and (g) under the provision of local and special laws. [Sections i.e. 170, 51, 165, 166, 153, 550 of Cr.P.C, 25 of the Police Act]. Sub-rule (2) thereof provides, inter alia, that each weapon, article or property (not being cattle) seized under the above sub-rule shall be marked or labelled with the name of the person from whom, or the place where, it was seized, and reference to the case diary or other report submitted from the police station. If articles are made up into a parcel, the parcel shall be secured with sealing wax, bearing the seal impression of the responsible officer, and shall similarly be marked or labelled. Such articles or parcels shall be placed in safe custody, pending disposal as provided by law or rule. Sub-rule (3) thereof provides, inter alia, that the police shall send to headquarters or to magisterial outposts all weapons, articles and property connected with cases sent for trial, as well as suspicious, unclaimed and other property, when ordered to do so by a

competent Magistrate. Sub-rule (4) thereof provided, inter alia, that motor vehicles detained or seized by the police in connection with cases or accidents shall be produced before a Magistrate after rapid investigation or by means of in-complete challan. The evidence relating to the identity or condition of the vehicle should be led and disposed of at an early date, and the Magistrate should then be invited to exercise the discretion vested in him by section 516-A, Code of Criminal Procedure, to order that the vehicle be made over to the owner pending conclusion of the case on security to be produced wherever demanded by the Court. It may be observed that the police rules are fully invokable and are to be followed by the police officer while conducting investigation and in Chapter-XXV, Rule 25.23 (1) (a), (b) and (c) of the Police Rules, 1934, a synopsis of a model form for preparing a memo. of recovery or things to be seized under Section 103, of Cr.PC has been prescribed which can be used by making besuiting changes in it. Although under the provision of Section 25 of CNSA, except Section 103 Cr.P.C, rest of the provisions of the Code of Criminal Procedure, have been made applicable mutatis mutandis, to all searches and arrests in so far as they are not inconsistent with the provision of Sections 20,21,22 and 23 of the Act and no bar has been placed against following the police rules, regulating the investigation i.e. the process of collection of evidence. It may be observed that Section 25 of CNSA, only bars the requirement of association of two respectable persons from the locality when the search is made of a house and the association of the person or inmate of the house or the place, as observed hereinabove, in the preceding paragraph No.4 of the judgment.

9. We have noticed that recovery memo. of charas (Exh.PA) neither contains the number nor the date of the FIR nor the name of police station. When the complainant (PW-1) was confronted with the aforementioned factum of non-mentioning the number of FIR, date and name of police station in the recovery memo. (Exh.PA), during his cross-examination, he had replied as follows:- "When Abdul Razzaq returned at the spot while taking FIR with him I got mentioned the case FIR number on recovery memo. as 458/22. At this stage,

the witness has perused the record and replied and case FIR number is missing. He further has deposed that the said case FIR number is also not available on recovery memo." PW-1 has further admitted that "in recovery memo. Exh.PA there is no specific mention of place where the contraband was allegedly recovered from the accused". Furthermore, the recovery witness (PW-3) in his cross-examination has also deposed that "I don't remember as to what case FIR number was written on the recovery memo. Exh.PA at the time when I signed the same". In view of aforementioned depositions of the PWs, serious doubt is caste upon the authenticity of preparation of recovery memo. (Exh.PA). Moreover, tenor of the testimonies of aforesaid prosecution's witnesses clearly reveals that the recovery memo. (Exh.PA) was prepared after registration of the FIR in this case, therefore, no legal sanctity can be attached to such document. In the above context, reliance is placed on the dictums reported as Zafar Khan and another v. The State (2022 SCMR 864) and The State through Advocate-General, Khyber Pakhtunkhwa, Peshawar v. Fayaz Khan (PLD 2019 Federal Shariat Court 21). It is cardinal principle of criminal jurisprudence that a single instance causing a reasonable doubt in the mind of the Court entitles the accused to the benefit of doubt not as a matter of grace but as a matter of right. Moreover, once a single loophole/lacuna is observed in a case presented by the prosecution, the benefit whereof in the prosecution case automatically goes in favour of an accused. Reliance in this regard is placed on the dictums reported as Daniel Boyd (Muslim Name Saifullah) and another v. The State (1992 SCMR 196); Gul Dast Khan v. The State (2009 SCMR 431); Muhammad Ashraf alias Acchu v. The State (2019 SCMR 652); Abdul Jabbar and another v. The State (2019 SCMR 129); Mst. Asia Bibi v. The State and others (PLD 2019 SC 64); Muhammad Imran v. The State (2020 SCMR 857) and Muhammad Imtiaz Baig and another v. The State through Prosecutor General, Punjab, Lahore and another (2024 SCMR 1191). Therefore, the conviction and sentence recorded by the learned trial Court against the appellant through the impugned judgment dated 15.05.2023 are set aside and he is acquitted of the charge. The appellant is in jail, he shall be

released forthwith if not required in any other case. Accordingly, this appeal is allowed.

JK/N-22/L **Appeal allowed.**

2018 LHC 3597

[Lahore (Multan Bench)]

Writ Petition No.15442 of 2018

Muhammad Idrees ---Appellant

Versus

Special Judge, Anti-Terrorism Court, etc ---Respondents

Sr.No.of order/ Proceedings	Date of order/ Proceedings	Order with signatures of Judge, and that of parties or counsel, where necessary.
02	**19.11.2018**	Sardar Mehboob, Advocate for the petitioner. Mr. Iftikhar-ul-Haq, Additional Prosecutor General alongwith Zakir Inspector. Mr. Mudassir Altaf Qureshi, Advocate for respondent No.2.

Through this Constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner has challenged the vires of order dated 08.10.2018, passed by the learned Judge, Anti-Terrorism Court-II, Multan (Respondent No.1) whereby application filed by the petitioner under Section 23 of the Anti- Terrorism Act, 1997 (hereinafter to be referred as „the Act") in case FIR No.381 dated 16.06.2018, registered at Police Station Gaggo, District Vehari, for offences under Sections 302, 324 & 34 PPC read with Section 7 of the Act, stood dismissed.

2. Briefly stating, the facts of the case, leading to the filing of the instant writ petition are that respondent No.2 had lodged the aforesaid criminal case against the petitioner and others with the allegation that on 16.06.2018, at about 7:00 p.m., he alongwith his son namely Ali Raza, nephew Muhammad Nawaz and other relatives, was sitting on a „*Thara*" in front of their house when the petitioner alongwith his co-accused, armed with fire arm weapons, came there, while making firing and creating panic

in the area. Due to fear, they tried to rush to their house in order to save their lives but in the meanwhile, accused Shafiq made a fire shot with his pistol 30- bore at the chest of Muhammad Nawaz, who after receiving injury, fell down on the ground. Idrees (petitioner) made fire shot with his rifle which landed at the chest of his son Ali Raza who also fell down on the ground. The complainant and other PWs tried to rescue the injured persons but they succumbed to the injuries at the spot. Accused Qaiser made fire shot with his pistol 30-bore hitting Muhammad Ramzan at his little finger of right hand, Khalil inflicted butt blows of his pistol to Allah Rakha causing injuries on his head.

The motive behind the occurrence has been stated to be a quarrel taken place between Muhammad Nawaz (deceased) and Qaiser accused during the cricket match at about 4:30 p.m., on the same day.

3. Learned counsel for the petitioner submits that bare reading of the FIR transpires that the occurrence has taken place on account of a private motive inter-se the parties and the learned Special Judge Anti- Terrorism Court-II, Multan has failed in taking into consideration that there exist neither any circumstance nor any material available on the record for attracting Section 6 of the Act, hence the impugned order is not sustainable under the law. He prayed for acceptance of the writ petitioner while relying upon *"Waris Ali and 5 others vs. The State"* **(2017 SCMR 1572)**.

4. On the other hand, learned counsel appearing for respondent No.2 as well as learned Additional Prosecutor General have submitted that since one of the deceased namely Muhammad Nawaz was an army personnel, therefore, keeping in view the provision of Sections 2

(a) & 6 (2) (n) of the Act, the impugned order has rightly been passed. Learned counsel for respondent No.2 has relied upon the cases reported as *Province of Punjab through Secretary Punjab Public Prosecution Department and another vs. Muhammad Rafique and others* **(PLD 2018 Supreme Court 178)**, *Kashif Ali vs. The Judge, Anti-Terrorism Court, No.II, Lahore* **(PLD 2016 Supreme Court 951)** and *Mst. Raheela Nasreen*

vs. The State and another **(2002 SCMR 908)** and has prayed for dismissal of the instant petition.

5. Arguments heard. Record perused.

6. The question, pithily, before us in the instant proceedings, requiring its determination, is whether or not, the instant occurrence attracts the provisions of Section 7 of the Act rendering the case to be cognizable by the Anti-Terrorism Court, in which murder of Muhammad Nawaz deceased, member of the Armed Forces, had taken place on account of private motive inter-se the parties.

7. In order to appreciate the contentions raised at bar, It will be convenient to firstly reproduce the preamble and other relevant provisions of the Act which are as under:-

> ***"An Act to provide for the prevention of terrorism, sectarian violence and for speedy trial of heinous offences."***
>
> ***2(a). "armed forces' means the Military, Naval and Air Forces of Pakistan and the Reserves of such Forces.***
>
> ***(b). "Civil armed forces" means the Frontier Constabulary, Frontier Corps, Pakistan Coast Guards, Pakistan Rangers or any other civil armed force notified by the Federal Government as such.***
>
> ***6(2)(n). Involves serious violence against a member of the police force, armed forces, civil armed forces, or a public servant."***

8. The contention of learned counsel for respondent No.2 that since one of the deceased namely Muhammad Nawaz was a member of the Armed Forces, therefore, combine reading of Sections 2(a), 2(b) & 6(2)(n) of the Act will bring the case of the prosecution, without any further qualifying factor, automatically within the cognizance of Anti-Terrorism Court, does not commensurate with the facts and circumstances of the instant case.

9. The Anti-Terrorism Act, 1997 was promulgated on 20th August 1997, as the legislation felt it expedient because the terrorist of different colours and creeds, backed by various inimical quarters, motivated by

different ideologies, were desperately attacking not only the civilian populace but also the men in uniform, public servants and institutions creating a sense of fear, despair and insecurity amongst the public at large apart from degrading the image of the country abroad. It appears that intention of the legislature for enactment of the Act was to give clear message to the terrorists, hitting even the men in uniform, who were duly trained and equipped with sophisticated weapons to combat such nasty elements for internal and external security of the country, that they will be dealt with iron hand under the aforesaid provisions of the Act by the Anti-Terrorism Courts.

10. The law was supposed to work as a moral boosting factor not only for the civilians but also for the men in uniform, therefore, taking into consideration the facts and circumstances of the case, we have no hesitation to hold, while keeping in view the object of the Act expressed in the preamble, that the provisions of Sections 6(2)(n) of the Act can only be attracted where a person belonging to the Forces mentioned supra is targeted with violence while discharging his duties, performing his official functions or the action complained of is designed with the object of creating a sense of fear and insecurity, except in the cases where the propelling force behind the occurrence is private motive.

11. The august Supreme Court, in case Waris Ali (supra), while discussing the same question, has held as under:-

> "24. True, that in section 6 read with section 7 of the Special Act, offences of murder, attempted murder or causing bodily hurt or injury have been made cognizable by the Special Court, however, from the qualifying words, preceding the description of offences under subsection (1) of section 6 read with the provisions of section 7 the intention of the legislature becomes perceivable/visible that in committing these crimes essentially the element of "*terrorism"* shall be persuasive factor however other category of crimes duly specified and

listed in Special Act shall fall within the ambit of provision of same being act of terrorism in that regard. The manifest intent of the Legislature does not leave behind any doubt for debate."

12. Bare perusal of the FIR shows that the complainant has set up his case with the narration that the motive behind the occurrence was a quarrel, taken place earlier at 4:30 p.m., between deceased Muhammad Nawaz and accused Qaiser during the cricket match on the same day. Therefore, we feel no difficulty in concluding that the main occurrence, which took place at 7:00 p.m., was sequel of the motive which had taken place 2-½ hours before due to personal grudge nourished in the mind of Qaiser, who had allegedly persuaded his co-accused, to commit the crime, in furtherance of their common intention i.e. to avenge the quarrel. No other inference regarding the cause of murder can be drawn in the circumstances of this case. Even during investigation, nothing adverse has come on the surface of record. We are of the opinion that in order to attract the provisions of the Act, the act complained of must have a serious nexus with the provision of Section 6. To exercise the jurisdiction under the Act ibid, „design" or „purpose" behind the action coupled with *mens-rea* to constitute the offence of terrorism is *sine-qua-non* but the same has not been taken into consideration by the learned court below while deciding the application of the petitioner. There is also nothing on record to show that life and liberty of large number of persons in the village was put in danger because of the firing of the accused party. In absence of solid and admissible evidence, mere conjectures and surmises, how so strong may be, cannot substitute the reality.

13. In a judgment passed by learned Division Bench of this Court reported as *Nazim Khan vs. Special Judge, Anti-Terrorism Court* **(2002 MLD 1433)**, it has been held as under:-

"---incident having sparked off over a triviality bearing no nexus with the discharge of the official duty being the sine qua non in the contest of

> things for assumption of jurisdiction by the Special Court constituted under the Anti-Terrorism Act, 1997 in terms of section 6 read with section 2(e) ibid…."

Similar view has been taken in case *Muhammad Riaz vs. Mian Khadim Hussain, Additional Sessions Judge, Mianwali and 11 others* **(2002 YLR 203)** Lahore (Full Bench Judgment).

14. In the instant case, as observed above, the occurrence had taken place as a result of private motive inter-se the parties, hence, addition of Section 7 of the Act in the FIR and submission of challan before the Anti-Terrorism Court is declared to be illegal and without lawful authority.

15. In view of what has been discussed above, the instant petition is **allowed**, impugned order dated 08.10.2018 is set aside, the application of the petitioner moved under Section 23 of the Act is accepted and addition of aforesaid Section is declared to be illegal, improper and of no legal effect. Learned Special Judge Anti- Terrorism Court-II, Multan is directed to transfer the record of the aforesaid case to the court of ordinary jurisdiction for further proceedings in accordance with law.

(Mujahid Mustaqeem Ahmed) **(Anwaarul Haq Pannun)**

Judge **Judge**

Approved for reporting

Judge

2019 LHC 2835

IN THE LAHORE HIGH COURT, BAHAWALPUR BENCH BAHAWALPUR

Murder Reference No.49 of 2016

The State versus Ali Ahmad

Criminal Appeal No.406 of 2016

Ali Ahmad versus The State, etc.

Date of hearing	**15.01.2019**
The Appellant by	Syed Asim Ali Bukhari, Advocate.
The Complainant by	Nemo
The State by	Mr. Najeeb Ullah Khan Jattoi, Deputy Prosecutor General.

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Anwaarul Haq Panun, J. This single judgment shall decide Murder Reference No.49 of 2016 submitted under Section 374 Cr.P.C by the learned trial Court and Criminal Appeal No.406 of 2016, filed under Section 410 Cr.P.C by the appellant against the judgment dated 30.06.2016 passed in case FIR No.439/2014, dated 24.10.2014, offence under Section

302 PPC, registered at Police Station Mecloed Gunj, District Bahawalnagar by the learned Addl. Sessions Judge, Minchinabad, whereby the appellant has been convicted and sentenced as under:-

Under Section 302(b) PPC

"Death sentence alongwith Rs.2,00,000/- as compensation u/s 544-A Cr.P.C. payable to the legal heirs of the deceased or in default thereof, to further

undergo S.I. for six months. The compensation amount shall be recoverable as arrears of land revenue."

2. The case of the prosecution as contained in written complaint (Exh.PB), on the basis of which, FIR (Exh.,PB/1) was chalked out, reiterated by Muhammad Umar, complainant, resident of Mauza Sharafpur, Tehsil Minchanabad, District Bahawalnagar, while appearing in the Court as (PW-4) is, to the effect that:-

"On the night of 24-10-2014, I alongwith my younger brother Zahid Hussain deceased of this case, Iftikhar Hussain and Muhammad Nazim PW went to attend Rasm-e-Hina ceremony of Naveed Iqbal Bhandara at Mohallah Gulab Shah, Mecloed Gunj. The host had arranged a stage and a tent was established for this ceremony. My brother Zahid Hussain sat with the groom on a Sofa set. At about 01:00 am, Ali Ahmad accused present in the Court armed with pistol 30- bore alongwith an unknown person came there. They asked my brother to get up from the said Sofa. My brother refused, on which the unknown persons asked Ali Ahmad to shoot my brother and murder him, on which Ali Ahmad accused present in the Court took out his pistol from the „nefa" of his „shalwar" and made straight fire which landed on the back side of head of my brother Zahid Hussain, who after sustaining the fire shot fell on the Sofa while both of the accused persons fled away from the spot. I alongwith other PWs attended my brother but he succumbed to the injuries at the spot. The accused persons had committed the murder of my brother on the instigation of our some opponent. Police

reached at the spot and I made statement Exh.PB which was read over to me and I signed the same as token of its correctness. My signature is Exh.PB/1."

3. The investigation was encapsulated into report under section 173 Cr.P.C, which was duly submitted before the learned trial Court, after taking cognizance of the offence, the learned trial Judge after supplying the requisite copies of the statements under Section 265(c) Cr.P.C, charge sheeted the accused, to which he pleaded not guilty, while professing his innocence, claimed trial. The learned trial Judge directed the prosecution to produce its evidence for establishing the charge. The prosecution has produced as many as 10 PWs, in order to prove the charge against the appellant. The medical evidence in the case, has been furnished by Dr. Syed Hasnain, M.O (PW-1), who deposed that on 24.10.2014, while conducting postmortem examination over the dead body of Zahid Hussain, he observed the following injuries:-

1. A lacerated wound about 1 cm in diameter on the posterior side of the skull in the occipital region. Wound track goes inward towards the skull cavity. Blood and brain matter was coming out of the wound edges.
2. A lacerated wound about 1-1/2 cm in diameter with everted margin on the right side of vault of skull. Blood and brain matter was coming out of the wound.

CRANIUM AND SPINAL CORD

Scalp was torn on the posterior and lateral side of skull. Skull bone in the occipital and right temporal region was fracture and pieces of wound were missing from the fracture side. Membranes were damaged. Brain matter was damaged and fresh

blood was present in the skull and wound track in the brain.

OPINION:-

"In my opinion, the cause of death in this case is the injury No.1 which damaged the brain matter. Injury to the brain resulted in severe bleeding and immediately death occurred. This injury was ante-mortem and caused by firearm and sufficient enough to cause death in normal course of life. Probable time between injury and death was within 15 minutes and between death and post mortem was within 12 hours.

Muhammad Umar, complainant (PW-4) and Iftikhar Hussain (PW-5) have furnished ocular account. Muhammad Aslam SI (PW-10), the Investigating Officer of the case, arrested the appellant, recovered pistol 30 bore on his pointing out, took the same into possession through recovery memo (Exh.PE). The evidence of rest of the PWs is formal in nature, therefore, it needs no discussion. The learned Prosecutor gave up the prosecution witnesses namely Shahid Hussain, Aftab Hussain and Muhammad Nazam, and after tendering positive reports of PFSA, Lahore (Exh.PM and Exh.PN) closed the prosecution"s evidence. The accused/appellant when examined under Section 342 Cr.P.C, refuted the entire evidence produced by the prosecution and in reply to a question as to why this case against him and why the PWs have deposed against him, replied as under:-

"The PWs have deposed against me maliciously in order to extort money from me and while substituting the real culprit. The roznamcha of

police station was stopped and the case was registered after consultation and deliberation with ulterior motive."

In responding to question have you anything else to say, the accused/appellant replied as under:-

> "I am innocent. I had not committed the murder of deceased. I had neither any motive nor had any weapon at the time of above detailed ceremony. Many persons of "bradari" of deceased made aerial firing while standing besides the stage as well as from behind the stage while being drunk and watching "Mujra" etc. All of a sudden a fire shot hit the deceased. Instead of actual culprits, I was arrayed in this case due to malice and ulterior motive. Previously a murder case was registered and tried by this Court against my two brothers who were acquitted by this Court, so, on the instigation of our previous opponent, I was involved in this case. I am innocent. I pray acquittal.

The appellant neither opted to appear as his own witness under Section 340(2) Cr.P.C. nor produced any defence evidence. On the conclusion of trial, the learned trial Court has convicted and sentenced the appellant through the impugned judgment dated 30.06.2016 as alluded to in para No.1 of the instant judgment. Hence, this appeal.

4. Arguments heard and record perused.

5. According to the FIR, the alleged unfortunate incident took place at about 1.30 a.m. (night) on 24.10.2014, and was allegedly reported to the police at 1.30 a.m., also the same night. The distance between the place of occurrence and the police station is ½ kilometer. Muhammad Umar complainant had not mentioned the time of occurrence in

complaint (Exh.PB). However, Muhammad Aslam SI (PW-10) has endorsed the time 1:30 a.m. (night) on receiving the complaint at Mohallah Ghulab Shah, Mecload Gunj. Since the police station statedly was not located at a far away from the place of occurrence, therefore, reaching of the police at the spot within a short period after the occurrence being possible, cannot be ruled out, but the presence of the eye-witnesses at the relevant time at the place where the occurrence took place is a different phenomenon. Even otherwise, the FIR recorded at the spot or elsewhere from the police stations are always seen with suspicious eyes, as the possibility of having it been lodged after due deliberation and preliminary inquiry cannot be ruled out. Hence, avowed promptitude of the prosecution in lodging the FIR cannot be readily accepted, as a complimentary factor, for believing the prosecution story contained in the FIR to be true as a gospel truth. The promptitude in lodging the FIR, does not necessarily exclude the chances of consultation and deliberations by the complainant, therefore, it cannot be treated as a substantive piece containing an element of correctness about the story of the prosecution. Each criminal case has to be decided while taking into consideration the overall circumstances of the case.

6. The promptitude shown by the prosecution in lodging the FIR and in conducting the post-mortem examination over the dead body is belied by the inherent flaws in existence in the evidence of PW-4 and PW-5, rendering their claim of being eye-witnesses of the occurrence to be doubtful. The Superior Courts time and again have shown their judicial anxiety, while noticing that the police either being in league with the complainant for some obvious reasons or for arranging a suitable complainant, capable of narrating the occurrence in the be-suiting manner through FIR or in order to show their efficiency do not hesitate

in stopping the Roznamcha for later on proceed to make relevant entries therein for showing the FIR to have been lodged promptly. It has been held in case titled *"Ata Muhammad and another Vs. The State"* **(1995 SCMR 599)** that:-

> *"Time of recording of F.I.R is not always genuine. The police, after learning about the commission of the crime keeps the space in the daily diary (Roznamcha) and a page in the F.I.R. Register blank for incorporating therein the gist of the information, the factum of registration of the case and the detailed report subsequently, in the light of preliminary investigation made by it. Furthermore, in the present case the F.I.R. was lodged by eye-witness himself. So, his previous statement recorded in the F.I.R. does not come from any distinct source. A witness cannot corroborate himself by repeating the version before different persons on different occasions. The evidence at the trial cannot be corroborated or reinforced by proving that the witness had made a similar statement to a third party on a previous occasion. Mere repetition of a story will not give it any force or prove its truth."*

Muhammad Umar complainant (PW-4) is the real brother, whereas Iftikhar Hussain (PW-5) happens to be paternal cousin of the deceased i.e. closely related, who both are residents of Mauza Sharfpur, Tehsil Minchanabad. The occurrence had taken place at Mohallah Ghulab Shah, Mecload Gunj. Both of these PWs are not residents of the locality, where the alleged occurrence had taken place. They have also not given any plausible reason for their presence at the relevant time at the place of occurrence. Their bald assertion of having been invited by the groom at the function cannot be accepted on its face value, therefore, the evidence

of these PWs needs serious scrutiny.

7. Before undertaking analytical discussion over the ocular account furnished by Muhammad Umar complainant (PW-4) and Iftikhar Hussain (PW-5), it is observed that the place of assemblage for celebrating *"Rasm- e-Hina"* of groom Naveed Iqbal Bhandara, is to be the place of occurrence, in view of the statement of Muhammad Aslam, SI/I.O. (PW-10), who has stated that *"it is correct that according to my investigation at the spot, it came to limelight that on the night of occurrence, it was "Rasm-e-Hina" of Naveed Iqbal Bhandara"* are the undisputed facts and realities of this case. In order to believe the evidence of a witness, furnishing the ocular account regarding some occurrence/crime, in view of the established principles, laid down by the Superior Courts, for the criminal dispensation of justice, it is the first requirement, whether the witness has established his presence at the place of occurrence, subject to the judicial scrutiny, undertaken by the Courts in order to satisfy its judicial conscious. Secondly, the conduct of the witnesses is always seen through the prism of circumstances. The Courts are always firm that in case a witness fails in satisfying a judicial mind by establishing his presence at the relevant time at the spot, his evidence cannot be relied upon despite his parrot like narration of the occurrence. The demonstration of a natural conduct by a witness at the time of occurrence attaches with itself an intrinsic evidentiary worth for a good ground for believing the evidence of such a witness, but if the conduct of the witness is either found to be unnatural at the relevant time by the Court or it appears to be in contradiction with other realities of the relevant facts, the Court will always be ready to discard such an evidence. The Superior Courts of this country are always consistent in expressing their views through their

authoritative pronouncements that the evidence of such a witness, who fails in satisfying a judicial mind by giving a reasonable explanation for his presence at the place of occurrence, his evidence may not be relied upon for holding an accused guilty or for upholding already recorded conviction by some lower forum.

8. In the instant case, both the PWs i.e. Muhammad Umar, complainant (PW-4) and Iftikhar Hussain (PW-5), the alleged eye-witnesses of the occurrence are the real brother and paternal cousin of the deceased respectively. They are not the residents of the locality, where the alleged occurrence had taken place. No other independent witness has entered appearance as a witness, in this case. So much so, the groom in whose "mehndi ceremony", the deceased had come to participate as a guest, in which the deceased lost his life, did not come forward to substantiate the prosecution"s version. Neither the trial Court in view of the peculiar circumstances of the case exercised its jurisdiction and power to summon the groom even as a C.W. The prime object behind the establishment of judicature under the constitution and the law is to do justice, in accordance with law while exercising their powers, so vested in it. The personality of groom namely Naved Iqbal Bhandara had the status of a bastion in this case. It was none else except him in whose "mehndi ceremony", this occurrence had taken place. By all stretch of imagination, his presence at the spot is well established, therefore, the learned trial Judge ought to have exercised his jurisdiction for summoning him, not only in order to do the justice but also to un-earthen the truth also, but he had failed in exercising his power in this regard. He was not expected to sit like an idle rather he was bound by his duty to exercise his jurisdiction in search of truth and truth alone. According to the admission of the

complainant Muhammad Umar(PW-4), regarding inter-se distance between the accused/appellant and the deceased at the time of his sustaining firearm injury, he deposed that *"they were at a distance of three feet"*, which fact is also confirmed by the entries of site plan (Exh:PF), drafted by Muhammad Saeed Rana, draftsman (PW-6) on the instructions of the eye-witnesses as well as the Investigating Officer. As per medical jurisprudence, when a fire shot is made from a distance of less than 3 feet, there may be blackening or charring marks on the corresponding wounds, but in the instant case, after going through the Post Mortem report, we find no blackening or charring marks, even the Medical Officer i.e. Dr. Syed Hasnain (PW-1), who conducted post-mortem examination over the dead-body of the deceased, did not observe any sign of blackening or burning over the dead body of the deceased. He during cross-examination admitted it correct that "*he did not note any blackening, burning or tattooing around the wound mentioned in examination-in-chief."* He further deposed that *"he did not find any burning of the hair of the scalp of the deceased".* It has been held in case titled *"Amin Ali and another Vs. The State"* **(2011 SCMR 323)** that:-

> *"None of the witnesses deposed that any of the appellants had caused the injuries from a close range but on the contrary in the site plan the place of firing has been shown 8 feet away from the deceased. Thus from such a distance injury with blackening cannot be caused as it can be caused from a distance of less than 3 feet as per Modi's Medical Jurisprudence.*

Reliance can also be placed upon case titled *"Nooro alias Noor*

Muhammad Shar and another Vs. The State" **(2018 P Cr. L J Note 52)**. Hence, it can safely be concluded that the ocular account is in contrast with the medical evidence. The medical evidence being a corroboratory piece of evidence, should have been in conformity with the ocular account for believing their evidence furnished by ocular account, but in case, it is found that the same, instead of being in conformity, has given rise to a doubt regarding the claim of the eye-witnesses of having seen the occurrence, which has to be resolved in favour of the accused, who is legally termed as a benefic i.e. the accused.

9. Unfortunately, it is little common in our cultural background, especially in the rural areas that some of the people celebrate the marriage, birth of a child, or alike nature occasions by arranging and indulging themselves in it in such manners, which becomes offensive and cannot be approved under any norm of civilized code of life but being a ground reality, which is hardly checked by law enforcing agencies, has been resulting into deaths of innocent participants of such ceremonies and as a result, un-intended deaths ensue into creating animosity against those persons from whose hands their near and dear lose their lives and while reporting the occurrence even do not hesitate in giving it a be-suiting colour as an intended crime. But the pretended story hardly sustains, either during investigation or the trial on judicial scrutiny, the benefit thereof, goes to the accused. In the instant case, neither the occurrence has taken place in the mode and manner, in which the prosecution had claimed nor the alleged motive had prodding the accused for committing the offence appears to be genuine. None has come forwarded out of the participants of the ceremony to tell the truth either before the I.O or before the Court. Even no attempt has

been made by the Court despite possessing inherent powers with it for calling any person as a Court witness, whose evidence in order to un-earthen the truth could have been brought on record, which would have been necessary for just decision of the case. Therefore, in such circumstances, when the eye-witnesses have utterly failed to satisfy our judicious consideration regarding their presence.

10. As regards recovery of 30 bore pistol (P-4) at the instance of the appellant and positive report of Forensic Science Laboratory (Ex.PN) are concerned, we have noted that in the present case, the recovery of empty of pistol 30 bore has been shown to be effected by the Investigating Officer (PW-10) on 24.10.2014, whereas the accused was arrested on 17.11.2014. The recovery of pistol 30 bore (P-4) was allegedly effected by the appellant from the iron box lying in his residential room on 20.11.2014, which was taken into possession by the I.O through recovery memo (Exh.PE). As per report of Punjab Forensic Science Agency, Lahore (Exh.PN), the aforesaid empty was sent to the said office on 17.11.2014 and weapon of offence i.e. pistol 30 bore (P-4) on 19.12.2014, meaning thereby, the recovered empty was sent after the arrest of the accused/appellant and after 23 days of the occurrence. It is, by now, well-established that if the crime empty is sent to the Forensic Science Laboratory after the arrest of the accused or together with the crime weapon, the positive report of the said Laboratory loses its evidentiary value. Reliance in this respect is placed upon the case titled *"Jehangir v. Nazar Farid and another"* **(2002 SCMR 1986)**, *"Israr Ali v. The State"* **(2007 SCMR 525)** and *"Ali Sher and others v. The State"* **(2008 SCMR 707)**. In Israr Ali's case, the Hon'ble Supreme Court has observed that when the crime empties are sent to the Forensic Science Laboratory with delay, the recovery of the

same does not provide strong corroboration qua the prosecution version. Moreover, Iftikhar Hussain (PW-5) deposed that *"on 20.11.2014, he alongwith Aftab Ahmad joined investigation before the police. On that day, accused Ali Ahmad present in the Court while under custody made disclosure and led to the recovery of pistol 30-bore. The police made the pistol into a sealed parcel and took into possession vide recovery memo Ex.PE. He alongwith Aftab PW had attested the recovery memo.* The above portion of statement of said PW clearly indicate that he had failed to point out the place wherefrom the alleged weapon of offence was recovered by the appellant. Hence, in view of the above, the recovery is inconsequential.

11. Coming to the motive part of the occurrence, according to the complainant Muhammad Umar (PW-4), the motive behind the occurrence was that the accused persons had committed the murder of his brother Zahid Hussain, on the instigation of some of their opponent. It is interesting to note that as per the case set out by the prosecution, no personal grudge/motive has been attributed to the appellant for the commission of the alleged offence. It has been alleged by Muhammad Umar, complainant (PW-4) in his complaint (Exh.PB), which he reiterated while appearing in the witness box as PW-4 that *"his brother Zahid Hussain sat with the groom on a Sofa set. At about 01:00 am, Ali Ahmad accused present in the Court armed with pistol 30-bore alongwith an unknown person came there. They asked his brother to get up from the said Sofa. His brother refused, on which the unknown persons asked Ali Ahmad to shoot his brother and murdered him. On which Ali Ahmad accused present in the Court took out his pistol from the "nefa" of his "shalwar" and made straight fire which landed*

on the back side of head of his brother Zahid Hussain, who after sustaining the fire shot fell on the Sofa while both of the accused persons fled away from the spot. Interestingly, Muhammad Umar, complainant (PW-4) further deposed in examination-in-chief that *"the accused persons had committed the murder of his brother on the instigation of their some opponent."* Both the aforesaid stances of the complainant regarding the motive are mutually destructive and inherently inconsistent with each other. The complainant in his first breath stated that the occurrence had taken place at the spur of the moment on refusal of the deceased to vacate the seat of sofa set, but in the subsequent breath, he had stated that the accused persons had committed the murder of his brother on the instigation of some of their opponents, even the motive could not have been established even during the investigation. Muhammad Aslam SI, Investigating Officer (PW-10) during cross-examination, admitted it as correct that *during investigation neither rivalry nor enmity between accused Ali Ahmad and Zahid deceased was established.* Even the identity of the unknown co-accused has neither could be established nor he ever had come on the surface. It will also be advantageous to note here that Iftikhar Hussain (PW-5) deposed during cross-examination that *"neither himself nor any PWs had disclosed the name and identity of that unknown person who asked Ali Ahmad for making fire on the deceased. It is correct that the name of said unknown person could not be traced/detected by the police.* Muhammad Aslam SI (PW-10) stated that *"during investigation, presence of unknown accused was not proved and he deleted Sec.34 PPC."* Furthermore, Muhammad Umar, complainant (PW-4) deposed during cross-examination that *"they had neither any altercation, nor any dispute, nor any litigation*

with the accused Ali Ahmad as well as his family member prior to the occurrence." These facts fully establish that there was no motive behind the occurrence as alleged by the prosecution. The motive was non-existent and only had been introduced by the complainant to furnish a justification for giving a be-suiting turn or colour to the occurrence, instead of bringing on record the true facts.

12. For what has been discussed above, keeping in view the ocular account being in contrast with the medical evidence, coupled with the pseudo promptitude in lodging the FIR by the complainant, and doubtful presence of eyewitnesses at the place of occurrence at the relevant time, failure of the prosecution in proving the motive and recovery against the appellant accumulatively, we are of the view that the prosecution has miserably failed to prove its case against the appellant beyond any shadow of doubt. The benefit of doubt must accrue in favour of accused as the Hon"ble Supreme Court of Pakistan has held in case titled *"Muhammad Khan and another Vs. State"* **(PLJ 2000 SC 1041)** that ***it is axiomatic and universal recognized principle of law that conviction must be founded on unimpeachable evidence and certainty of guilt and hence any doubt that arises in prosecution case must be resolved in favour of accused.*** Moreover it is cardinal principle of criminal jurisprudence that a single instance giving rise to a reasonable doubt in the mind of Court entitles the accused to the benefit of doubt not as a matter of grace but as a matter of right. Reliance is placed on case titled as *"Muhammad Akram versus The State"* **(2009 S C M R 230)** and "*Tariq Pervaiz Vs. The State"* **(1995 SCMR 1345).** Consequently, we accept this appeal, set aside conviction and sentence of appellant Ali Ahmad,

awarded by learned trial Court vide impugned judgment dated 30.06.2016 and acquit him of the charge by extending him the benefit of doubt. The appellant Ali Ahmad is directed to be released forthwith, if not required in any other case. The death sentence awarded to appellant Ali Ahmad is **not confirmed** and Murder Reference No.**49/2016** is answered in **negative**.

13. Before parting this judgment, I gratefully acknowledge the material assistance rendered by Lahore High Court Bahawalpur Bench, Research Center headed by Mr. Muhammad Javed Khan, Civil Judge/Research Officer of this Bench.

(Ch. Abdul Aziz) **(Anwaarul Haq Pannun)**

Judge **Judge**

APPROVED FOR REPORTING.

Judge Judge

2019 LHC 2435

IN THE LAHORE HIGH COURT, BAHAWALPUR BENCH BAHAWALPUR

Crl. Appeal No.689 of 2017

Ashiq Elahi versus The State, etc.

Criminal Revision 35 of 2018

Noor Ahmad versus The State, etc.

Date of hearing	**13.02.2019**
The Appellant by	M/s. Malik Muhammad Sajid Feroz and Azeem Ashraf Cheena Advocates.
The Complainant by	Mr. Abdul Rasheed Rashid, Advocate.
The State by	Mr. Shahid Farid, Assistant District Public Prosecutor.

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Anwaarul Haq Pannun, J. This single judgment shall decide Criminal Appeal No.689 of 2017, filed under Section 410 Cr.P.C by the appellant and Crl. Revision No.35 of 2018 filed by the complainant against the judgment dated 04.12.2017, on the conclusion of trial in case FIR No.285/2015, dated 26.08.2015, offence under Section 302 PPC, registered at Police Station Abadpur, District Rahimyar Khan by the learned Sessions Judge, Rahimyar Khan, whereby the appellant has been convicted and sentenced as under:-

Under Section 319 PPC

"to pay "Diyat" i.e. 16,80,320/- to the legal heirs of the deceased alongwith rigorous imprisonment for five years as Ta'zir. Benefit of Section 382-B Cr.P.C is extended to the convict."

2. The case of the prosecution as contained in the FIR (Exh.PC/1) lodged on the written complaint (Exh.PC) of the complainant Noor Ahmad (PW-4) is to the effect that on 26.08.2015, at about 6.30 a.m., Hafiz Samdani Kamboh being panic stricken came to him clamouring that earlier one of his buffalo had died, due to snake biting, once again a black snake has come to his house, whereupon the complainant and Nafees Ahmad, while armed with rifle started walking towards the house of Hafiz Samdani, his son Muhammad Altaf and one Muhammad Bakhsh followed them, when they reached at the house of Hafiz Samdani, in the meantime, the appellant came there, who started abusing to Nafees Ahmad whereupon an altercation took place between Nafees Ahmad and the accused. The accused became infuriated and after snatching the gun from Nafees Ahmad, made straight fire with it landing on his back and near right elbow of Nafees Ahmad, deceased, who fell down and succumbed to the injuries on his way to Sheikh Zayed Hospital, Rahimyar Khan. The motive behind the occurrence was that there were litigation and dispute between the deceased and the accused.

3. The investigation was encapsulated into a report under section 173 Cr.P.C, which was duly submitted before the learned trial Court, while

taking cognizance of the offence, the learned trial Judge after supplying the requisite copies of the statements to the accused as required under Section 265(c) Cr.P.C, charge sheeted him, to which he pleaded not guilty, while professing his innocence and claimed trial. The learned trial Judge directed the prosecution to produce its evidence for establishing the charge. The prosecution has produced as many as 11 PWs, in order to prove the charge against the appellant. The medical evidence has been furnished by Dr. Haji Ahmad Khan Durrani, M.O (PW-1), who on 26.8.2015 conducted postmortem examination on the dead body of deceased Nafees Ahmad and issued his postmortem report Exh.PA and pictorial diagrams Exh.PA/1. He noted the following two injuries on the dead body of deceased:-

1. Circular penetrating wound having burning with inverted margins on right upper portion of back of chest just below right scapula 2 cm from mid line,13 cm below from base of neck, 3 x 3 cm in diameter (entry wound). On deep dissection, cartridge and some pellets recovered which were sealed and handed over to police p/s Abadpur.
2. Multiple lacerated abrasions on right elbow area measuring 0.5 x 0.5 cm, 0.4 x 0.3 cm, 0.2x 0.5 cm, 0.4 x 0.3 cm. All injuries are skin deep. All abrasions are in area of 6 x 6 cm

diameter.

OPINION:-

"After conducting autopsy, I was of the opinion that injury No.1 by fire arm leading to severe damage to right lung, excessive hemorrhage, hemorrhage, shock and caused death in ordinary course of nature. All injuries were ante-mortem in nature. Fracture of 5th rib was seen in skiagrams.

Probable time that elapsed

Between injury and death within 1-2 hours. Between death and post mortem within 2 to 4 hours.

Noor Ahmad, complainant (PW-4) and Muhammad Bakhsh(PW-5) have furnished the ocular account. Matloob Ahmad Bajwa, Inspector RIB (PW- 8) and Abdul Hadi SI (PW-9) are the Investigating Officers of the case. The evidence of rest of the PWs being formal in nature, except PW-2 Riaz Ahmad Patwari, who prepared Exh.PB/1, the scaled site plan showing the house of Hafiz Samdani as the place of occurrence, needs no serious debate. The learned Prosecutor, while giving up witnesses namely Muhammad Altaf, Najeeb Ullah, Hafiz Samdani, Irfan Afzal 266/C, and

after tendering positive reports of Forensic DNA & Serology Analysis and Firearms & Toolmarks Examination (Exh.PJ & Exh.PK) closed the prosecution's evidence. The accused/appellant, when examined under Section 342 Cr.P.C, refuted the evidence put to him and in reply to a question as to "why this case and why the PWs have deposed against him", replied as under:-

> "The story of prosecution is fabricated. FIR is concocted and based on malafide intention. Complainant/PW4 and PW.5 Muhammad Bakhsh were not present at the time and place of incident. Complainant is a greedy person and PW.5 lives under his supervision and is dependent upon PW.4. The FIR has been registered by complainant for blackmailing and taking punitive benefit from me. The local police has also registered and investigated this case with malafide intention and in collusion with the complainant. I had no grudge, dispute, litigation or any previous enmity with the deceased and his family. I cannot even think of killing the deceased and his any family member.

The real facts are that on 26.08.2015 in early morning, I heard noises that a dangerous snake had come in the house of Hafiz Samdani which had also previously appeared in his house and bit his buffaloes and resultantly some of the buffaloes died. On hearing out cry, I also went there. When I reached there, number of people from locality

were already present. Meanwhile, Altaf Ahmad (given up PW) s/o Noor Ahmad complainant alongwith his gun reached there. Altaf Ahmad (given up PW) requested me to take his gun and kill the snake. Other people present there also asked me to kill the snake with gun. Meanwhile, Hafiz Samdani (given up PW) asked the people present over the place of occurrence that they should get away and disperse them from the place of incident, and they started getting away. Altaf Ahmad (given up PW) voluntarily handed over his gun and cartridges to me for killing snake, in the presence of other people. When I was loading the gun and closing the same, the fire was made itself suddenly. I had no intention to cause the death of or harm to any person. I am innocent and have been involved falsely in this case. The PWs being relatives of deceased have deposed falsely. PWs are related inter-se and deposed against me with some ulterior motive.

The appellant neither opted to appear as his own witness under Section 340(2) Cr.P.C. nor produced any evidence in his defence. On the conclusion of trial, the learned trial Court has convicted and sentenced the appellant vide its impugned judgment dated 04.12.2017 as alluded to in paragraph No.1 of the instant judgment. Hence, this appeal.

4. Learned counsel for the appellant submit that the ocular account

furnished by PW-4 and PW-5 is not worthy reliance for the reason that (i) being closely related to each-other and the deceased (ii) for making dishonest and deliberate improvements, in order to change the demeanor of occurrence as of an intentional murder, (iii) the recovery of double barrel gun 12 bore is not proved, (iv) Firstly there exists no motive with the appellant for committing the offence and secondly, the so-called subsequently motive introduced by the prosecution has even not been proved, (v) During the course of investigation, the case of the complainant has been nullified, (vi) The learned trial Judge while passing the conviction under Section 319 PPC had in-fact disbelieved the prosecution evidence, while acquitting the appellant from the charge under Section 302 PPC, hence, conviction cannot sustain, which has been passed under the wrong legal assumptions, hence, it is liable to be set aside. Lastly he prayed for acquittal of the appellant from this case.

5. Conversely, learned Assistant District Public Prosecutor for the state has supported the impugned judgment whereas, learned counsel for the complainant while arguing the revision petition has also prayed for enhancement of sentence of the appellant.

6. Arguments heard and record perused.

7. Before analyzing the prosecution's evidence through a minute judicial scrutiny, it is straight away observed that (i) time of occurrence, as mentioned in the FIR, lodged by Noor Ahmad complainant, (ii) the place of occurrence as per site plan (Exh.PB) prepared by Riaz Ahmad, Patwari (PW-2) being the house of Hafiz Samdani, (iii) the death of deceased through firearm injuries, are not in dispute in this case. It will, thus, be appropriate, in the light of arguments of learned counsel of the parties to scrutinize the available

prosecution ocular account furnished by Noor Ahmad complainant (PW-4) and Muhammad Bakhsh (PW-5) to determine as to (i) whether there existed any previous ill-will or enmity between the deceased and the appellant as a motive prodding him for abusing, snatching 12 bore double barrel gun and then firing at him and if not (ii) whether the case of the appellant comes within the en-catchment of maxim "*actus non facit reum nisi mens sit rea*"? For this purpose, it will be relevant to refer certain excerpts from the evidence of prosecution.

> Noor Ahmad, complainant (PW-4) deposed during the cross- examination that *"No criminal case stood registered between the complainant party and the accused party prior to registration of this case. No civil litigation was pending between the parties prior to this case."* Matloob Ahmad Bajwa, Insepctor RIB/I.O (PW-8) stated during cross- examination that *"Motive of the occurrence was the appearance of snake near the house of Hafiz Samdani PW…. The accused also took the version before me that he had no enmity of any kind with the deceased…. According to my investigation, version of complainant that before firing, altercation took place between the deceased and accused, was found false…. In my investigation, incident took place due to negligence of accused Ashiq Elahi, and no intention of murder was found in my investigation.*

The above referred evidence clearly shows that there existed no previous ill-will, enmity creating any *mens rea* in the mind of the appellant against the deceased. The learned trial Judge has also

held that the prosecution has miserably failed to prove the existence of previous enmity between the parties, thus, the motive as alleged in the complaint (Exh.PC) is not established, therefore, it is held that there existed no reason with the appellant, for abusing him, while snatching his gun, for firing at the deceased.

8. From the facts of the case and the evidence available on record, it is quite discernable that the appellant had not snatched the rifle from the deceased for firing at him or at the snake, rather the rifle was handed over to him by the deceased himself. He after having been handed over the rifle, was just filling the cartridges in the rifle, when it went off hitting unfortunately to the deceased, which resulted into his death. Abdul Hadi, SI/I.O (PW-9) has deposed that as per Hafiz Samdani (given up PW), the best evidence with the prosecution, the gun was handed over to Ashiq Elahi with the consent of the complainant party. The accused after taking the gun, loaded the same with two cartridges, when the gun itself went off suddenly and the fire hit Nafees deceased. Matloob Ahmad Bajwa, Inspector RIB(PW-8) deposed in cross-examination that *the gun was very old and when he (accused Ashiq Elahi) was loading the gun, the fire was suddenly happened.* He further deposed that *in the light of evidence produced before him on 30.08.2016, he was of the opinion that at the time of occurrence Altaf Hussain brought double barre gun at the spot and handed over the same to Ashiq Elahi and requested to make fire at the snake, and when Ashiq Elahi loaded cartridge in the gun, fire was happened accidentally, and that Ashiq Elahi did not fire at the deceased intentionally.* It is admitted by Noor Ahmad complainant (PW-4) that the rifle, which was being carried by Nafees was an

unlicensed weapon. It can thus, be concluded that in-fact, it was the deceased, who himself handed over the gun to the appellant, which ultimately resulted into his unfortunate death without being any intention behind it on the part of the appellant. It has been held by the apex Court in case titled "*NASIR ABBAS versus THE STATE and another*" **(2011 S C M R 1966)** that:-

> "*Act does not make a person guilty unless the mind is also guilty. Actus reus in simple parlance is the actual act of committing some offence contrary to the law of land mens rea is the intent to commit that offence. If either of the elements is missing, the conduct would not attract a penal provision unless it is a case of strict liability wherein absence of mens rea may not be fatal to prosecution.*"

Furthermore, the complainant did not challenge the result of investigation, conducted by the aforesaid Inspector RIB(PW-8) before any higher forum. In view of above analysis of the prosecution's evidence and in the light of above ratio, I hold that neither there existed any enmity or ill-will inter-se the appellant and the deceased for propelling him to commit the murder of the deceased nor he did any intentional act in order to murder the deceased.

9. So far as recovery of double barrel gun P-5 on the pointing out of the appellant and positive reports of Forensic DNA and Serology Analysis Exh.PJ and Firearms & Toolmarks Examination Exh.PK are concerned,

the same do not render any corroboration to the prosecution for proving the recovery of the rifle on his pointing out for more than one reasons (i) it is admitted by Noor Ahmad (PW-4) that "*the rifle which was being carried by Nafees Ahmad deceased was an unlicensed weapon*, (ii) Matloob Ahmad Bajwa, Inspector RIB (PW-8) deposed that Hafiz Samdani got recorded his statement before him and according to his statement, *the accused Ashiq Elahi threw the gun at the spot and went away*, whereas Shafique Ahmad 921/C (PW-6) and Abdul Hadi SI/I.O (PW-9) deposed that on 26.11.2015, accused Ashiq Elahi made disclosure in the presence of PWs and got recovered a double barrel gun P-5 from a room towards south of brick kiln situated in Mouza Fazalabad, obviously an open place. In view of this situation, the recovery appears to be doubtful and is not believable, hence the recovery followed by positive report of PFSA (Exh.PK) is inconsequential in this case.

10. The learned trial Judge proceeded to convict the appellant under Section 319 PPC, whereas the law laid down in case titled "*MUNIR AHMAD versus THE STATE*" **(P L D 2000 Lahore 425)**, wherein it has been held that *Provision of S. 318 P.P.C. would be attracted in case of a deliberate act on the part of accused person to do one thing but because of a mistake of act or of fact the end result of such an act was different from that intended by the accused person. Accused was charged and convicted under S.319, P.P.C. for causing death by accidental firing…Accused had neither used his rifle nor had fired any shot therefrom by design or with intention to do so….Where Trial Court admitted that the rifle had gone off accidentally, Court was not justified in invoking the provisions of S.319,*

P.P.C. against the accused as his case was fully covered by provisions of S.80, P.P.C. ....Nothing was available on record to show that accused had not used proper care and caution in that regard…. Sentence and conviction passed by Trial Court were set aside.

11. For what has been discussed above, the prosecution has miserably failed to prove its case against the appellant beyond any shadow of doubt. The benefit of doubt has accrued in favour of accused as the Hon'ble Supreme Court of Pakistan has held in case titled "Muhammad Khan and another Vs. State" **(PLJ 2000 SC 1041)** that **it is axiomatic and universal recognized principle of law that conviction must be founded on unimpeachable evidence and certainty of guilt and hence any doubt that arises in prosecution case must be resolved in favour of accused.** Moreover it is cardinal principle of criminal jurisprudence that a single instance giving rise to a reasonable doubt in the mind of Court entitles the accused to the benefit of doubt not as a matter of grace but as a matter of right. Reliance is placed on case titled as *"Muhammad Akram versus The State"* **(2009 S C M R 230)** and "*Tariq Pervaiz Vs. The State"* **(1995 SCMR 1345).** Consequently, the instant Appeal is allowed, the conviction judgment dated 04.12.2017 passed by learned trial Court is set aside and the appellant is acquitted of the charge by extending him the benefit of doubt. The appellant Ashiq Elahi is directed to be released forthwith, if not required in any other case, whereas the Crl. Revision No.35 of 2018 filed by the complainant is dismissed.

(Anwaarul Haq Pannun)

Judge

APPROVED FOR REPORTING.

Judge

2019 LHC 2847

IN THE LAHORE HIGH COURT, MULTAN BENCH MULTAN

Criminal Appeal No.58-J of 2017

Qaiser Nadeem versus The State, etc.

Date of hearing	**17.04.2019**
The Appellant by	M/S Malik Muhammad Latif Khokhar and M. Ahmad Khan Sial, Advocates.
The Complainant by	Nemo
The State by	Mr. Muhammad Abdul Wadood, Deputy Prosecutor General.

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Anwaarul Haq Pannun, J. Through the titled appeal u/s 410 Cr.P.C., the appellant Qaiser Nadeem has challenged the vires of judgment dated 19.06.2015 passed by learned Addl. Sessions Judge, Jalalpur Pirwala, on the conclusion of trial, in case FIR No.285/2011, for offence under Sections 302/337-F(i)/394/411 PPC, registered at Police Station Saddar, Jalalpur Pirwala, whereby he has been convicted and sentenced as under:-

Under Section 302(b) PPC

Imprisonment for life as Ta'zir with fine of Rs.50,000/- and in case of default, the convict shall further undergo one year S.I. The convict is also liable to pay Rs.200,000/- as compensation to the legal heirs of the deceased under Section 544-A Cr.P.C. and in default whereof, he shall further undergo one year simple imprisonment.

Benefit of Section 382-B Cr.P.C was extended to the

convict.

The prosecution's story unfolded through FIR (Ex.PA/2) lodged on written complaint (Exh.PA) of Saeed Ahmad (PW-1) is to the effect that during the preceding night of 11.06.2011, he alongwith Ijaz Ahmad, Mehboob Ahmad alias Boba and Khalil Ahmad, deceased was irrigating his crop through tube-well. At about midnight, two persons bearing features, one tall height, medium body wearing Shalwar Qameez aged about 20 to 25 years old, other medium height and body, curly hair wearing white Shalwar & Qameez were present suspiciously at Pull Vereero Wala near the shop of Iqbal Shah son of Sardar Shah. His brother namely Khalil Ahmad inquired from the accused, the reason for their presence there, whereupon they told that they had come to meet one Ibrahim Langha. Khalil asked them to get themselves connected with Ibrahim through Cell Number 0342-2771476 but in vain. Ijaz PW armed with 44 bore licensed gun, when tried to pupt them under search, the tall heighted person overpowered Ijaz and caught hold his rifle and the other accused, medium height brought out a pistol fastened with his calf and made fire shot which hit on the right side of the belly of Khalil while passing through his body. Khalil fell down, tall heighted person snatched rifle from Ijaz and brought his pistol and made fire shot on Mehboob, causing a grazing wound on his right shoulder. They also injured Ijaz PW with their fists blows. The accused though made firing upon the complainant, who luckily survived. On their hue and cry, his brother Zafar alongwith other people of the locality came over there but the accused fled away while making aerial firing. They immediately tried to shift Khalil to Civil Hospital, Jalalpur Pirwala, but on their way to hospital, he succumbed to his injuries.

2. Registration of the case, after its usual investigation encapsulated into a report under Section 173 Cr.P.C which was duly submitted before the learned trial court, the appellant and his co-accused, after

supplying them with the copies of incriminating material under Section 265(c) Cr.P.C, were charged sheeted to which they denied and pleaded not guilty, while professing their innocence and claiming trial, the prosecution was directed to produce evidence.

3. The medical evidence in the case has been furnished by Dr. Shoukat Ali M.O. T.H.Q Jalalpur Pirwala(PW-6). He conducted post-mortem examination on the dead body of the deceased Khalil Ahmad and observed the following injuries:-

i. Wound of entry A lacerated fire arm wound measuring 1x1 cm on right side of chest. 11 cm below from right nipples. Blackening present round the margin of the wounds. No tattooing seen. Corresponding tear present on qamiz.

ii. Wound of exit A fire arm lacerated wound measuring 2 x 2 cm on left lumber region 10 cm above from posterior superior iliac spine. Margins are everted. No burning blackening or tattooing seen.

Opinion

In his opinion, all injuries are ante-mortem in nature. Injury No.1 and 2 are sufficient to cause death in ordinary course of life. Hypovolemia and shock lead to death and injury to vital organs like liver and kidney as well.

Probable time that elapsed

Between injury and death within one hour.

Between death and postmortem within 9-11 hours.

Dr. Abdullah Khan, M.O T.HQ Hospital Jalalpur Pirwala (PW-3) conducted medical examination of injured Ejaz Hussain on 15.06.2011 who was brought by Toqeer Nasir 2771-C and noted the following injuries:-

i. An abrasion size 2 cm x 1 cm on upper part of left side of back of chest.

ii. An abrasion size 4 cm x 6 cm on lower part of back of right chest.

iii. An abrasion size 4 cm x 2 cm on front of left knee joint.

Injuries No.1,2 & 3 were declared as Jurh Ghair Jafia Damia and probable duration of injuries was within three to five days.

He also medically examined Mehboob Hussain and found the following injury.

A lacerated wound size 7 cm x 1.5 cm on upper part of right scapular region. Bone not exposed.

The injury No.1 was declared as Jurh Ghair Jafia Matlahima and probable duration of injury was three to five days back.

4. The ocular account in this case has been furnished by Saeed Ahmad, complainant (PW-17) and Ijaz Ahmad (PW-2). Liaquat Ali SI and Muhammad Farooq SI, the investigating officers have appeared as PW-9 and PW-15. Mohsin Raza, the then Magistrate Ist.Class (PW-12) supervised the test identification parade of the accused Qaiser Nadeem

and Imtiaz Hussain.

5. The prosecution has produced as many as 15 witnesses beside tendering, in evidence, reports of Chemical Examiner, Lahore and Serologist regarding blood stained earth, Exh.PX & Exh.PZ and photocopy of report of FSL regarding empties as Mark-A.

6. When examined under Section 342 Cr.P.C., the appellant denied every bit of incriminating material so produced. While replying the question that as to why this case against him and why the prosecution witnesses had deposed against him, he replied as under:-

> *"This occurrence might have been a blind murder conducted by some un-known persons. The complainant party had merely found dead body of Khalil deceased and at that time, they were fully unaware of circumstances and happening of the occurrence as well as culprits, that was why, at the time of registration of case, the complainant gave vague features of the accused persons, so that he may nominate any person in the instant case. Alleged occurrence was of night time and there was no source of light, in these cirucmstances, nobody could identify or recognized the real culprits. The deceased might have made an attempt to commit dacoity at Pul Veero Wali and on resistance, he was murdered as he himself was a criminal person. Allegedly, injured PWs do not seem to be present and made injured at the time of occurrence. Both the injured PWs remained reluctant of joining investigation and to get medically examined only a considerable time. It seems that both the alleged injured PWs were not ready to become false witnesses*

of the instant case. I and my co- accused person were dragged in this criminal case by a suspicion and doubtful manner. Even the prosecution has mala-fide withheld its own evidence of our nomination in the case. The complainant has falsely implicated me and my co-accused person in the instant case on the asking of some political figure. The complainant is a greedy person and want to grab money from me and my co-accused person. He has also offered monitory share to the PWs that was why on the asking of complainant have falsely deposed against me. "

7. The appellant neither opted to appear under section 340(2) Cr.P.C nor has produced any defence evidence.
8. Learned trial court, on conclusion of the trial, proceeded to convict the appellant as aforesaid. Hence, the titled appeal.
9. Arguments heard. Record perused.

10. Before judicious analysis, it will be appropriate to state broadly prosecution's, the bare facts of the case. According to the prosecution's own version, the occurrence took place at midnight (2/2.30 a.m.) on 11.06.2011 in the fields. No source of light existed in the fields for identification of the accused with exactitude. Saeed Ahmad, complainant (PW-1) reported the matter through rappat No.34 dated 11.6.2011 at 5.10 a.m. while making his statement (Exh.PA) on the basis of which formal FIR (Exh.PA/2) was registered. The post mortem examination over the dead body of the deceased was conducted at 11.30 a.m. on 11.06.2011 by Dr. Shoukat Ali M.O THQ Jalalpur Pirwala (PW-6) who noted down the aforesaid two injuries on the person of the deceased and according to his opinion, both injuries (injury No.1 and 2) were sufficient

to cause death in ordinary course of nature. According to him, vide post mortem report (Exh.PK), probable time that elapsed between injury and death was within one hour while between death and postmortem was within 09-11 hours. Furthermore, according to prosecution's own version two persons namely Ijaz Hussain (PW-2) and Khaleel Ahmad(given up PW) had also received injuries at the hand of the accused. But interestingly, the said Ijaz Hussain (PW-2) and Mehboob Hussain have been medically examined by Dr. Abdullah Khan, M.O, THQ Hospital Jalalpur Pirwala (PW-3), after unexplained delay of about 04 days on 15.06.2011. He observed duration of injuries as 3 to 5 days back. They also got recorded their statements under Section 161 Cr.P.C recorded on 15.06.2011.

11. The ocular account in this case has been furnished by Saeed Ahmad, complainant (PW-1) and Ijaz Hussain, injured (PW-2). Since the accused were not named in the FIR, therefore, after their arrest on 27.06.2011, they were put to identification parade. It was conducted under the supervision of Mohsin Raza, Magistrate 1st Class(PW-12) on 04.07.2011. From the place of occurrence, the police took into possession blood stained earth through recovery memo (Exh.PB), one empty of pistol 30 bore vide recovery memo (Exh.PC), one empty of pistol 30 bore from a distance of 10 steps and 04 empties from a distance of further 10 steps, vide recovery memo (Exh.PD).

12. The evidence of Saeed Ahmad, complainant (PW-1) has been scanned. During the course of cross-examination, he states that *"It is correct that I have narrated in my statement Ex.PA that features of the accused persons were 1-tall height, medium body age 20/25 years, 2-medium height, medium body, curly hair. As it was darkness and due to occurrence I could not identify the accused persons. Again said that there was no darkness and I had identified the accused."* He further

deposed that *"The height of both the accused is almost similar. I cannot say that Qaiser Nadeem accused is ¾ inch taller than Imtiaz accused. At present hairs of both the accused are not curly but at the time of occurrence hair of one accused were curly."*

13. Moreover, Saeed Ahmad, complainant (PW-1) has also made many dishonest improvements while recording his statement in the Court, with his previously recorded statements, which have been duly confronted by defence, which are as under:-

> *"In my statement Ex.P-A I have narrated that accused Imtiaz over powered Ejaz Ahmad and caught hold rifle. Confronted with Ex.PA wherein it is not so recorded rather there is recorded that on hearing word of search tall heighted person caught hold Ejaz Ahmad alongwith his rifle. I have narrated in Ex.PA that Qaisar accused brought out pistol from his calf and made fire which hit on the right side of belly of Khalil deceased. Confronted with Ex.PA wherein name of Qaisar accused is not mentioned rather it is mentioned that other person fired upon deceased. I have narrated in Ex.PA that Khalil fell down and Imtiaz accused gave him butt blow with rifle. Confronted with Ex.PA wherein it is not so recorded. I have narrated in Ex.PA that then Imtiaz accused also made fire with his own pistol at Mehboob which left a grazing mark on the right shoulder of Mehboob. Confronted with Ex.PA wherein the name of accused Imtiaz is not mentioned rather according to statement Ex.PA this act is attributed to the tall heighted person. I have narrated in Ex.PA that we*

call a motor car and brought the deceased Khalil to Civil Hospital, Jalalpur Pirwala wherein the factum of to be called the motorcar is not mentioned."

14. The another eye-witness of the occurrence is Ijaz Hussain (PW-2), who allegedly received injuries during the occurrence. The occurrence in this case taken place on 11.6.2011, whereas Ijaz Hussain (PW-2) along-with Mehboob Hussain (Given up PW) were medically examined on 15.6.2011, vide medico legal certificates (Exh.PH and Exh.PI). Liaquat Ali SI (PW-9), who partly investigated the case during the course of cross- examination deposed that *"PWs Ijaz and Mehboob did not meet me during my first visit at the place of occurrence. On the same day, I also searched the accused persons in the relevant locality. I could not see said PWs in the locality during my search. On the next day of registration of case, I investigated the case, in the relevant locality but Ijaz and Mehboob PWs were not seen by me. I also did not meet witnesses during investigation of 13 & 14 June, 2011. Volunteered that witnesses joined the investigation on 15.06.2011. I visit THQ Hospital, Jalalpur Pirwala where dead body and relatives as well as companions were available but Ijaz and Mehboob PWs were not available there. On 15.06.2011, when Ijaz and Mehboob PWs joined the investigation at that time what ever I did, I wrote down in the police diary and whatever PWs stated I recorded u/s 161 Cr.P.C. It is correct to suggest that in the statements u/s 161 Cr.P.C of Mehboob and Ijaz PWs, there was no explanation that for a period of four days why they did not join investigation and made their statements."* The non-appearance of this PW before the I.O, non-examining him medically and non-recording of statements of the injured PWs, with the Investigating Officer, for four days after the occurrence i.e. till 15.06.2011, in absence of any explanation casts serious doubt about their presence at the spot. The

learned trial Judge also observed in para No.37 of the impugned judgment that:-

> *"As such the allegation of sustaining some bodily injuries by injured PWs at the hands of accused Imtiaz in view of medical evidence has not been proved because it did not corroborate with the ocular account of the PWs against the accused Imtiaz. So, keeping in view afore- going discussion, it could be assumed that charge u/s 337-F(i) PPC for causing injuries on the person of PWs is disproved."*

16. Furthermore, Ijaz Hussain(PW-2) while facing the test of cross-examination has made many dishonest improvements which, after duly confronting the PWs with their previously made statements, have been brought on record by the defence. The relevant portion of his statement is as under:-

> *"It was night occurrence. One accused was taller and the other was of short height. I narrated these facts to the police. I narrated to the police that features of one accused were tall heighted, medium body and age 20/25 years. While the features of second accused were medium height, medium body and curling hair. These features were narrated by me in Ex.DB. At this time both the accused persons are present in the court. I have seen them. Accused Qaisar is of tall height while accused Imtiaz is of short height. I have seen accused persons present in court. Hair of both the accused are not curly. It was night occurrence."*

In view of above, both the aforesaid PWs (PW-1 and PW-2) have made dishonest improvements, therefore, their presence at the spot appears to be highly doubtful.

17. So far as identification of the accused by the PWs during their test Identification Parade is concerned, Saeed Ahmad, complainant (PW-1) stated that about 20/22 days after the occurrence, they received information and went to Central Jail Multan for identification parade and in the jail, he, Zafar, Mehboob and Ijaz identified the accused Imtiaz & Qaiser, in the presence of Illaqa Magistrate. Ijaz Hussain (PW-2) deposed on the same lines as deposed by the complainant (PW-1). During cross-examination, PW-1 deposed that *he alongwith Ejaz, Mehboob and Zafar joined identification parade proceedings. They were called by the Judicial Magistrate who asked them as to whether they can identify their accused persons and thereafter their statements were recorded. He has narrated in Ex.DA that Imtiaz accused fired upon Mehboob and gave butt blows to Khalil deceased. Confronted with Ex.DA, wherein it is not so recorded.* Ijaz Hussain (PW-2) during cross-examination deposed that *he alognwith Saeed, Mehboob and Zafar joined proceedings for identification parade of the present accused persons in the New Central Jail, Multan. During the same proceedings learned Magistrate recorded his statement Ex-DC. He narrated in Ex.PC that Qaiser Nadeem fired upon Khalil whereas Imtiaz accused snatched his rifle. At the time of recording Ex.DC he narrated to the learned Magistrate that Imtiaz accused made fire upon mehboob. Confronted with Ex.DC wherein it is not so recorded. He also narrated the learned Magistrate that Imtiaz accused hit him with rifle butt blows. Confronted with Ex.DC wherein it is not so recorded.*

18. It is trite law that holding of test identification parade was not a mandatory requirement as identification would be essential for

establishing the identity of the accused only if there is any doubt in this regard. Reliance in this case be placed on case reported as *"Abdul Aziz and others vs. The State"* **(2019 P Cr L J 12)**. According to prosecution, the witnesses duly identified the accused persons during the wake of identification parade. In order to rely upon the said identification parade, I am of the opinion that it will be necessary for the prosecution to establish, at the first instance, whether there existed, the circumstances in which a prudent man can recognize the feature of the persons under identification. In this case, the occurrence had taken place during at 2.30 a.m. during the midnight of 11.6.2011. No source of light has been alleged to be in existent at the time of occurrence, therefore, I hold that it was not humanly possible to give the description of features of the accused persons by the PWs at the time of occurrence, hence, despite the fact that the accused had raised no objection over the identification parade, I am not inclined to rely upon the said identification parade because of non-existence of sufficient light, at the place of occurrence for recognizing the features, role and face complexions of the accused persons at the time of occurrence, hence, the identification parade is rejected on this score. Reliance in this case be placed on case reported as *Kamal Din alias Kamala vs. The State* (2018 SCMR 577).

19. So far as recovery of weapon of offence i.e. pistol 30 bore is concerned, Muhammad Farooq SI (PW-15) deposed that on 28.07.2011 he interrogated the accused Qaiser Nadeem and Imtiaz Hussain and they one after the other made disclosure in pursuance whereof, Qaiser Nadeem accused got recovered 30 bore pistol along with five bullets from the Chah Verow Wala and same was taken into possession and sealed into parcels vide recovery memo Ex.PE, Pistol (P-4), bullets P4/1-5. He further stated that on the same day and place, Qaiser Nadeem accused got recovered 44 bore rifle P-5 alongwith seven live bullets P-

5/1-7 and the same were taken into possession, sealed into parcels vide recovery memo Ex.PF. Saeed Ahmad, complainant (PW-1) deposed that in their presence, accused Qaiser made a disclosure and led to the recovery of pistol 30 bore from the bank of a canal. The pistol was buried under earth. The accused himself while digging earth recovered pistol along-with five live bullets, which I took into possession vide recovery memo Exh.PE. He further deposed that from a distance of 4 steps accused Qaiser also got recovered rifle 44 bore with 7 live cartridges which were taken into possession through recovery memo Exh.PF. Khurshid Ahmad 1520-HC is silent about handing over, of the recovered empties of pistol .30 bore, taken into possession by Liaquat Ali SI (PW-9) vide recovery memos (Exh.PC and Exh.PD) to anyone, for keeping the same in the malkhana for safe custody. Tariq Mehmood 1927/C (PW-13) deposed that he transmitted sealed parcel of pistol .30 bore for its transmission to the Forensic Science Laboratory, Lahore on 06.08.2011. He is also silent about the transmission of crime empties recovered from the spot vide recovery memo (Exh.PC and Exh.PD) to the office of PFSA, Lahore. Furthermore, Mark-A is the photocopy of report of Punjab Forensic Science Agency, Lahore, which is not admissible in evidence under Section 510 Cr.P.C, hence same cannot be relied upon. Reliance in this regard is placed upon the case titled *"GHAYOUR ABBAS versus The STATE"* **(2018 Y L R 2494),** wherein it is observed that:-

> *"However, the report of the concerned quarter available on file as Exh.PE reflects that it is neither original report nor it is true/certified copy of the report rather it is a duplicate copy, which was issued on 13.01.2017 i.e. four years after the occurrence. Moreover, it does not carry signature of the Bio-*

Chemist or Chemical Examiner and only signatures of one Additional Medical Superintendent (Admn), Benazir Bhutto Hospital, Rawalpindi, are affixed on it and underneath his stamp it is mentioned ex-Chemical Examiner. No doubt the report of Chemical Examiner is to be brought on record in terms of Section 510, Cr.P.C. and that could be without summoning its author, however, admittedly it should be in original form and in case its original is not available, then on the basis of very cogent reasons then its certified copy should be presented for consideration by the learned trial court. However, perusal of Exh.PE reflects that neither it is original report nor it qualifies to be a certified/true copy, hence, it cannot be read in evidence against the appellant to connect him with the case. Moreover, there is no provision of law to deviate from the requisite mode of proof of a document. Respectful reliance in this regard is placed on the ratio decidendi of august Supreme Court of Pakistan in Province of Punjab case reported as 2017 SCMR 172; wherein following principle was laid down:--

"---Chap. V [Arts. 72 to 101]---Documents brought on record---Mode of proof---Provisions governing the mode of proof could not be compounded or dispensed with, nor could the Court, which had to pronounce a judgment, as to the proof or otherwise of the document be precluded to see whether the documents had been

proved in accordance with law and could, as such, form basis of a judgment."

When facts of the case in hand are examined on the touchstone of the case law referred to above, we have been persuaded to hold that the report of Chemical Examiner (Exh.PE) in this case is neither a legal document nor it carries any sanction of law, hence the same being vague/invalid document could not be read against the appellant. Therefore, the learned trial court was not justified in recording conviction against the appellant on the basis of such a indistinct document."

20. As stated above, the recoveries of weapon of offence shown to have been effected from the open plot, taken into possession by the I.O vide recovery memos (Exh.PE & Exh.PG) attested by the PWs, which was accessible to the public-at-large. Such type of pieces of recovery, is nothing, but trash and had failed to render any corroboration to the prosecution's case. Reliance in this regard is placed upon case titled *Muhammad Saleem Vs. Shabbir Ahmad"***(2016 SCMR 1605)** wherein their Lordships have pleased to observe as under:-

"We have noticed that the weapon in issue had allegedly been recovered from a place which was open and accessible to all and sundry and, thus, it was unsafe to place reliance upon such recovery."

21. The nutshell of the above discussion is that the prosecution's case is not free of doubts, benefit of doubt has accrued in favour of the accused as the apex Court has held in case titled *"Muhammad Khan and another Vs.*

State" **(PLJ 2000 SC 1041)** that ***it is axiomatic and universal recognized principle of law that conviction must be founded on unimpeachable evidence and certainty of guilt and hence any doubt that arises in prosecution case must be resolved in favour of accused.*** Moreover it is cardinal principle of criminal jurisprudence that a single instance causing a reasonable doubt in the mind of Court entitles the accused to the benefit of doubt not as a matter of grace but as a matter of right. Reliance is placed on case law reported as *"Muhammad Akram versus The State"* **(2009 SCMR 230)** and "*Tariq Pervaiz Vs. The State"***(1995 SCMR 1345).** Consequently, the instant appeal is allowed, the conviction and sentence awarded to the appellant by the learned trial Court, vide impugned judgment dated 19.06.2015 is set aside and the appellant is acquitted of the charge by extending him the benefit of doubt. The appellant is detained in jail, directed to be set at liberty forthwith in this case, if not liable to be detained in any other case.

(Anwaarul Haq Pannun)
Judge

APPROVED FOR REPORTING.

Judge

2019 LHC 3881

IN THE LAHORE HIGH COURT, MULTAN BENCH MULTAN

Case No. Diary No.40709 of 2019

Muhammad Iqbal versus The State, etc.

08.10.2019 Rao Jamshed Ali Khan, Advocate for the petitioners.

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The petitioners, through this petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, seek suspension of their sentence awarded to them vide judgment dated 27.09.2019 passed by the learned Judge Anti-Terrorism Court-II, Multan in case FIR No. 44 dated 02.09.2018 registered at Police Station CTD, District Multan for offences under Sections 4 & 5 of Explosive Act, 1908, 13(2)(c) of Arms Ordinance, 1965 and 7 of Anti-Terrorism Act, 1997, whereby they have been convicted and sentenced as under:-

Under Section 5 of Explosive Substance Act, 1908

Rigorous imprisonment for 02 years each and forfeiture of whole property belonging to them.

Under Section 13 of Arms Ordinance, 1965

Muhammad Iqbal

Rigorous imprisonment for 02-years and fine of Rs.5,000/- and in case of non-payment of the same, to further undergo two months S.I.

Benefit of Section 382-B Cr.P.C was extended to accused-petitioners and both the sentences awarded to petitioner Muhammad Iqbal were directed to run concurrently.

2. Against their afore-quoted conviction and sentences, all three petitioners (Muhammad Iqbal, Muhammad Usman & Hasnain Moavia) preferred Criminal Appeal No.891 of 2019 before this Court during pendency whereof, the instant constitution petition has been filed by them for suspension of their

sentences. The petitioners have only affixed court fee/stamp paper of Rs.500/- on this petition.

3. Although the petition has been diarized by the office but it is fixed as an objection case. As per objection performa, the following objection has been raised:-

"The Court fee is insufficient to the extent of Rs.1000/-."

4. Learned counsel for the petitioners, while relying upon the cases reported as Abid Hussain Shah and 28 others Vs. Government of the Punjab through Secretary S&GAD and others (PLJ 2012 Lahore 334) and Zahoor Ahmad and 309 others Vs. Member (Consolidation) Board of Revenue, Punjab and 23-others (PLD 2007 Lahore 461), contends that where the impugned acts arise out of one action or one order, one set of court fee is payable by several petitioners; that since the petitioners having joint interest have challenged one and the same order/judgment, therefore, court fee of Rs.500/- on behalf of all the three petitioners is sufficient and the office objection is not sustainable.

5. Heard.

6. Before dilating upon the merits of the case, I deem it necessary to firstly take bird's eye view over the concept and history of levying the court fee/stamp paper with the petition filed by the prisoner(s) before the court of law. The court-fee was ordered to be levied in the Sub-continent, for the first time, in the year 1780 by Viceroy Warren Hastings during East India Company's rule over India. After his impeachment by the British Parliament, his successor Lord Carnivales took over as the Viceroy of India. He abolished the condition of court-fee as, according to him, a tax on justice was a disgrace to a civilized power. However, after his retirement in the year 1795, the levy of court-fee was again imposed. In 1870, present Court Fees Act, 1870 (Act VII of 1870) was enacted and enforced by the British rulers throughout the British India. However, the British rulers exempted the Chartered High Courts/Supreme Court, established in the three Presidency Towns of India, namely, Calcutta, Madras and Bombay, where their British subjects could file suits without paying any court-fee.

After the establishment of Pakistan on 14th August, 1947 the laws then in force in British India were adopted in Pakistan. The Court Fees Act, 1870 is one of such laws, which has remained in force in Pakistan under Article 268 of the Constitution as the "existing Law". Browsing of the Court Fees Act, 1870 reveals that it is a Central statute relating to the levy of the court-fees. Chapter-I of the Act is preliminary, Chapter II deals with levy of court-fees in High Courts on original side, to be collected in the manner provided in the Act, Chapter III, deals with fees in other Courts, Chapter III-A, deals with fee leviable on probates, letters of administration and certificates of administration, Chapter-IV deals with process fees. Chapter-V deals with mode of levying fees and Chapter-VI deals with miscellaneous matters. There are three Schedules appended with the said Act. Schedule-I prescribes fees on ad-valorem basis whereas Schedule-II prescribes fixed rates and fees. Schedule-III prescribes forms of valuation. The main purpose of the Court Fee Act is to levy fee for the services to be rendered by the court. The Act not only prescribes fee but also provide how they are to be ascertained. In Mst. Walayat Khatoon's case (PLD 1979 SC 821), the apex court has held as under:-

> *"Court Fees Act is a fiscal enactment entitled only to secure revenue, it is a form of taxation."*

Needless to mention here that judicature is creation of the constitution. Article 175 of The Constitution of Islamic Republic of Pakistan, 1973 reads as under:

> 175. Establishment and Jurisdiction of Courts. (1) There shall be a Supreme Court of Pakistan, a High Court for each Province and a High Court for the Islamabad Capital Territory, and such other courts as may be established by law.
>
> (2) No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.

(3) The Judiciary shall be separated progressively from the Executive within fourteen years from the commencing day.

This Article also makes clear that the courts shall exercise the jurisdiction authorized by the constitution and law.

Article 192 of the Constitution states about formation of High Courts of the provinces which reads as under:

192. Constitution of High Court. (1) A High Court shall consist of a Chief Justice and so many other Judges as may be determined by law or, until so determined, as may be fixed by the President.

(2) The Sindh and Baluchistan High Court shall cease to function as a common High Court for the Provinces of Baluchistan and Sindh.

(3) The President shall, by Order, establish a High Court for each of the Provinces of Balochistan and Sindh and may make such provision in the Order for the principal seats of the two High Courts, transfer of the Judges of the common High Court, transfer of cases pending in the common High Court immediately before the establishment of two High Courts and, generally, for matters consequential or ancillary to the common High Court ceasing to function and the establishment of the two High Courts as he may deem fit.

(4) The jurisdiction of a High Court may, by Act of Majlis-e- Shoora (Parliament), be extended to any area in Pakistan not forming part of a Province.

Article 202 of the Constitution empowers the High Courts to make rules for regulating the practice and procedure of the Court or of any court subordinate to it subject to the Constitution and law which, for convenience of reference, is reproduced as follows:-

> 202. Rules of Procedure. Subject to the Constitution and law, a High Court may make rules regulating the practice and procedure of the Court or of any court subordinate to it.

In pursuance of the above constitutional provision, Lahore High Court, Lahore framed certain Rules and time to time issued Orders for regulating its judicial proceedings and that of District courts of the province. In order to determine the livability of the court fee on petitions, Rules & Orders of the Lahore High Court, Lahore, Volume- V (Relating to Proceedings in the High Court) Chapter 1 (Judicial Business) Part-A Rule 11 states as follow:

> *"No petition, memorandum of appeal or other document, which ought to bear a stamp under the Court Fees Act, 1870, shall be received in the Court until it is properly stamped."*

Moreover, Rule 10(i), Chap.4-F, Part-III of Part. J, Volume- V of High Court Rules and Orders, reads as under:

> "A court-fee of Rs. 500/- shall be payable on each petition but no court-fee shall be required in case a writ is required in respect of the detention of any person by or under orders of any public authority."

In Pakistan Defence Officers Housing Authority and others v. Lt. Col. Syed Jawad Ahmed (2013 SCMR 1707), the august Supreme Court of Pakistan has defined public authority as:

> *"A public authority is a body which has public or statutory duties to perform and which performs those duties and carries out its transactions for the benefit of the public and not for private gain or profit"*

7. It will be relevant to quote here Section 19(xvii) of The Court Fee Act, 1870 in verbatim which provides as under:-

> "19. Exemption of certain documents. Nothing contained in this Act shall render the following documents chargable with any fee:-
>
> i. _____
> ii. _____
> iii. _____
>
> xvii. Petition by prisoners, or other persons in duress or under restraint of any court or its officers"

While expounding the principle, in Abid Hussain Shah's case (supra), following dictum has bene laid down:-

> "In view of the foregoing, since all the petitioners complain of a single action and are employees of the same department, the office objection is overruled for the time being. Let the main case be listed for hearing on the judicial side."

Similarly, in Zahoor Ahmad's case (supra), following has been observed:-

> "10. From the survey of above case law, it can safely be concluded that each petitioner, in a joint petition has his/its own cause of action and relief claimed by such petitioner is to his extent and grievance of each petitioner is individual. The petition by each one of the petitioners in a joint petition, shall be deemed independent and each of such person, shall be liable to pay court-fee separately. The object, of allowing joint petitions, is to avoid conflicting judgments or to allow litigants to conveniently and properly file one petition without going into a hassle of filing and documenting the petition separately. This however; does not absolve the petitioners from payment of court-fee, separately. Single set of court-fee in such petition is not legal.

> 11. One set of court-fee is payable by several petitioners only when inter se the petitioners a jural relationship subsists i.e. association of persons registered as a firm or incorporated company etc. or in the case of public injury leading to public interest litigation, or in case where series of complained/impugned acts arise out of one action or order.

8. On the following grounds, Zahoor Ahmad's case is distinguishable from the present case:-

> (a) In present case, the office has raised objection regarding the non-affixation of court fee on this constitutional petition while the petitioners are in detention whereas the referred case pertains to civil matter. **(b)** In the referred case, the constitutional petition did not fall within the exemptions mentioned in provision of section 19 of The Court Fee Act, 1870, therefore, the above provisions could not have been considered. **(c)** In referred case, interest of community and common grievance of the petitioners qua civil matter was involved whereas the present petition involves the personal liberty of the petitioners. It is well settled principle of law that in criminal cases, an individual is responsible of his own act.

I may refer a judgment from the other side of the international border. In AIR 1978 AP 297, the Indian High Court has observed as under:-

> "5. This provision makes it abundantly clear that it exempts the application to be filed by a prisoner of other person in duress or under restraint of any Court or its Officers from payment of court-fee. As the petitioners are in prison, the application filed by them in the Court need not be affixed with any court-fee stamp. Whether the petition is presented to Court through jail or it is presented through an advocate is not material for the reason that exemption is given from the payment of court- fee for filing a petition by the prisoner.

> Therefore, in out view, the accused who are in jail need not pay any court- fees."
>
> (underlined for emphasis)

I may supplement the above proposition by referring Section 371(1) of The Code of Criminal Procedure,1898 which provides as under:-

> "In every case where the accused is convicted of an offence, a copy of the judgment shall be given to him at the time of pronouncing the judgment, or when the accused so desires, a translation of the judgment in his own language, if practicable, or in the language of the Court, shall be given to him without delay. Such copy or translation shall be given free of cost."

It is clear from the afore-quoted section of Cr.P.C that copy of judgment or translation shall be given free of cost to the convicted person. The provision leads to the conclusion that at the moment when judgment of conviction with imprisonment is pronounced, convict person is ordered to be taken under custody unless granted bail under Section 381-A of Cr.P.C and copy of the same is given to him free of cost because he is under detention. Likewise, if he approaches the upper forum regarding his conviction and detention while he is in prison or under custody, law exempts his petitions from levy of court fee. Intention and purpose of the legislature was that there should be no financial burden on the person under custody or detention who wants to approach the courts for redressal of any of his grievance in the case in which he is in prison or custody etc. I may refer to Section 420 of the Criminal Procedure Code which provides that:-

> *"If the appellant is in jail, he may present his petition of appeal and the copies accompanying the same to the Officer in charge of the jail, who shall thereupon forward such petition and copies to the proper Appellate Court."*

In order to advance the above object, Rule 94 (Chapter 5) of Pakistan Prisons Rules, 1978 is referred which provides as under:-

(i) If a convicted prisoner without a friend, relative or counsel to act for him, elects to appeal, the Superintendent shall apply to the Court concerned for a copy of the judgment or order against which the appeal is to be filed. If several persons are sentenced in the same case, only one copy of judgment shall suffice for all the prisoners electing to appeal from the same prison.

(ii) On receipt of the copy of the judgment or order, a prisoner if literate shall be allowed to write his own appeal. If the prisoner is not able to write, the Superintendent shall cause his appeal to be written for him by another prisoner or a prison official strictly in accordance with the dictation of the appellant.

(iii) An appeal preferred by a prisoner from the prison should, before despatch, be read over to him in the presence of the Superintendent. If the prisoner approves of the appeal, he shall affix his signature or thumb-impression on it. The Superintendent shall sign the document and cause the official seal of the prison to be stamped on it.

(iv) The Superintendent shall forward the appeal, with a copy of the judgment or order appealed against, direct to the appellate court as required by section 420 of the Code of Criminal Procedure.

Article 9 of the Constitution of Islamic Republic of Pakistan guarantees the right to life and liberty of citizens of Islamic Republic of Pakistan in the following words:-

> "No person shall be deprived of life or liberty save in accordance with law."

The above-quoted provision i.e. Section 19(xvii) of the Court Fee Act, 1870 clearly grants exemption from affixing court fee on the petitions by

prisoners or other persons in duress or under restraint of any court or its officer(s). The office should avoid from raising illegal and unnecessary objection on the petitions when there are specific, clear provisions and rules granting exemption particularly when question of liberty of a person is involved because such like objection may curtail his/her days of liberty if they are otherwise entitled to apply to the High Court to be set at liberty in accordance with law. Such office objections may amount to infringement of their fundamental right of liberty as envisaged in Article 9 of the Constitution if otherwise they are entitled to apply for any relief of liberty on merits. Unnecessary objections cause delay in disposal of cases and waste the precious time of the court. Article 4 of the Constitution covenants that every citizen has protection of law and to be treated in accordance with law particularly (i) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law; (ii) no person shall be prevented from or be hindered in doing that which is not prohibited by law (iii) no person shall be compelled to do that which the law does not require him to do.

9. For what has been discussed above, I am of the view that since the petitioners are confined in jail to serve out sentences awarded to them in the aforementioned criminal case, thus, in the presence of afore-quoted provisions of law, they are not liable to affix court fee/stamp paper on this petition. The office objection, in view of above, is **over-ruled.**

10. Before parting with this order, I duly appreciate the assistance rendered by Mr. Fakhar Bashir Sial and Mr. Muhammad Shafiq, Civil Judges/Research Officers Lahore High Court, Multan Bench, Multan to deal with the issue discussed and dealt with hereinabove.

(Anwaarul Haq Pannun)

Judge

Approved for reporting

Judge

2019 LHC 4540

IN THE LAHORE HIGH COURT, MULTAN BENCH MULTAN

Case No. Writ Petition No.15567 of 2019

Tahira Bibi versus SHO, etc.

29.10.2019 Sh. Aamer Habib Siddiqui, Advocate for the petitioner. Mr. Zulfiqar Ali Sidhu, AAG with M. Arshad Gopang, Director, Local Government, Multan.

The petitioner, by means of instant Constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 has made the following prayer:-

> "In the light of above submissions, it is, respectfully prayed that the instant writ petition may very kindly be accepted by way of directing the respondent Nos.1 to 3 not to harass the petitioner, their family members and also not to interfere within the matrimonial lives of the petitioner at the instance of respondent No.4 to 11. It is further humbly prayed that any other equitable relief, to which the humble petitioner may be found entitled to, be also granted".

2. As per averments of the petition, the petitioner being major and sui-juris, while exercising her free-will entered into a matrimonial bond with one Muhammad Bashir on 07.08.2019 against the wishes and without the blessing of her parents. After the solemnization of marriage, respondents No.1 to 3/SHOs at the behest of private respondents started harassing, intimidating and compelling the petitioner to get divorce from her husband and in the wake of this drive, on 15.08.2019, respondents No.1 to 3 illegally conducted a raid at her house. Upon raising hue and cry, the people of the locality attracted to the spot and rescued her from the clutches of said

respondents. The petitioner has invoked the jurisdiction of this Court being aggrieved of the behaviour and conduct of the official respondents who in the aforementioned circumstances are illegally creating harassment to her.

3. Heard.

4. At the very outset, it is observed that during the judicial dispensation, it has oftenly been noticed that as a result of registration of criminal cases in respect of offences under Chapter XVI-A PPC while waging a plea of valid marriage having duly been registered under the Muslim Family Laws Ordinance, 1961 (hereinafter to be referred as 'the MFLO') by one of the parties to the lis, generally contested by the other side or even in absence of registration of criminal cases, the grievance of illegal and undue harassment to the breach of fundamental rights of the aggrieved persons claiming valid marriage, at the hands of police at the behest of the parents, guardians or other relatives of the bride, is found to be voiced and by filing such petitions either the relief of quashing of FIR or issuance of a writ in the nature of prohibition is usually prayed for. Even, in certain cases upon a cursory inquiry it divulges that despite clear legal provisions specifying the eligibility with regard to age limit of the parties to the marriage, the acclaimed marriage is found as having been contracted by violating the provisions of the Child Marriage Restraint Act, 1929 (hereinafter to be referred as "the Act 1929"). It has further been noticed that some of the Nikah Khawans/Nikah Registrars instead of requiring any proof of age from the parties to the marriage which should be in the shape of some authentic document either issued by the NADRA in the form of National Identity Card, B-Form or School leaving Certificate, medical certificate based on ossification test issued by the competent authority and the Birth Certificate validly issued by the Union Council etc, out of their petty temptations knowingly that one of the parties to the marriage is minor, proceed to rely upon a self- declaration of the

concerned party in respect of his/their age at the time of registration of their marriage.

Similarly, it has also come on surface at a number of occasions that despite a clear legal requirement of filling in each column of the Nikahnama individually, with specific answer of the parties to the marriage, the Nikah Registrar proceeds to place a single long vertical line against all or some of the columns which amounts to an offence liable to be punished under the law. Such criminal lapse/acts of the Nikah Registrar or the parties, as the case may be, despite being a source of breach of rights of the parties to the marriage are randomly ignored. The unscrupulous elements while taking advantage of such omissions or lapses try to exploit the situation and create serious future complications for the others. It has also been observed with concern that the relevant Authorities i.e. Director General Local Government & Community Development, Lahore or any other person authorized in this behalf have not bothered to issue specific S.O.Ps containing mechanism or guidelines to avoid such violations to the provisions of the Act 1929 and the MFLO.

5. During the hearing of even instant case, while perusing the documents appended with this petition, it has been noticed that the Nikah Registrar has either left some of the columns of the Nikahnama blank or has not accurately fill in the same with requisite/specific reply of bride or the bridegroom, thus, in view of this criminal negligence, a notice was issued to Director, Local Government, Multan vide order dated 15.10.2019, who when confronted with the above noted criminal negligence and failure on the part of Nikah Registrar, sought time for obtaining instructions from the Director General, LG & CD, Punjab, Lahore. Learned Law Officer was also directed to establish contact with the Secretary, LG & CD, Punjab Lahore and submit his report before this Court in this regard on 29.10.2019. The Director, LG &

CD Department, Multan Division, Multan in view of his correspondence with the D.G. LG & CD, Punjab Lahore, under the subject of "Issuance of Standard Operating Procedure (SOP) for taking punitive action against Nikah Registrars violating the basic law" who, vide his letter No.LG & CD/AD(CD)13/19 (CRMS Complaints)/P-II dated Lahore, 23.10.2019 clarifying the legal position and providing guidelines approved by the competent authority on the subject matter to all the Directors in the Punjab, the same has been made part of the record and shall be discussed and commented upon in the later part of the judgment.

6. Under the Muslim Law the competence of a girl to enter into a contract of marriage is dependent on the attainment of puberty. Puberty is presumed at the age of fifteen years. According to 'Fatawa Alamgiri', Page-93 of Vol-V, the lowest age of puberty according to its natural signs, is 12 years in males and 9 years in females and if signs do not appear, both sexes are held to be adult on the completion of their age of 15 years. The principle which after copying out from Fatawa Alamgiri and Hedaya can be deduced is that a girl even having not attained puberty but possessing discretion and sufficient understanding can enter into a contract of marriage however for its operation it will be dependent on the consent of the guardian, if there is one, but in the absence of any guardian it will take effect on her attaining of majority and ratifying the contract. According to Paragraph-274 of Mahomedan Law, "when a marriage is contracted for a minor by any guardian other than the father or father's father, the minor has the option to repudiate the marriage on attaining the puberty. This is technically called the "option of puberty" (Khyar-ul- bulugh). The right of repudiation of the marriage is lost, in the case of a female, if after attaining puberty and after having been informed of the marriage and of her right to repudiate it, she does not repudiate without reasonable delay. The Dissolution of Muslim Marriages Act, 1939, however, gives her the right to repudiate the marriage before attaining the age of

eighteen years, provided that the marriage has not been consummated. But in the case of a male the right continues until he has ratified the marriage either expressly or impliedly as by payment of dower or by cohabitation."

7. I feel it expedient to observe that unfortunately due to fissiparous and rival political, social and religious forces, the resultant anarchy besides other factors also paved the way for the colonization of Sub- Continent. Despite scathing criticism, for many valid reasons for the systemic loot and plunder, of the resources of Indian Sub-continent, which at the relevant time were comprised over 1/3rd wealth of the world, initially by the barrens running the Company Bahadar and thereafter by the British Government itself. The society at the relevant time was also flowing many sordid traditions including child marriage because of certain socio-economic reasons and their education backwardness. It cannot be denied that the Indians of all colour and creed, had however benefited from the modern education system, innovative scientific research based technical knowledge which was introduced by their Colonial Masters. The modern education system brought a positive change in every sphere of life of the natives.

8. It may be necessary to express that the legislature despite being nicest one was comprised over forward looking men of wisdom. While adopting a progressive approach for relieving the society from the harmful effects of prevalent child marriage, it indeed undertook a commendable legislative business in the form of the Child Marriage Restraint Act, 1929 (Act XIX of 1929). It appears that without directly meddling with above described position discussed in para No.6 of this judgment regarding which age limit of marriage under the Muslim Personal Law, the provisions of Act 1929 have expediently and objectively been framed to hold male adult i.e. marriage contracting party about 18-years of age liable for punishment alongwith the other persons including the parents and guardians, who perform, arranged,

conduct or direct any child marriage. A deterrence of punishment for violation of the provisions has been created. It is quite vivid that the act does not hold the minor responsible for violation of the provision of the Act 1929. It also does not invalidate the marriage itself. It only, as discussed above, holds certain categories of persons liable for the violations of the provisions of the Act 1929. Under Section 2(a) of Act 1929, child has been defined 'a person, if male, under 18 years of age and if female, under 16 years of age. In sum and substance, except the minor, the Act 1929, holds three persons accountable for violating its provisions i.e:-

(i). Contracting party;

(ii). Promoter of the marriage;

(iii). Guardians

It is a matter of great concern that despite ninety years of the promulgation of the Act, 1929, its objectives could not have been achieved satisfactorily due to certain lapses or loopholes in the mechanism for its enforcement. The children are still being lured by unscrupulous elements through deceitful means to abuse their innocent souls. It is also relevant to point out that although under The Majority Act, 1875 (Act XX of 1875) (hereinafter known as 'Majority Act') a person is said to attain majority at the age of eighteen years. However, in case of appointment of his guardian by the Court, the age of majority of such a Ward is twenty-one years. The application of the above provisions has however been excluded insofar as the operation of personal law in respect of marriage, divorce and dower is concerned. Every other person, subject to as aforesaid, domiciled in Pakistan shall be deemed to have attained his majority on completion of his age of eighteen years, and not before. A Muslim though under 18 years on attaining puberty, can bring a suit relating to marriage, dower and divorce without next friend.

Nothing is more precious in the world than human beings. Human resource is most important and valuable as compared to other sources in the universe. Child is the future asset of a family, a nation and the world at large, respectively.

9. Normally, the marriages in early age are likely to be higher in rural areas due to less development as compared to more developed urban areas. Lesser or fewer educational and economic opportunities reduce the female access to education and restrict their involvement in sales and services as compared to their urban counterparts. Poverty and cultural barriers put constraints on women from having their say regarding their marriage decisions specifically in the traditional and parochial societies. Early age marriages can have severe consequences to the life of a female and pose serious personal and social problems ranging from health issues to social mobility. Women who marry earlier in age are more likely to bear child at younger age and are more exposed to prolong domestic violence. Similarly, women marrying at younger ages tend to have less education, less economic opportunities, lower level of social mobility and poor access to health services. The denial of opportunity for an adequate education would amount to denial of opportunity to succeed in life. Early marriage does not only restrict women from socio-economic opportunities, but also affects their reproductive health status such as forced sexual relations, early and complicated pregnancies, higher fertility rate and large family size formation.

There is almost a consensus that fertility and age at the time of marriage have an inverse relationship, lower the age at marriage, higher will be the fertility rate as lower age at marriage lengthens the reproductive span of a girl. In general, early age marriage of females not only exacerbates the poor socio-economic development by depriving them of education, social freedom, good health, but also their personal development and well-being. While talking

about the consequences of early age marriage at broader sense, it not only brings socio-economic underdevelopment at individual level but also hampers the development process of a region or a country. Therefore substantial part of human population, the women, remain uneducated or less educated, unemployed and underprivileged with poor health measures and no decision making power. It also increases the gender inequality and putting higher value on the boys than girls in the society.

Early marriage ensues into numerous adverse health consequences. Physically , child bride has small pelvis and are not prepared for childbearing. It results in deliveries that are too early or late. This exposes them to different complications. High mortality rates are due to postpartum hemorrhage, sepsis, obstructed labor and HIV transmission. Besides that, they are also at risk of acquiring Sexually Transmitted Infection and Cervical Cancer. To prove their fertility, they go for high frequency and unsafe intercourse with their old age polygamous spouse. Conjointly, the adolescent mother produces less breast milk or colostrum, which makes their child susceptible to infection. After marriage, girls are brought to their husband's place, where they have to play the role of wife, domestic worker, and ultimately a mother. Their husband may also be polygamous due to which they end up in burdensome situation and feel isolated, rejected, and depressed. Literature suggests that age differences and the poor communication may lead to divorce or separation. Also, their children are more likely to report a stressful life and notably more psychiatric disorders. Socially child brides are unable to look after their families because they have less authority and control over their kids, and have less capability to become decisive about their housing management, nutrition and health care. With that most of wives have never gone to school or left school early, making them dependent on their spouses in practical life.

According to the preamble of the Constitution which inter alia says that "Wherein shall be guaranteed fundamental rights, including equality of status, of opportunity and before law, social, economic and political justice, and freedom of thought, expression, belief, faith, worship and association, subject to law and public morality so that the people of Pakistan may prosper and attain their rightful and honoured place amongst the nations of the World and make their full contribution towards international peace and progress and happiness of humanity".

Now, therefore, we, the people of Pakistan,

Do hereby, through our representative in the National Assembly, adopt, enact and give to ourselves, this Constitution.

In the case reported as "Ismaeel vs. the State" (2010 SCMR 27), it has been observed as under:-

> "It is settled law that preamble and object is always be kept in mind by interpreting the provisions of the Act on the well-known principle that preamble is key to understand the Act. According to the Chief Justice Dyer, preamble is the key to open the minds of the makers of the Act, and the mischief of which they intend to redress. See Stowel v. Lord Zouch (1965) I Plowd.…..It is settled principle of law that Act must be read as an organic whole while reading the Act in question as an organic whole then it casts heavy duty upon the Courts to examine the evidence on record and decide the cases

keeping in view the object and mandate of the provision of the said Act. …"

It may be proper to refer here Article 9 of the Constitution, which says that 'No person shall be deprived of life or liberty save in accordance with law' it has been interpreted by the Superior Courts in plethora of judgments while enlarging comprehensively the word 'life' with a variety of shades emphasized that the said Article does not merely protect the right to 'exist' or 'live' but it also encompasses the idea of leading of a meaningful and dignified life with a minimum standard of living. In Ms. Shehla Zia and others v. WAPDA (PLD 1994 SC 693) it has been held that:-

> "The word 'life' has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country, is entitled to enjoy with dignity, legally and constitutionally. It is now well established that right to life as envisaged by Article 9 of the Constitution includes all those aspects of life which go to make a man's life meaningful, complete and worth living. In the case of Employees of Pakistan Law Commission v. Ministry of Works (1994 SCMR 1584), it has been laid down that Article 9 of the Constitution which guarantees life and liberty according to law, is not to be construed in a restrictive manner. Life has larger concept which include the right of enjoyment of life, maintaining adequate level of living for full enjoyment of freedom and rights."

Article 25-A of the Constitution provides as under:-

> **Right to Education**. The State shall provide free and compulsory education to all children of the age of five to sixteen years in such manner as may be determined by law'.

In case of "Bushra Jabeen and 367 others vs. Province of Sindh through Chief Secretary and others" (2018 M L D 2007), the co-relation between Articles 9 & 25-A of the Constitution has beautifully been maintained in the following words:-

> "-----It needs no reiteration that right to life includes right to education, therefore, it is one of the Fundamental Rights of every citizen of Pakistan, whereas, in terms of Article 25-A of the Constitution of Islamic Republic of Pakistan, 1973, it has now become the duty of the State, to be performed through Government(s), to provide free and compulsory education to all the children of the age of five to sixteen years in such a manner as may be determined by law."

It will be relevant to mention that in terms of above Article, Punjab Free and Compulsory Education Act, 2014 (Act XXVI of 2014) has been promulgated.

> **Islam is the most progressive religion. It has laid more emphasis on the importance of learning and research than every other religion. Besides individual efforts, the atmospheric support is sine-qua-non for acquiring scholarship. The education enhances the consciousness and sharpens the vision of the humans. Being a substantial portion of population, women cannot be kept out of the main stream of the national life for the progress of any society and development of a country.**

In case reported as "LIAQAT HUSSAIN and others vs. FEDERATION OF PAKISTAN through Secretary, Planning and Development Division,

Islamabad and others" (PLD 2012 Supreme Court 224) it has been held as under:-

> ----Art. 25-A---Right to education Education plays an important role in the successful life of an individual---Generally, education is considered to be the foundation of society which brings economic wealth, social prosperity, political stability and maintaining healthy population--- Further progress of society is stopped in case of deficit of educated people Educated people enjoy respect among their colleagues and can effectively contribute to the development of their country and society by inventing new devices and discoveries-- -Islam is a scientific religion emphasizing on the need of scientific inquiry---Need, purpose and kinds of education and as under the mandate of Quran and Ahadith, elucidated.
>
> ----Arts. 270AA(8), (9), 25-A, 29, 7, 37(a) & 184(3)---Constitutional petition---Right to education---Duty of State---"State"---Definition--- By virtue of Art.270AA(8)(9) of the Constitution [as substituted by Constitutional (Eighteenth Amendment) Act, 2010] the Concurrent Legislative List was omitted in pursuance whereof projects being run by the Federal Government in the Provinces, including Basic Education Community Schools were decided to be wound up- --While assailing the proposal of such winding up prayer of the petitioners (fathers of students and employees of the Projects) was that the proposed action on the part the authorities of closing down "Establishment and Operation of Basic Education Community Schools" be declared to be without lawful authority and of no legal effect and be also declared to be in violation of

> Art.25-A of the Constitution and the proposed act of winding up of the National Commission of Human Resources may be held to be entirely unconstitutional and of no legal effect so as to allow the Commission to continue to perform the positive duty of providing basic human rights to the citizens of Pakistan, under Art.7 of the Constitution, and that the State including the Federal and the Provincial Governments, therefore, under Art.25-A of the Constitution, the Parliament, in view of the definition of the 'State' had not absolved the Federal Government from conferring the Fundamental Rights upon the children---State, in terms of Art.37(a) of the Constitution, shall form such policies on the basis of which State shall promote, with special care, the educational and economic interest of backward classes or areas---- Held, under Art.29 read with Art.25-A of the Constitution the Fundamental Rights were required to be enforced by the State---Especially in view of Art.25-A of the Constitution, it had been made mandatory upon the State to provide the education to the children of the age of 5 to 16 years."

No country can make progress without maintaining a nice balance between its population and resources. The august Supreme Court, in a Human Rights Case NO. 17599 of 2018, regarding alarming high population growth rate in the country, reported as 2019 SCMR 247, has held as under:-

> "As of 2017, Pakistan is ranked as the fifth most populous nation in the world, with a population of over 200 million. While all nations and economies rely on population growth and a creation of future younger generations, such growth must be sustainable and proportionate to the resources available. Approximately 14,000 babies are born in Pakistan which is already struggling to

feed, educate and provide employment for its existing population. Pakistan has experienced unchecked population growth since its creation in 1947. From 1998 (the previous comprehensive census) to 2017, Pakistan's population has increased by 57%, with the addition of approximately 76 million people to the population. Projected growth trends from the United Nations suggest that if this population growth rate does not slow considerably, Pakistan can expect to have its population increase by 50% resulting in an estimated 306 million people, surpassing the United States, Indonesia, Brazil, and Russia to become the world's third largest country in terms of population trailing behind India and China. The steadily increasing population rate in Pakistan is a ticking bomb which will certainly not wait till it is convenient for us to take note of it. What will follow this population explosion is starvation, famine and poverty, the likes of which are already visible in areas like Thar. Other indicators of overstretched resources and infrastructure are apparent in Pakistan's unemployment rate, maternal and child mortality rate, literacy and educational enrolment figures, and access to clean water and adequate food. A brief overview of the above figures reveals the extent of the resource and infrastructure shortcomings for an already large populace. Pakistan currently has a very high mortality rate for children under the ages of five years (75 deaths per 1000 live births), an above average maternal mortality rate (178 deaths per 10,000 births), and approximately 44% of the population lacks access to clean drinking water. Furthermore, Pakistan's literacy rate is 58% while over 22 million children are out-of-school. Future projections indicate the number of educational institutions to

reduce in number. The above figures make it clear that Pakistan is not equipped to handle the addition of another 100 million people to its ranks.

10. Through a Proclamation on the conclusion of International Conference on Human Rights at Tehran in 1968, 'family planning' was recognized by the international community as both a right and a means of enabling other human rights. In this regard, paragraphs 16 and 17 of the Proclamation are relevant which read as under:-

> "16. The protection of the family and of the child remains the concern of the international community. Parents have a basic human right to determine freely and responsibly the number and the spacing of their children; 17. The aspirations of the younger generation for a better world, in which human rights and fundamental freedoms are fully implemented, must be given the highest encouragement. It is imperative that youth participate in shaping the future of mankind;"

As obvious from the language of the above reproduced paragraphs, the right to freely and responsibly determine the number and spacing of children involves imparting sufficient information and means to the parents to control reproduction as well as providing them with adequate knowledge regarding the advantages and disadvantages of such determination. Also apparent from the above language is the interdependence of planned births with the right of the younger generation to be afforded all fundamental and human rights recognized by the international community. Thus, the right to well-informed and controlled pregnancies is a right that paves the path for enabling several other rights; for an overburdened economy cannot be expected to juggle with a growing population while struggling to provide a better facilities and opportunities for its progeny. This right, which forms part of the

international commitments of Pakistan, originates from the right to life under Article 9 of the Constitution of the Islamic Republic of Pakistan, 1973 (Constitution), and other fundamental rights such as the right to education, equality, speech, information and due process (Articles 4, 25, 25-A, 19, 19-A and 10-A of the Constitution respectively), which are in turn inevitably linked to the economic progress of the State expected to make such rights available to its people. Unfortunately, by failing to prioritize the provision of information and means of controlling unplanned and unwanted births, the country now faces a surplus of unskilled and unemployed manpower for whom basic human and fundamental rights are luxuries they can at best only hope for, but never attain.

11. It is maintained that in order to give effect to certain recommendations of the Commission on Marriage & Family Laws and to achieve the other objects, it has been made mandatory for the Muslim citizens of Pakistan solemnizing and contracting marriage to get their marriages registered in accordance with the provision of Section 5 of the MFLO and the Rules made thereunder i.e. West Pakistan Rules under the Muslim Family Laws Ordinance, 1961.

12. For ease of reference and better comprehension of the issues highlighted, relevant provisions of law and rules made there-under, in their chronological order are reproduced:-

5. Registration of marriage;

(1) Every marriage solemnized under Muslim Law shall be registered in accordance with the provisions of this Ordinance.

(2) For the purpose of registration of marriage under this Ordinance, the Union Council shall grant licences to one or more persons, to be called Nikah Registrars, but in no case shall more than one Nikah Registrar be licensed for any one Ward.

Province of Punjab

For the purpose of registration of marriage under this Ordinance, the Union Council shall grant licences to one or more persons, to be called Nikah Registrars.

(2-A) The Nikah Registrar or the persons who solemnizes a Nikah shall accurately fill all the columns of the Nikahnama form with specific answers of the bride or the bridegroom.

(3) ……...

……..

Province of Punjab

(4) If a person contravenes the provision of:

(i) Sub section (2A), he shall be punished to simple imprisonment for a term which may extend to one Month and fine of twenty five thousand rupees; and

(ii) Subsection (3), he shall be punished to simple imprisonment for a term which may extend to three months and fine of one hundred thousand rupees.

(5) The form of Nikahnama, the registers to be maintained by Nikah Registrars, the records to be preserved by Union Councils, the manner in which marriage shall be registered and copies of Nikahnama shall be supplied to the parties, and the fees to-be charged thereof, shall be such as may be prescribed.

(6) ..... ,,

13. Rule 7 of the West Pakistan Rules under the Muslim Family Laws Ordinance, 1961, deals with the issuance of a licence to the person for registration of marriages, which reads as under:-

> "7(1) Any person competent to solemnize a marriage under Muslim Law may apply to the Union Council for the grant of a licence to act as Nikah Registrar under section 5. (2) If the Union Council, after making such enquiries as it may consider necessary, is satisfied that the applicant is a fit and proper person for the grant of a licence, it may, subject to the conditions specified therein, grant a licence to him in Form I. (3) A licence granted under this rule shall be permanent and shall be revocable only for the contravention of any of the conditions of a licence granted under this rule. (4) If any person to whom a licence has been granted under this rule contravenes any of the conditions of such licence, he shall be punishable with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

The license is issued on a prescribed form i.e. Form-1 given in West Pakistan Rules.

"CONDITIONS"

1. The Licence is not transferable.
2. <u>The licence is revocable for breach of any of the provision of MFLO, 1961, or the rules made thereunder or of any condition of this licence.</u>
3. .....
4. .....
5. <u>Such other conditions, if any, as may be specified by the Provincial Government.</u>

On a combined reading of above provisions of MFLO and the Rules, the irresistible conclusion which can draw is that every marriage solemnized under Muslim Family Law is mandatorily registerable. The registration of the marriage shall be in accordance with the provisions of the Ordinance and the Rules. For registration of Nikah/marriage, the Union Council has been authorized to issue a license to one or more persons who are fit and proper to solemnize the Nikah, on his/their application who are called as Nikah Registrars. The Nikah Registrar is under

obligation to fill in accurately every column of the Nikahnama individually with specific answers of the bride and the bridegroom. Any violation/contravention with the provisions of the Ordinance is punishable with simple imprisonment and fine. The record of the marriage in respect of marriage registration is to be maintained by the Union Council. The copy of Nikahnama shall be supplied to the parties. It may be relevant to observe that in view of section 21 of the Pakistan Penal Code, 1898, Nikah Registrar is deemed to be a 'Public Servant' for criminal prosecution. The status of Nikah Registrar is that of a licensee. He does not fall within the definition of an employee as provided under Section 2(h) of the PEEDA (Punjab employees, efficiency and discipline) Act 2006, therefore, in case of any contravention with any of the provisions of law or violation of any of conditions of the licence, subject to notice, his licence can be revoked/ cancelled by the Union Council.

14. Except a child, let me reiterate that the persons of three categories i.e. contracting party, promoters of the marriage and the guardians including the parents are liable for arranging and contracting the marriage for violating the provisions of the Child Marriage Restraint Act, 1929. It appears that qua authorization of the Union Council [under Section 9 of the Act] to make a complaint to take cognizance of an offence by a family Court is an outcome of a pragmatic legislative intent to achieve the objectives behind the Act. If marriage of a child is found to have been solemnized, Union Council is under a legal obligation to file a formal complaint against the persons violating the provisions of the Act before the Court to punish them and in this way, the efforts if any, made by the offenders/parents/guardians for screening of the violation made by them can effectively be frustrated. The prosecution of violators shall create deterrence in the society against the practice of child marriage. The legislature has, therefore, objectively given this mandate to the Union Council. The office of Union Council is a public body, created under the law. Being a statutory body, Union Council is obliged to perform its functions strictly in accordance with law. It may also be pointed out that under Section 2(v) of The Punjab Local Government Act 2019, the 'Council' comprises over the Convenor and other councilors of a local government. Both elected councilors of the council and a convenor

[Section 2(W)] are covered by the definition of a Councilor. From the date of its first meeting unless dissolved earlier [under section 233 of this Act], the term of office of the council, head of the local government, convenor and councilors shall be for a period of four years. Before assuming their office, all heads of the Local Government, conveners and councilors are required [under Section 114 of the Act] to take oath of their offices in terms of seventh, eighth and ninth Schedule of the Act respectively. They pledge to perform their duties under the Punjab Local Government Act, 2019, Rules, Bye-laws and Regulations made thereunder honestly, efficaciously and efficiently to the best of their ability. It appears that these provisions have been legislated to inculcate in them a sense of responsibility. In case they make any breach or omission, in discharge of their functions/duties, they have been held accountable. The government is empowered [under Section 121 of the Act] to appoint administrators, on the dissolution of local governments or expiry of the term of a council [under Section 113 of this Act] or occurrence of a vacancy in the office of the head of the local government and pending the constitution of a new local government or a council, or appointment of a new head of the local government by way of elections. The Government by an order publish in the official gazette shall appoint any of its officers to perform such functions and exercise such powers and authority of the respective local government as may be specified in that order, which have duly been mentioned/enumerated in detail in the Act. Inter-alia, it is the duty of the Metropolitan Corporation, Town Committee and Tehsil Council to perform functions pertaining to "births, deaths, marriages and divorce registration" as given in item No.(j) Part I, Third Schedule, item No.(j) Part I Fourth Schedule and item No.(i) Part I Fifth Schedule of the Act respectively. It may be added that being settled proposition, even if, expression "misconduct" is not defined in the statute or the rules, yet when pointed out, it should be interpreted by the Courts narrowly in the sense of an infringement of binding rule of conduct applicable. Reliance in this regard is placed upon case titled "The Province of East Pakistan Vs. Muhammad Sajjad Ali Mazumdar" (P L D 1962 Supreme Court 71). However, a mechanism of accountability, oversight and responsiveness has definitely been devised through various provisions of Punjab Local Government Act, 2019. Any head of the Local Government,

Convenor, Councilor, Officer or servant of the Local Government or any other person [under Section 220 of the Act] may be held guilty of misconduct if he violates any provision relating to code of conduct prescribed [under Section 219], derelicts from duty or shows gross negligence in performance of duties with manifest wrongful intent, knowingly vitiates any provision of this Act or lawful directions or orders of the government, involves in an act that results in wrongful gain to himself or to any other person, exercise powers or authority vested in him under this Act or any other law for the time being in force or fails to or refuses to exercise such powers or authority, for corrupt, unlawful or improper motives and attempts or abets any act which constitutes misconduct under this section.

15. It will be relevant to observe that the trial of the offence under the provisions of the Child Marriage Restraint Act, 1929 is to be held by a Family Court exercising the powers of a Judicial Magistrate of the first class in accordance with the Provisions of Family Courts Act, 1964 (XXXV of 1964). In addition to what has been discussed in the preceding paragraph, it is observed that due to child marriage, the possibilities/ chances/likelihood of infringement of fundamental rights of a child which have duly been guaranteed by the Constitution of Islamic Republic of Pakistan, 1973 are enhanced. As referred hereinabove, that the right of life is not a mere right to exist or live, it also encompasses the idea of leading a meaningful and dignified life. Offering of an opportunity to get education by the state is also a fundamental right of a minor, denial whereof would amount to denial to excel and progress in life. The education enlightens the soul of a human being. Besides shedding positive effects on his body, the education also refines human behavior. Examining this proposition while seeing it through the prism of rule "loco parentis" is observed that the paramount consideration before the Courts has always been the welfare and betterment of a minor. The Courts always act in loco parentis position while keeping in view a variety of considerations. A formalistic approach commonly associated with the adjudication of adversarial civil disputes may not

be conducive to the exercise of parental jurisdiction by this Court. A more proactive role shall have to be adopted so as to ensure the protection of the best interest of the minor. The expression welfare shall have to be construed in a way as to include in its compass all the dominant factors essential for determining the actual welfare of the minor/child with a progressive outlook enabling him to prove as a useful entity. Technicalities of law are not supposed to circumvent the exercise of jurisdiction and powers by the Courts in dealing with the matters pertaining to the minor/child. All courts are therefore, supposed to exercise their jurisdiction proactively to forestall any endeavor to cause a breach to the fundamental rights of the children, the protection/provision of which essentially is also in the welfare of the minor/child. Therefore, I feel it appropriate to hold that whenever it comes to the notice of a Court that prima facie a case of breach of fundamental rights of the minor is made out, the Court, in case of failure of the Union Council in moving a complaint before the Court, while adopting a proactive role in "loco Parentis" should, without any hesitation, pass an appropriate order directing the Union Council to send a requisite complaint before the competent Court that a marriage has been contracted in violation of the provisions of the Child Marriage Restraint Act, 1929.

16. As referred in Para-5 of the judgment, Director Local Government and Community Development, Multan in view of his correspondence with Director General Local Government and Community Development, Lahore has issued some Standard Operating Procedure for taking punitive action against the Nikah Registrar violating the basic law to the following effect:-

> "i. That section 5(2A) of MFLO, 1961 states that at the time of solemnization of marriage, the Nikah Registrar or the person who solemnizes a Nikah shall accurately fill all columns of the Nikahnama form with specific answers of the bride or the bridegroom. And in case of contravention, a punishment is prescribed under section 5(4)(i) of the said Ordinance i. e. if a person contravenes the provisions of sub- section (2A), he shall

be punished to simple imprisonment for a term which may extend to one month and fine of twenty five thousand rupees.

ii. Further, under rule 21 of the West Pakistan Rules under Muslim Family Law Ordinance, 1965 (hereinafter 'rules"), no court shall take cognizance of any offence under the ordinance or the rules unless on a complaint in writing by the union council, stating the facts constituting the offence; therefore, ensure that every union council should lodge complaints soon after the receipt of Nikahnama forms columns of which are not accurately filled. Furthermore, prepare a report, on quarterly basis, containing the details about the complaints lodged during the quarter and furnish the same to DG office for information;

iii. That cancel/revoke, after giving show-cause notice, the license of Nikah Registrar who breaches any of the provisions of MFLO, 1961 or rules made thereunder r or any of the condition of his license.[In view of condition No.5 of the Conditions of the License, these directions may be deemed to be part of the conditions of the license.]

iv. That ensure that no incomplete (not accurately filled) Nikahnama be registered in the UCs and if any Secretary UC or any other official registers the incomplete Nikahnama, he may, forthwith, be proceeded against under the PEEDA Act, 2006 and keep noted that no laxity in this regard shall be tolerated.

In addition to above, the following further directions are being issued

(1) All the Nikah Registrars or other persons, who solemnize marriages are under legal obligation to scrutinize the credentials at the time of Nikah as to whether the marriage is solemnized with the free will of the parties and no child is exposed to marriage. Mere submission of oral entries for the purpose of age should not be accepted unless any proof of age from the parties to the marriage preferably which should be in the shape of some

authentic document either issued by the NADRA in the form of National Identity Card, B-Form or School Leaving Certificate, Medical Certificate based on ossification test issued by the competent authority and the Birth Certificate validly issued by the Union Council, etc. is produced.

(2) Furthermore, after perusing the record in compliance with SOP (ii) mentioned in para 17, in case the Authority fails to take the requisite action, it will be deemed that he himself has willfully failed to perform his function/duty amounting to negligence rendering himself liable for initiation of disciplinary proceedings against him under the relevant law.

17. So far as the prayer of the petitioner as reproduced in Para-1 of the judgment is concerned, the same in view of Article 9, 14 and 35 of the Constitution of Islamic Republic of Pakistan, 1973, 'The State shall protect the marriage, the family, the mother and the child' the same is granted and the official respondents are hereby directed to remain within the fourcorners of law and restrain themselves from causing any illegal harassment to the petitioner in any manner whatsoever. Resultantly, the instant writ petition is allowed and respondents No.1 to 4 being public functionaries are directed to remain within the four corners of law and desist from causing any harassment to the petitioner.
18. Before parting with this order, it is observed that the Secretary Local Government, Punjab, Director General Local Government and Community Development, Lahore and head of the Local Governments as mentioned in the Punjab Local Government Act, 2019 shall bring the existing SOPs in conformity with the directions issued hereinabove, copy whereof shall be submitted before this Court through Addl. Registrar (Judicial) of the Bench within two months, after receipt of copy of this order. Office is directed to transmit copy of this order to all concerned.
19. I also duly appreciate the assistance rendered by Mr. Muhammad Shafiq, Research Officer/Civil Judge 1st Class, Lahore High Court Multan

Bench, Multan to deal with the issue discussed and dealt with hereinabove.

(Anwaarul Haq Pannun)
Judge

APPROVED FOR REPORTING.

Judge

2020 LHC 1228

Case No. Crl. Appeal No. 519 of 2018

State Through Prosecutor General Punjab

versus

Muhammad Esa

J U D G M E N T

Date of Hearing.	04.02.2020.
The State by:	Mr. Khalid Pervaiz Uppal, DPG
Respondents- accused by	M/s. Ahsan Bhoon, Zulfiqar Abbas Naqvi, Sheharyar Tariq, Ch. Hafeez-ur-Rehman and Mustafa Naqvi, Advocates.

Anwaarul Haq Pannun-J:- The State, through The Prosecutor General, Punjab, has filed instant appeal under Section 25 (4) of the Anti- Terrorism Act, 1997 (Act No.XXVII of 1997) as amended by way of Act, XIII and XX of 2013, (hereinafter to be called as "the Act"), while calling in question the vires of judgment dated 30.03.2018, whereby, learned Judge Anti-Terrorism Court, Rawalpindi Division, Rawalpindi (hereinafter to be called as the trial court) on the conclusion of trial held in case FIR No.17 dated 17.05.2017, under Section 4 & 5 of the Explosive Substances Act, 1908, Sections 11-I, 11-K, 11-N, 21-C of the Act, Section 13(2)(c) of Pakistan Arms Ordinance and Article 4 of the Prohibition (Enforcement of Hadd) Order, 1979, registered at P.S. CTD, Rawalpindi has acquitted respondents No.1 to 7, namely, Muhammad Ehsan, Ghulam Yasin, Muhammad Adeel Akram, Muhammad Fayyaz, Khawaja Ashar Fayyaz, Aslam Khan and Moeez Ahmad Khan respectively of the charge.

2. At the very outset, learned counsel for the respondents-acquitted accused questioned the maintainability of instant appeal by submitting that impugned

judgment of acquittal was pronounced on 30.03.2018, the appeal as required under section 25 (4) of the Act, could have been filed within thirty days of its pronouncement, till 29.04.2020, instead thereof, the same was filed on 03.05.2018 which is clearly three days barred by limitation, therefore, the appeal may be dismissed on this score alone.

3. Conversely, learned Deputy Prosecutor General contends that in view of Subsection (2) of Section 25 of the Act, learned trial court was under a legal obligation to supply copy of the impugned judgment dated 30.03.2018, free of cost, on the day it was pronounced, instead it was supplied to the Public Prosecutor subsequently on 04.04.2018, therefore computing the prescribed limitation period of 30 days if the time consumed in supplying copy of the impugned judgment, is excluded, the appeal filed on 03.05.2018, is within time. He further contends that the above noted delay in supplying copy of the judgment to the Public Prosecutor is an act of the Court as the appeal can only be filed under Section 25(4) of the Act after supplying copy of impugned judgment by the Court, therefore, the prosecution cannot be held responsible for the delay in filing the appeal, he prayed that in the interest of justice, the delay, if any, in filing the appeal may be condoned while exercising inherent powers of this Court.

4. Heard. Record perused.

5. Heard. Record perused. In order to appreciate the above-noted rival contentions of the learned counsel for the parties, we feel it appropriate to examine the issue under discussion while seeing through the prism of provisions of relevant Statutes. For ready reference, Section 25 of the Act is reproduced hereunder:-

> 25. Appeal.- (1) An appeal against the final judgment of (an Anti-terrorism Court) shall lie to [a High Court].
>
> (2) Copies of the judgment of (an Anti-terrorism Court) shall be supplied to the accused and the Public Prosecutor free of cost on

the day the judgment is pronounced and the record of the trial shall be transmitted to the "a High Court" within three days of the decision.

(3) An appeal under sub-section (1) may be preferred by a person sentenced by (Anti-terrorism Court) to "a High Court" within [fifteen days] of the passing of the sentence.

(4) The Attorney general (Deputy Attorney General, Standing Counsel) or an Advocate General (or an Advocate of the High Court or the Supreme Court of Pakistan appointed as Public Prosecutor, Additional Public Prosecutor or a Special Public Prosecutor) may, on being directed by the Federal or a Provincial Government, file an appeal against an order of acquittal or a sentence passed by (an Anti-terrorism Court) within [thirty] days of such order.

[(4A) Any person who is a victim or legal heir of a victim and is aggrieved by the order of acquittal passed by an Anti-terrorism Court, may within thirty days, file an appeal in a High Court against such order.

(4B) If an order of acquittal is passed by an Anti-terrorism Court in any case instituted upon complaint and the High Court, on an Application made to it by the complainant in this behalf, grant Special leave to appeal from the order of acquittal, the complainant may within thirty days present such an appeal to the High Court.]

(5) An appeal under this section shall be heard and decided by [a High Court] within seven working days.

[(6)* * * * * * *

(7) * * * * * *

(8) Pending the appeal a [High Court] shall not release the accused on bail.

[(9) For the purposes of hearing appeals under this section each High Court shall establish a Special Bench of Benches consisting of not less than two Judges.

(10) While hearing an appeal, the Bench shall not grant more than two consecutive adjournments.]

The above provision, without any ambiguity, determines forum for filing an appeal against the final judgment of the learned trial court, places the court under a statutory obligation to supply the copy of the final judgment free of cost on the day of its pronouncement to the accused and the Public Prosecutor, vests a statutory right of appeal in some persons, besides enabling the complainant, in case of acquittal of an accused in a private complaint to seek leave of the High Court for filing an appeal to challenge such acquittal, prescribes the period of limitation for filing appeal against the final judgment. The provision of subsection (3) of Section 25 of the Act further enables to a person sentenced by the Anti-Terrorism Court to prefer an appeal, within fifteen days of the passing of sentence, to High Court. Under sub-section (4) of Section 25 of the Act, the Attorney General (Deputy Attorney General, Standing Counsel) or an Advocate General (or an Advocate of the High Court or the Supreme Court of Pakistan appointed as Public Prosecutor, Additional Public Prosecutor or a Special Public Prosecutor) may on being directed by the Federal or a Provincial Government, file an appeal against an order of acquittal or a sentence passed by (an Anti-terrorism Court) within [thirty] days of such order. Apart from above, under Section 4-A of the Act any person who is a victim or a legal heir of the victim or otherwise is a person aggrieved of the order of acquittal passed by the Anti-Terrorism Court, may also file an appeal against such order within a period of thirty days in the High Court. By providing a period of thirty days as limitation for filing an appeal to State i.e. the Federal or the Provincial Government, the victim or legal heir of the victim or any other person aggrieved by order of acquittal passed by the Court, they all have been treated at par.

6. On browsing of various provisions of the Act, one may not feel any difficulty in coming to the conclusion that enacting its provision to achieve its avowed object inter alia of speedy trial, behind the promulgation, a special emphasis has been made right from the registration of a case, in respect of the offence(s) triable under the provisions of the Act, cognizance, a special procedure prescribing a period for conclusion of trial including the provisions providing limitation for appeal and decision thereof by the appellate court. Before we leap forward, it may also be beneficial to consider some other important and relevant aspects of the matter. The Act is a Special Law and its provisions prevail upon, insofar as they are inconsistent with the provisions of General Law. However, in the absence of any particular provision in a Special Law dealing with any specific aspect, the provisions of the General Law are to be applied and invoked. Deeming it to be an opportune moment, after reaching at the trajectory of the discussion, it is observed that there exists no express provision in the Act, providing distinctly to regulate the special procedure of the appellate court except the pending appeal, the High Court shall not release accused on bail and the appeal shall be heard by a special Bench consisting of not less than two judges and the Bench while hearing an appeal shall not grant more than two consecutive adjournments and the appeal shall be heard and decided within seven working days. It appears that in absence of any express provision catering a legal requirement embodied in the provision of Section 419 Cr.P.C., (hereinafter to be referred as "the Code") which states that an appeal shall be in the form of a petition in writing, accompanied by a copy of judgment appealed against unless directed otherwise by the Court it is presented, under Section 25(2) of the Act, the Anti-Terrorism Court has been directed, to supply to the Prosecutor and the accused, as the case may be, copy of the judgment free of cost on the day it is pronounced.

7. After above analysis of Section 25 of the Act, we feel it expedient, for measuring the substance and strength of the arguments of the learned Deputy Prosecutor General, regarding exclusion of time consumed in delivery of the

copy of the judgment, to examine, as of necessity, Section 3 of the Limitation Act (Act IX) of 1908 (hereinafter to be referred as 'the Limitation Act'), which reads as under:-

> "Dismissal of suits, etc., instituted, etc., after period of limitation. Subject to the provisions contained in sections 4 to 25 (inclusive), every suit instituted, appeal preferred, and application made, after the period of limitation prescribed therefore by the first schedule shall be dismissed, although limitation has not been set up as a defence."

8. The gist of command contained in the above-quoted provision, may be expressed in simple words by saying that subject to Provisions of Section 4 to 25 of the Limitation Act (both inclusive) every suit instituted, appeal preferred and application made, after the period of limitation prescribed therefor in the First schedule, inspite the Limitation is not set up as a defence by an adverse party, shall be dismissed. The Court, seized with the matter, of its own, shall examine the question of limitation and pass an order accordingly. Needless to observe that the Provisions of Sections 4 to 25 of the Limitation Act are the exceptions meant for excluding such period by condoning the delay on the application of the concerned party on its showing sufficient cause in computing the period of Limitation. The First Schedule, which finds mention in Section 3 of the Limitation Act, being its progeny, has been divided into three parts i.e. (i) First Division: Suits, (ii) Second Division: Appeals, (iii)Third Division: Applications.
9. In order to elaborate the issue under discussion, the relevant Articles dealing with the appeals mentioned above, are reproduced as under:-

The First Schedule

(See Section 3)

Second Division: Appeals

	Description of suit	Period of limitation	Time from which period beings to run
	1	2	3
150	Under the Code of Criminal Procedure, (V of 1898), from a sentence of death passed by a Court of Sessions or by a High Court in the exercise of its original Criminal Jurisdiction.	Seven days	The date of the sentence
151	……..	…….	……..
152.	…….	…….	……..
153.	…….	…….	…….
154.	Under the Code of Criminal Procedure, (V of 1898), to any Court other than a High Court.	Thirty days	The date of the sentence or order appealed from
155.	Under the same Code to a High Court, except in the case provided for by Article 150 and Article 157.	Sixty days	The date of the sentence or order appealed from.
156.	…….	……	……
157.	**Under the Code of Criminal Procedure, 1898, from an order of acquittal.**	**Six months**	**The date of the order appealed from**

10. The provision of sub-section 4 of Section 25 of the Act, when read parallel to the above Articles, makes it vivid that in the said schedule, a different period of limitation for filing appeals against an order/judgment of conviction or acquittal, under the Code of Criminal Procedure, 1908 as compared with the Act has been prescribed. Article 157 of the Act, referred above, is only relevant for the purpose of our discussion. It provides a period of six months as limitation for filing an appeal under Section 417 Cr.P.C against the acquittal order, from the date of passing of the impugned order/judgment by the State. Needless to observe that Criminal Procedure Code, 1908 is a procedural law generally regulating the procedure before the criminal courts established under it. A person aggrieved by order of acquittal passed by any Court, other than High Court, is vested with a right of appeal under Section 417(2-A) of the Code to be filed within a prescribed period of 30 days as limitation against such order from the date of its pronouncement. Having discussed the above provisions in length and depth, still we feel ourselves tempted to examine the provision of Section 29 of the Limitation Act 1908, being relevant, which reads as under:-

> "29. Savings.(1) Nothing in this Act shall affect section 25 of the contract Act, 1872 (IX of 1872).
>
> (2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by the First Schedule, the provisions of section 3 shall apply, as if such period were prescribed therefor in that Schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law:
>
> (a) The provisions contained in section 4, sections 9 to 18, and section 22 shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law; and
>
> (b) The remaining provisions of this Act shall not apply."

3. …….

4. …….

11. The provision, reproduced hereinabove, on its close scrutiny, manifests that where a different period of limitation for the institution of a suit, preferring an appeal or making of an application is prescribed under the provisions of any Special or Local Law, than the Limitation Act, it shall be deemed as if the same has been prescribed by the First Schedule under Section 3 of the Limitation Act. The provision of Section 3 of the Limitation Act shall apply, as if such period of limitation were prescribed therefore in that schedule. It has further been mentioned that for the purpose of computing the period of limitation, prescribed for any suit, appeal or application under any Special or Local Law, the provisions of Sections 4, 9 to 18 & 22 of the Limitation Act, shall apply only in so far as and to the extent to which they are not expressly excluded by special or local law and the remaining provisions of the Act shall not apply.

12. It may further be observed that Section 4 of the Limitation Act extends the period of prescribed limitation where it expires on a day when the court is closed for institution of the suit, appeal or application, as the case may be, till the day the court re-opens. It is an established principle of law that Section 5 of the Limitation Act, in its applicability, has a limited scope, as the same is only applicable where it has specifically been made applicable to certain kind of proceedings "by or under any enactment". The conspicuous non- making of application to this provision in proceedings under Special or Local Laws thus has very obvious reasons. The law of limitation is not merely a reflection of public policy. It creates and extinguishes the rights of the parties with the efflux of time. Out of the remaining provisions of Sections 9 to 18 & 22 of the Limitation Act, only Section 12 is relevant for advancing our discussion, which is reproduced as under:-

"12. Exclusion of time in legal proceedings.(1) In computing the period of limitation prescribed for any suit, appeal or application, the day from which such period is to be reckoned shall be excluded.

(2) In computing the period of limitation prescribed for an appeal, an application for leave to appeal and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed shall be excluded.

(3) Where a decree is appealed from or sought to be reviewed, the time requisite for obtaining a copy of decree on which it is founded shall also be excluded.

(4) In computing the period of limitation prescribed for an application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded.

(5) For the purpose of subsections (2)(3) and (4), the time requisite for obtaining a copy of the decree, sentence, order, judgment or award shall be deemed to be the time intervening between the day on which an application for the copy is made and the day actually intimated to the applicant to be the day on which the copy will be ready for delivery.

13. It may be reiterated that Sections 4, 9 to 18 & 22, according to Section 29(2)(a) of the Limitation Act, shall apply only insofar as and to the extent of which they are not expressly excluded by such special or local law and no other section shall apply. We have found no express provision in the Act excluding the application of Section 12 of the Limitation Act but dealing with the arguments of the learned Deputy Prosecutor General that non-compliance of the provision of Section 25(2) of the Act requiring supply of copy of the judgment, to the Public Prosecutor, free of cost, on the day it was pronounced, being an act of the Court, when the appeal can be filed under

Section 25(4) of the Act only after supplying of copy of impugned judgment free of cost to him, the prosecution therefore cannot be held responsible for the delay in filing the appeal, if any, and prayed for condoning the delay while exercising inherent powers by the Court, it may be observed with good quantum of ease that under sub-sections 1 & 2 of Section 12 of the Limitation Act, it is legally permissible while computing the prescribed period of limitation only the exclusion of time requisite for obtaining a copy of decree, sentence or order appealed for or sought to be reviewed. Sub-section 5 of Section 12 of the Act further clarifies the position leaving no room for entertaining any doubt that for the purpose of sub-sections 2, 3 & 4, regarding exclusion of time, the time requisite for obtaining a copy of decree, sentence, order, judgment or award shall be deemed to be the time intervening between the day on which an application for the copy is made and the day actually intimated to the applicant to be the day on which the copy will be ready for delivery. In addition to above, even in case the copy of the judgment is not supplied either to the public prosecutor or the accused, as the case may be, there exists, under sub-section 4 of Section 25 of the Act, no bar in filing an appeal after obtaining a copy of the judgment on their own, therefore, the maxim "Actus Curiae Neminem Gravabit" has not application in the instant case. The above referred Section 421 of Cr.P.C., also permits the filing of appeal in the form of a petition in writing accompanied by a copy of judgment appealed against, however, at the same time, the court to which the appeal is presented, if requested, can dispense with such requirement. Dealing with the second limb of arguments of learned Deputy Prosecutor General that while exercising inherent power vested with this Court, the delay in filing the appeal may be condoned, it may be suffice to observe that despite perusing the memorandum of appeal keenly we have found not a single word showing any sufficient cause for seeking condonation of delay. Even on Court's query, the learned Deputy Prosecutor General, after perusing the memorandum of appeal and copy of impugned judgment, failed to show that the copy of the judgment appended with this

appeal was the first ever and no copy prior to that had been supplied to the Public Prosecutor. Even, the judgment is also silent in this regard. The doubt, which has arisen in the afore-referred circumstances about the exact date of supply of copy of judgment to the learned Prosecutor for computing the prescribed period of limitation for filing of appeal requires its resolve in favour of the respondents-accused, who have earned double presumption of their innocence. It may further be observed that in most of the criminal jurisdictions, acquittal of the charge recorded by the court of competent jurisdiction is not appealable and is deemed to be final. In our law, however, acquittal can be challenged in certain circumstances within a period of limitation prescribed by law. The request for condonation of delay by invoking jurisdiction of the superior courts, in the larger interest of justice, if made, can only be entertained on showing that delay in filing the appeal was caused either by an act of the acquitted accused or by circumstances of some compelling nature beyond human control, which as discussed above, do not exist in the instant case, therefore, repelling the arguments of learned Deputy Prosecutor General, we hold that the appeal at hand being barred by limitation is not maintainable.

14. For what has been discussed, it is un-hesitantly observed that the appeal in hand has been filed beyond a prescribed period of limitation i.e. 30 days from the date of pronouncement of the judgment, therefore, the same is **dismissed** on the score alone being barred by limitation.

(Sadaqat Ali Khan) Judge

(Anwaarul Haq Pannun) Judge

Approved for Reporting

Judge

2020 LHC 1238

IN THE LAHORE HIGH COURT, LAHORE

Case No Crl. Revision No.7500 of 2020

Parveen Bibi versus ASJ, etc.

19.02.2020 Mr. Safwan Abbas Bhatti, Advocate for petitioner.
Mr. Haroon ur Rasheed, Deputy Prosecutor General.
Mr. Naseer ud Din Khan Nayyar, Advocate for the respondents.

By means of instant criminal revision petition under Sections 439 Cr.P.C., the legality and propriety of the order dated 30.01.2020 passed by learned trial Court/Addl. Sessions Judge, Hafizabad has been brought under challenge, whereby the petitioner's request for transposing the earlier recorded evidence under Section 512 Cr.P.C., of the complainant, Hassan Murtaza was turned down while to the extent of Masood Ahmad Bhatti, the draftsman (since dead), it has been partially allowed.

2. Briefly the relevant facts for the decision of instant criminal revision petition are that as a result of Qatl-e-amd of one Tahir Murtaza, allegedly committed by respondents No.2 & 3 alongwith their three accomplices, the FIR was lodged on the complaint of Hassan Murtaza. Record further reveals that initially the police submitted a report u/s 512 Cr.P.C., on 15.07.2008 against the accused. Respondent No.3 Ali Raza was formally arrested on 31.03.2010. On commencement of trial of the case, due to non- availability of Hassan Murtaza complainant because of the alleged danger to his life coupled with other circumstances beyond his control, consequently, learned trial court on 02.11.2013 ordered that the file of the case be consigned to the record room. After arrest of some of the accused, on the application of the complainant, the case file was ordered to be resurrected on 27.10.2014. The

accused accordingly were summoned to face trial and the case was fixed for recording of evidence. The complainant Hassan Raza had been appearing before the trial court so that his evidence might be recorded but as a result of intentional concealment of accused/respondent Ali Raza, he was declared proclaimed offender vide order dated 09.05.2015 and evidence of Hassan Murtaza complainant was recorded on 20.05.2015 by learned trial court as PW-14 during the trial of co-accused, who allegedly abetted the crime. The proceedings of trial of co-accused had terminated during abscondence of respondent Ali Raza. At present, respondents No.2 & 3, after their arrest, are facing the trial. The record further evinces that since 31.03.2018, the complainant has been living abroad and as such he is not available for evidence. The present petitioner, who is mother of the deceased, through an application, which she moved before the trial court prayed that Masood Ahmad Bhatti, the Draftsman had since died and the complainant apprehending danger to his life at the hands of the accused party being abroad are not available, therefore, the statements which they had got recorded under Section 512 Cr.P.C., may be transposed to the record of present trial being a legal, valid and substantive piece of evidence. Learned trial court while accepting application to the extent of above-named draftsman (since dead), has dismissed the same to the extent of Hassan Murtaza Complainant, hence this criminal revision petition.

3. Learned counsel for the petitioner while relying upon case reported as Arbab Tasleem v. the State (PLD 2010 Supreme Court 642) contends that because of their willful concealment, since the respondents were declared P.Os, consequently the statements of the PWs were recorded under Section 512 Cr.P.C., and that in view of long standing bloody enmity inter-se the parties, apprehending serious danger to his life at the hands of the accused, the complainant had gone abroad, his return for recording of his evidence

would not be safe and will cause undue delay also, by transposing his previously recorded deposition to the record of the instant trial would serve the purpose behind procurement of his attendance thus has prayed for acceptance of instant petition by setting aside the impugned order.

4. Conversely, learned counsel for the respondents while referring to Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973 (hereinafter to be referred as 'the Constitution') contends that unless evidence of the complainant is recorded while affording the accused a fair opportunity to cross-examine the PW, their right of fair-trial shall be infringed. Further contends that since the complainant, a star witness of the prosecution is living abroad at present, for enabling him to get his statement recorded while allowing the accused to cross-examine him to avoid any possible prejudice to their cause, the accused are ready to bear expenses of his boarding and lodging out of their pockets even. He while replying arguments of the learned counsel for the petitioner regarding the apprehension of danger to the life of the complainant states that learned trial court has ample powers to issue direction to the law enforcement agencies to ensure the protection to his life. Lastly states that evidence of the prosecution witness can even be recorded through video-link and the impugned order being unexceptional, therefore, he has prayed for dismissal of the instant criminal revision petition.

5. Arguments heard. Record perused.

6. In order to appreciate the above noted rival contentions of the learned counsel representing their respective parties, one of the relevant provisions of law, is being reproduced hereunder:-

> 512**. Record of evidence in absence of accused**. (1) If it is proved that an accused person has absconded, and that there is

no immediate prospect of arresting him the Court competent to try or [send for trial to the Court of Session or High Court] such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions. Any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for the offence with which he is charged, if the deponent is dead or incapable of giving evidence or his attendance cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

(2) **Record of evidence when offender unknown.** If it appears that an offence punishable with death or [imprisonment for life] has been committed by some person unknown, the High Court may direct that any Magistrate of the first class shall hold an inquiry and examine any witness who can give evidence concerning the offence. Any deposition so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits of Pakistan.

The above provision makes it evident that there being no immediate prospects of arrest of an accused, on fulfilment of legal requirements, proving his abscondence, the court competent to try or send for trial to the court of Sessions or High Court may in absence of such persons, examine the witnesses, for the offences complained of if produced by the prosecution and record their depositions. It further says that on the arrest of such absconding accused, the deposition recorded, as aforesaid, may be given in evidence

against him, in the inquiry or trial for the offence with which he is charged. However, such deposition can only be given in evidence in certain exceptional circumstances, where the attendance of the witnesses, whose evidence has already been recorded under Section 512 Cr.P.C., cannot be procured without any unreasonable amount of delay, expenses or inconvenience. The question of reasonableness of otherwise of the delay, expenses or inconvenience can only be determined by the court in the given facts and circumstances of every individual case before it. It seems that the provision ibid is enabling in its nature, for catering to certain exceptional circumstances and situations. It enables the court to preserve evidence for its use in certain circumstances against the absconding accused especially when on its own part the prosecution is not at fault and to safeguard the interest of a party giving evidence against some possible unscrupulous endeavor of the adversaries. The provision fully takes care of the situation tending to place a party for none of its fault in an awkward and unreasonable situation to its disadvantage.

7. Before treading further, it may be expedient to examine some relevant provisions of Qanun-e-Shahadat Order (P.O No. X) 1984 for advancing further on the subject under discussion to a point to draw a logical conclusion in the facts and circumstances of the case.

> "46. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant: Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot, be found, or, who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court

unreasonable, are themselves relevant facts in the following cases:

(1) When it relates to cause of death: --------

(2) Or is made in course of business……

(3) Or against interest of maker…….

(4) Or gives opinion as to public right or customs, or matters of general interest …….

(5) Or relates to existence of relationship…….

(6) Or is made in will or deed relating to family affairs …….

(7) Or in document relating to transaction mentioned in Article 26, paragraph (a).…….

(8) Or is made by several persons and expresses feelings relevant to matter in question:

47. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated: Evidence given by a witness in a judicial proceeding or before any person authorized by law to take it, is relevant for the; purpose of proving, in a subsequent judicial, proceeding or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable Provided that— the proceeding was between the same parties or their

representatives-in-interest; the adverse party in the first proceeding had the right and opportunity to cross-examine ; the questions in issue were substantially the same in the first as in the second proceeding.

131. Judge to decide as to admissibility of evidence: (1) When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant, and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant and not otherwise. (2) If the fact proposed, to be proved is one of Which evidence is admissible only upon proof of some other fact, such last mentioned fact must be proved before evidence is given of the fact first mentioned unless the party undertakes to give proof of such fact, and the Court is satisfied with such undertaking. (3) if the relevancy of one alleged fact depends upon an other alleged fact being first proved, the Judge may in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact."

After considering the above Articles of Qanoon-e-Shahadat Ordre in conjunction with each other, the Hon'ble Supreme Court of Pakistan in the case reported as Arbab Tasleem vs. The State (PLD 2010 S.C 642), relied upon by learned counsel for the petitioner, has held as under:-

"A plain reading of Article 46 would show that it illustrates the situations where statements having relevancy to the controversy, made in some earlier proceedings, subject to fulfilment of certain conditions, can be considered relevant and admissible piece of evidence. Particularly, sub-Article (1) shows that when the evidence or statement of a person, who is dead, as in the instant case, relates to the cause of his death or as to any of the circumstances of the transaction, which resulted in his death, than deviating from the normal course, such statement becomes relevant and gains evidentiary value because of the special circumstances that the person, who made such statement was no more alive/available. Similarly, Article 47 visualize relevancy and significance to the evidence of a witness in a judicial proceeding or before any person authorized by law to take evidence, when the said witness is dead or cannot be found or is incapable of giving evidence, subject to the conditions, provided in the proviso to the said Article, that the proceedings were between the same parties or their representative-in-interest, which for the purpose of criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of the said Article; when the adverse party in the first proceedings had the right and opportunity to cross- examine; the questions in issue were substantially the same in the first as in the second proceeding. Article 131 of the Qanun-e-Shahadat, 1984 leaves at the discretion of the Judge to decide admissibility of any evidence and for this purpose gives wide powers to him subject to the language of this Article. Moreso,

as there is no provision in the Qanun-e-Shahdat Order which specifically makes such piece of evidence inadmissible."

After above discussion, yet I feel it necessary to have a glance over the provision of Article 10-A [Inserted by the Constitution (Eighteenth Amendment) Act, 2010 (10 of 2010) of the Constitution of Islamic Republic of Pakistan, 1973, which in its verbatim, reads as under:-

> **"10-A. Right to fair trial**.---For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process."

Through the insertion of afore-quoted Article in Part-II of Chapter-I—Fundamental Rights, the Constitution in fact has enhanced the status and attributes of 'due process of law clause' as it is commonly known in different jurisdictions of the world, besides recognizing the importance of fair trial, which now under our constitutional dispensation, has been granted the status of a fundamental right of a person seeking determination of his civil rights or obligations or facing any criminal charge. The Constitution itself now guarantees the enforceability of this right for its enjoyment through a legal process by the courts which are the defenders and custodians of such rights of the citizenry. The status of the Constitution viz-a-viz other laws, being fully established now, needs no amplification through spoken or written words. In order to ensure the avoidance to any breach to this fundamental right, an accused facing the criminal charge, in my opinion, demands a nicely drawn balance between the exceptional situations pointed out above and the mandatory rule embodied in the following provision of law i.e. Section 353 Cr.P.C which is reproduced as follows:-

> "353. Evidence to be taken in presence of accused. Except as otherwise expressly provided, all evidence taken under

> [Chapters XX, XXI, XXII and XXIIA] shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader."

Sequel to the discussion made so far, with reference to the above-referred statutory provisions, it can irresistibly be concluded that it is a mandatory rule that all evidence taken under Chapter XX (The trial of … cases by Magistrate) XXII (Summary Trials) & XXII-A (Trials before High Courts and Courts of Sessions) shall be taken in the presence of the accused, except where his personal attendance is dispensed with, it shall be taken in presence of his pleader. The evidence recorded in violation of this rule vitiates the proceedings and such illegality even cannot be cured under Section 537 Cr.P.C. The mandatory command contained in the afore-quoted Section, using the word 'shall' as compared to the word 'may' in Section 512 Cr.P.C., is sufficient to highlight the importance of recording of evidence in presence of the accused. Resorting to referred above exceptional circumstances for giving previously recorded deposition in evidence under Section 512 Cr.P.C is only subject to the discretion of the Court after considering the circumstances of the case. The recording of examination-in-chief of a witness also includes cross-examination, conducted either personally or through a counsel/pleader of his own choice by the accused. Needless to reiterate that the accused is inherently deemed innocent unless found guilty by the court of competent jurisdiction. On the basis of proved abscondence itself no accused can be held guilty as it is not a substitute to the incriminating evidence. The abscondence of an accused is merely taken as additional circumstance leading to the guilt of an accused provided the charge against him is proved otherwise, through unimpeachable incriminating evidence beyond a shadow of reasonable doubt. Inherent presumption of innocence remains attached to the accused irrespective of

severity of charge unless proven guilty. Adopting due course of law, the compliance with the mandatory provision of Section 353 Cr.P.C., laying a general rule for recording of evidence either in presence of the accused or in case his presence is dispensed with, in presence of his pleader, is duly covered by Article 10-A of the Constitution guaranteeing fair trial as a fundamental right of the accused. The provision of Section 512 Cr.P.C., duly galvanized with Articles 46 & 47 of the Qanun-e-Shahadat Order, 1984 envisages besides enabling the court to weigh the circumstances judicially before resorting to the exceptions for using any deposition recorded during the abscondence of an accused as evidence against him. The court while conducting a trial must explore the possibilities for adhering to the general rule of recording of evidence. The facts of the instant case, when considered in the light of above discussion made on legal planks, it surfaced that when the accused- respondents were initially facing the trial, due to non-availability of the complainant, learned trial court on 02.10.2013, ordered that the file be consigned to the record room. Later on, the file was got resurrected by the complainant vide order dated 27.10.2014, the evidence of the complainant was recorded as PW-14, during the abscondence of the respondents, therefore, it is observed that both the parties remained busy in playing hide and seek with each other and with the process of court also. The complainant is currently residing out of the country and it has been stated that due to pitched enmity inter-se the parties, his coming to the country for recording of evidence may not be safe and even otherwise, it will cause delay and he will have to bear expenses unreasonably. Learned counsel for the respondents has shown his willingness to pay the expenses of boarding and lodging of the said witness, which shall be determined by the learned trail court, out of their pockets for coming to country for evidence. The learned trial courts have ample power to direct the relevant authorities to ensure the

safety of the person of the complainant on his arrival to the country. It is the fundamental right of every citizen to have an access to justice. The learned trial courts can also consider the possibility of recording of evidence of the PWs by resorting to modern devices. I feel it appropriate to observe here that the trial courts have been vested with vast powers for exercising it while taking into their judicial consideration the effects which the revolution in information technology has been brought about, bestowing the countries with a status of an individual unit while maintaining their political sovereignty which is a gift product of the modern state system. The learned counsel has not been able to point out any impropriety or illegality in the impugned order showing that the learned trial Court has either failed in exercise of its jurisdiction or has exceeded to the limits prescribed by the law while passing the impugned order to the prejudice of either of the parties, therefore, this petition is **dismissed**.

(Anwaarul Haq Pannun)

Judge

Approved for reporting

Judge

2020 LHC 704

IN THE LAHORE HIGH COURT, LAHORE

Case No Crl. Appeal No.55 of 2015

Rashid Ali Versus The State, etc

Date of Hearing:	25.02.2020
Appellant by:	Rai Bashir Ahmad, Advocate.
State by	Mr. Muhammad Nawaz Shahid, Deputy Prosecutor General. Complainant by Rana Zulfiqar Ali, Advocate.

ANWAARUL HAQ PANNUN, J. Through this criminal appeal filed under Section 25 of the Anti-Terrorism Act, 1997, the appellant Rashid Ali has called in question the vires of judgment dated 23.12.2014, passed on conclusion of the trial in case/FIR No.187, dated 11.107.2014, offence under Section 365-A PPC, registered at Police Station Mankera, District Bhakkar by the learned Special Judge, Anti-Terrorism Court, Sargodha, whereby he has been convicted and sentenced as under:-

(Under Section 365-A PPC)

"to undergo imprisonment for life with forfeiture of his property. He shall pay a sum of Rs.1,00,000/- as compensation to the complainant Naubahar Shah, real father of the minor abductee, as envisaged under Section 544-A Cr.P.C, in default thereof, he shall also undergo three months' SI."

(Under Section 7 (e) of the Anti-Terrorism Act, 1997)

"to undergo imprisonment for life with forfeiture of his property."

> "The sentence of imprisonment awarded to the accused for both the offences shall run concurrently and he shall also be entitled to benefit under section 382-B Cr. P.C."

2. The prosecution's story unfolded through FIR (Ex.PA/1) lodged on the complaint (Exh.PA) of one Naubahar Shah (PW-6) is to the effect that during his posting as Principal at Government College Mankera, on 11.07.2014 at 10.18 a.m. while on duty, he received a call on his Cellular phone having SIM No.03334900797 from No. 03341725739, made by an unknown person, demanding an amount of Rs.5,00,000/- as ransom for the release of his son Muhammad Zaryab, who was in the caller's captivity, while extending threats that in case of non-payment of ransom amount, till 12:00 Noono, the minor will be done to death or shall be sold.

3. Registration of the case, arrest of the accused, and after its usual investigation encapsulated into a report under Section 173 Cr.P.C, duly submitted before the learned trial court, the appellant, after supplying him with the copies of incriminating material under Section 265(c) Cr.P.C, the accused was charged sheeted to which he denied and pleaded not guilty, while professing his innocence, and claimed trial, the prosecution produced as many as 11 witnesses besides tendering, in evidence, report of Punjab Forensic Science Agency, Lahore (Exh.PP). When examined under Section 342 Cr.P.C., the appellant denied every bit of incriminating material so produced. While replying the question that as to why this case against him and why the prosecution witnesses had deposed against him, he replied as follows:-

> "I belong to Pattoki and had been residing with my paternal uncle Ibrahim who had a land dispute with father of Khalid Zaman PW and also with Ahmad Hussain Ex-Chairman of Union Council Mankera and

both said persons belong to the party of Ghazanfar Cheena. Madah PW had been driver of Ahmad Hassan and all these PWs were produced during investigation by Ghazanfar Cheena. Many other persons had been joined in investigation but they were let off at the instance of Ghazanfar Cheena and I was substituted to grab the land of my paternal uncle Ibrahim."

The appellant did not examine him as witness under section 340(2) Cr.P.C, however, produced Ibrahim(DW-1) in his defence. The learned trial court, on conclusion of the trial, proceeded to convict the appellant as aforesaid. Hence, the titled appeal.

4. Arguments heard. Record perused.

5. Normally reasonable prompt in reporting a crime presumably excludes the possibility of concoction and making up of a besuiting story etc., but at the same time, the over promptness casts suspicion not only about the story but all over the circumstances of the case set out by the prosecution. In the instant case, on 11.7.2014 at about 10.18 a.m., the complainant on his duty at Govt. College Mankera, received a phone call from an unknown person regarding abduction of his son Muhammad Zaryab, reported the occurrence within an hour, allegedly with great promptitude, to the police at 11.15 a.m. on the same day, vide zimini No.7. Naubahar Shah, the complainant (PW-6) nowhere has stated that the accused threatened him that in case he imparted the information about the occurrence to the police, the abductee will be done to death. Had there been any threat, given by the accused to the complainant, the story regarding making "arrangement" of private PWs, instead of police personnel, for identification of accused, at the time, the accused had allegedly picked the ransom amount, could have been believed, therefore, depositions of PW-6 and PW-7 create doubt about their genuineness. The

contradictory depositions of the PWs are also generating the doubt about the un-natural flow of events, which the prosecution has tried to prove. Khalid Zaman (PW-5) did not disclose his relationship with the complainant (PW-6) as well as justification of his availability with the complainant at the relevant time. He deposed that "We remained at complainant's house till Asr time. In our presence, the complainant again received a call for ransom of Rs.500,000/- to be left at a berry tree on a "Katcha Path" ahead of Degree College and thereafter the child would be returned." Contrary to the above, the complainant (PW-6) deposed that "he arranged the ransom money of Rs.500,000/- and then informed the kidnapper on the same cell number asking him the place where I was supposed to bring the month." Khalid Zaman (PW-5) deposed that "the complainant asked me and Madah PW to remain concealed at the aforesaid place in order to identify the culprit whereupon we did so. After sometime, the complainant came there on a motorbike and left the money wrapped in a black & yellow cloth/handkerchief under the aforesaid tree and left. After about 10/15 minutes accused Rashid, present in court, came there on a motorbike bearing No.LYC-1065 whom we knew before. He took the money and left. We informed the complainant on phone about this fact who asked us to stay concealed over there. After about 5 minutes, accused Rashid brought the minor abductee to the same tree and left him there. After about 10 minutes, the complainant came there. Thereafter, we all left from there and informed the police." Although Naubahar Shah, complainant (PW-6) had almost narrated the above story as stated by PW-5, but it is important to note that despite lodging the FIR relatively with over promptitude, astonishingly the complainant did not inform the police about the place of payment of ransom amount fixed between him and the accused, rather, he secured the services of Khalid Zaman (PW-5) and Maddah (given up PW) for the identification of the accused, while concealing their identity and presence, to witness the

payment of ransom amount where-after, the abductee was to be set at liberty. It is also not understandable that why they have not either made any effort to overpower him or to make a noise seeking help from police or passerby, when the accused had set the abductee free, at the relevant place.

6. There is another important loophole in the prosecution's case. The prosecution has withheld the evidence of minor abductee by not producing him/ abductee before the Court enabling it to assess his capability and credibility for making the statement. The argument of learned counsel that due to the tender age of the abductee, he could not have been produced in the Court, cannot be entertained because it was the prerogative of the Court and not the prosecution, to determine capability of making statement due to his tender age. The minor should have been produced before the Court. According to PW-6, "my son would clearly tell if he is abducted by somebody….. The minor is competent enough to disclose whether he was maltreated or provided milk or kept in confinement." As per Article 3 of Qanun-e- Shahadat Order, 1984, all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. So much so, neither the I.O recorded the statement of the minor abductee under Section 161 Cr.P.C nor cited him in the calendar of witnesses for the reasons best known to him. It is well settled that if best piece of evidence lying with the prosecution is withheld, then an adverse inference under Article 129(g) of Qanun-e-Shahadat Order 1984 can be drawn against the party withholding such witness, that had such witness been produced, he would have not supported the prosecution's case. Thus the self-harming act of the complainant, for retaining its cards quite close to his chest had given rise to an occasion for drawing an adverse presumption against the prosecution's case, the benefit of which irresistibility has to be extended to

the defence. The prosecution, as discussed above, is guilty of withholding the best available evidence, therefore, it is presumed that had the minor abductee been produced, he would have not supported the prosecution's version. The learned trial Court had also failed to exercise its power under Section 540 Cr.P.C, such exercise of power could have been validly made in the circumstances of the instant case, in the larger interest of justice.

7. Last but not the least, perusal of complaint (Exh.PA) reveals that the accused made telephone call to the complainant from the mobile having SIM No.0334-1725739 (P-9). The said SIM number has not been issued in the name of the accused, rather it was in the name of one Mst. Naseem Bibi. The I.O (PW-11) during cross examination admitted it to be correct that "during investigation it came on surface that SIM No.0334-1725739 is in the name of one Mst. Naseem Bibi." The said Mst. Naseem Bibi was found no connected with the occurrence of this case. The prosecution's failure into establishing any nexus of the appellant with the said SIM, also creates doubt about the veracity of the prosecution's case.

8. So far as recoveries of motorcycle (P-10), pistol 30 bore (P-13) and cash amounting to Rs.5,00,000/-(P12/1-500) are concerned, these are of no avail to the prosecution for the reasons that motorcycle (P- 10) did not belong to the accused/appellant and same was owned by one Muhammad Asif. The I.O (PW-11) during cross-examination deposed that "It is correct that the motorcycle alleged recovered from accused Rashid had belonged to one Asif". The I.O did not associate said Asif during investigation to ascertain the factual position as to whether said motorcycle remained under the use of the accused Rashid or not at the time of the alleged occurrence. The recovery of Pisto.30 bore (P-13) is nothing but a robe, it was allegedly recovered from an open place, easily accessible to all and sundry. Coming to the recovery of cash amount (P12/1-500) allegedly recovered on pointing out the appellant,

the I.O (PW-11) deposed that the accused Rashid Ali after making disclosure got recovered Rs.500,000/- (P12/1-500) as a ransom meony which were wrapped in a polythene bag and also in a black & yellow colour handkerchief, from the shed of drawing room of his house situated in Mankera, which was taken into possession vide recovery memo (Exh.PI). Riaz Hussain SI/SHO/recovery witness (PW-7) deposed that "the owner of the house, from which the ransom amount was allegedly recovered, is Ibrahim Bhatti". The I.O (PW- 11) stated during cross-examination that "the owner of said house is Ibrahim. The said Ibrahim was not present at the time of recovery proceedings but he had joined the investigation." The I.O did not join any person from the house or the locality during the recovery proceedings. The place wherefrom the alleged ransom amount was recovered is not in exclusive possession of the appellant, therefore, the recovery of ransom amount (P12/1-500) is of no avail to the prosecution.

9. The nutshell of the above discussion is that the prosecution's case is full of doubts, benefit of which must resolve in favour of the accused as the Hon'ble Supreme Court of Pakistan has held in case titled "Muhammad Khan and another Vs. State" (PLJ 2000 SC 1041) that "it is axiomatic and universal recognized principle of law that conviction must be founded on unimpeachable evidence and certainty of guilt and hence any doubt that arises in prosecution case must be resolved in favour of accused". Moreover it is cardinal principle of criminal jurisprudence that a single instance caused a reasonable doubt in the mind of Court entitles the accused to the benefit of doubt not as a matter of grace but as a matter of right. Reliance is placed on case law titled as "Muhammad Akram versus The State" (2009 S C M R 230). Reliance is also placed upon the case titled "Tariq Pervaiz Vs. The State" (1995 SCMR 1345).

10. For what has been discussed above, the prosecution has failed to prove its case against the appellant beyond any shadow of doubt. Resultantly, the instant appeal is allowed, the conviction and sentence of the appellant Rashid Ali, awarded by learned trial Court vide impugned judgment dated 23.12.2014 is set aside and he is acquitted of the charge by extending him the benefit of doubt. The appellant Rashid Ali is directed to be released forthwith, if not required in any other case.

(Aalia Neelum) Judge

(Anwaarul Haq Pannun) Judge

APPROVED FOR REPORTING.

Judge

2020 LHC 4265

IN THE LAHORE HIGH COURT, MULTAN BENCH MULTAN

Case No Crl. Misc. No.7693-M/2020

Umar Farooq Versus The State etc.

22.12.2020. Ms. Humaira Naheed Khand, Advocate for the petitioner. Malik Mudassir Ali, Deputy Prosecutor Generals for the State. Mr. Mubashar Hussain Khosa, Advocate for respondent No.2.

By means of instant miscellaneous application under Section 561- A Cr.P.C, the petitioner calls in question the vires of orders dated 25.11.2020 passed by the learned Revisional Court/Additional Sessions Judge, Dera Ghazi Khan and the order dated 10.09.2020 passed by the learned Magistrate Section-30, Dera Ghazi Khan, whereby the petitioner's application under Section 539-B Cr.P.C for local inspection was dismissed.

2. Precisely the relevant facts for the disposal of the instant miscellaneous application are that a criminal case vide F.I.R No.250/2016 dated 09.06.2016, offence under Sections 322, 427, 279 PPC, Police Station Saddar Dera Ghazi Khan, has been registered on the complaint of respondent No.2 against the petitioner with the allegation that while driving a car rashly and negligently he collided with the motorcycle of complainant's paternal cousin namely Muhammad Kamran, who succumbed, the pillion rider namely Abdul Ghaffar also sustained serious injuries. Presently, the petitioner is facing trial before the learned Magistrate Section-30 Dera Ghazi Khan. After the evidence of some of the PWs and one CW had been recorded by the trial court, the petitioner moved an application under Section 539-B Cr.P.C, which is reproduced in its verbatim hereunder:-

1۔ یہ کہ مقدمہ ہذا میں سیشن /ملٹم پز جو الشامبت Charge frameہوئے ہیں ان کی روح کے مطبیق سیشن /ملٹم کے اوپز تیش رفتیری کے الشامبت ہیں۔

2۔ یہ کہ جبئے وقوعہ ایک مصزوف روڈ ہے جس کے اوپز ہز وقت ٹزیفک رواں دواں ہے اور جبئے وقوعہ والی جگہ پز کوئی گبڑی سیبدہ سے سیبدہ سپیڈ نہیں چل سکتی ۔

3۔ یہ کہ جبئے وقوعہ والی جگہ پز سیبدہ سے سیبدہ 35/44کلومیٹز سپیڈ سے سیبدہ گبڑی چل ہی نہیں سکتی یب Normally گبڑی دوسزے سے تیسزے گیئز میں چلتی ہے ۔

4۔ یہ کہ 539-B ، Local Inspection کے تحت

Any Judge or Magistrate may at any stage of any inquiry, trial or other proceeding, after due notice to the parties visit and inspect any place in which an offence is alleged to have been committed, or any other place which it is in his opinion necessary to view for the purpose of properly appreciating the evidence given at such inquiry or trial, and shall without any un-necessary delay record a memorandum of any relevant facts observed at such inspection.

بحبلات بیلا استدعب ہے کہ سیز دفعہ 539-B کے تحت سیشن کی درخواست منظور فزمبئے ہوئے جنبۂ والا خود موقع ملاحظہ فزمبئیں تبکہ مقدمہ کے حبلات و واقعبت سبمنے آسکیں اور سیشن/ملٹم کے سبتھ انصیف ہوسکے اور انصیف کے تقبضے پورے ہوسکیں۔

The request of the petitioner failed to find favour, as stated above, with the learned Magistrate as well as the learned Revisional Court. Hence, the instant petition.

3. The learned counsel for the petitioner while reiterating the grounds urged through his application in writing and relying upon the judgments reported as Asfandyar and another v. Kamran and another (2016 SCMR 2084), Abdur Rehman v. the State (2000 SCMR 1355) and Ghulam Hussain alias Hussain Bakhsh and 4 others v. the State and another (PLD 1994 SC 31), has craved for acceptance of the instant petition. The learned Deputy Prosecutor General assisted by the learned counsel for the complainant/ respondent No.2, on the

other hand, have vociferously opposed the submissions of the learned counsel for the petitioner and defended the impugned orders.

4. Heard. Record perused.

5. At the outset it may be observed that while considering the importance of the sketch of a crime scene, some necessary guidelines have been issued to police officers by means of Rule 25.13, Chapter 25 of Police Rules, 1934, to preserve the factual information relating to crime during investigation for proper appreciation of evidence at trial. The site plan of a crime scene or place of occurrence is prepared either by a qualified police officer, expert or other suitable agencies. The Financial Commissioner with the concurrence of the Inspector General of Police as required under sub-rule 2(i) of Rule 25.13 ibid., read with paragraph No.26 of the Patwari Rules is competent to issue instructions concerning the preparation of map of a crime scene to Patwaris, to illustrate police inquiries regarding the crime scene. Ordinarily in petty offences no demands are made upon Patwaris for the preparation of such site plan of scene of the offence. However, after visiting the crime scene, while conducting investigation into even ordinary offences, in the light of available factual information relating to crime, as an established practice, the Investigating Officers proceed to prepare such maps. The police officer investigating cases of heinous crimes especially of homicide, riots, land disputes etc., if considers, that an accurate map of crime scene is required to be prepared, he after summoning the Patwari of the circle or a duly qualified draftsman to the scene of crime, causes him to prepare map in duplicate i.e. one for its submission along with the charge-sheet or the final report for producing it as evidence in the Court and the other for the use of the police/investigating agency. In the original map, a reference relating to facts observed by the police officer is to be entered while in the duplicate, references are recorded which are not relevant for evidence but are based on the statements of the witnesses. It is necessary to clearly define the responsibility of the Patwari, draftsman etc. and the police officer in respect

of these maps. The police officer has to indicate to the Patwari the limits of the land, of which the map, the topographical items etc., he desires to be shown. While drawing a map, the Patwari is responsible for its correctness. The Patwari cannot write any explanation on the map which is intended to be produced as evidence before the Court. The police officer, however, may write any explanation on the duplicate copy of the map. He can add such remarks which may be necessary to the duplicate of the map to explain its connection with the case. A police officer is equally responsible along with the Patwari for the correctness of all particulars regarding crime scene. However, he cannot make any remarks or explanations on the copy of a map produced by a party. It will be convenient if all the entries made by the Patwari are made in black ink and those added by the police officer in red ink. The police officer in any case cannot require a Patwari to make a map of any inhabited enclosure or of land inside a town or village site. The site plan is not per se admissible in evidence as it has to be proved by producing its maker, as a witness in the Court, who may be subjected to cross-examination. Needless to say that the site plan is not a substantive piece of evidence. See Javed Ishfaq vs. The State (2020 SCMR 1414) and Muhammad Iqbal and others vs. Muhammad Akram and another (1996 SCMR 908). It is generally used for explaining the information relating to the crime scene for the purpose of appreciation of evidence. Being a reflection of the crime scene, preparing and bringing on record the site plan is part of an attempt to furnish a panoramic view of the occurrence to scrutinize the evidence of prosecution witnesses produced at the trial. Alam Zar Khan vs. The State and another (2018 YLR (Notes) 59) is referred.

6. It may further be observed that the diversity of motive behind crimes, the variety in modes of commission thereto, coupled with a perceptible desire of perpetrator, either to attenuate or for shielding him from the culpability or punishment of the crime, he had committed, being the undeniable realities have been taken care of while evolving the systems of criminal dispensation

of justice throughout the world. The keen inspection of the prevailing circumstances and self-evident hard realities at the crime scene, despite their silence and voicelessness, in some cases may carry a potential either to fortify the accusation or to belie the same. While making use of modern techniques in the field of forensic science, by keenly observing a crime scene; an officer conducting investigation to form a mature opinion about the involvement of an accused so that his liability may be fixed by a Court is, therefore, considered to be relevant and important. A criminal Court or a Judge while deciding about a crime is, therefore, well advised to make every effort to visualize the crime scene through site map or from other pieces of evidence, for proper appreciation of evidence to reach at a just conclusion.

7. After making the above discussion, the stage has now been set to examine the scope of the provisions of Section 539-B Cr.P.C, which is reproduced hereunder:-

> "539-B. Local Inspection. (1) Any judge or Magistrate may at any stage of any inquiry, trial or other proceeding, after due notice to the parties visit and inspect any place in which an offence is alleged to have been committed, or any other place which it is in his opinion necessary to view for the purpose of properly appreciating the evidence given at such inquiry or trial, and shall without unnecessary delay record a memorandum of any relevant facts observed as such inspection. (2) Such memorandum shall form part of the record of the case. If the Public Prosecutor complainant or accused so desires, a copy of the memorandum shall be furnished to him free of cost.

Upon bare perusal it transpires unequivocally that the traits of this provision are procedural and substantive in their nature besides being discretionary. A Judge or a Magistrate at any stage of the trial or inquiry or other proceedings, after due notice to the parties, is vested with the power to visit and inspect

any place in which either an offence is alleged to have been committed or any other place having a nexus with the offence committed, which "it is in his opinion" is necessary to view for the purpose of properly appreciating the evidence given at such inquiry or trial. It may further be observed that the proceedings under this provision are judicial in their nature. The requirement of issuance of notices before local inspection is ingrained in the Maxim "audi alteram partem" i.e. no one should be condemned unheard, to afford a fair opportunity to the parties to represent themselves even during such inspection proceedings. The power of local inspection either may be exercised suo motu or on the application of a party. A Judge or a Magistrate is required mandatorily, without any unnecessary delay, to record a memorandum of relevant facts observed by him at such local/site inspection. Such memorandum shall form part of the record of the case. A copy of the memorandum, if so desired by the public prosecutor, the complainant or the accused, shall be furnished to them free of cost. The requirement of recording of memorandum of the relevant facts observed by a Judge or a Magistrate at the time of inspection and forming it a part of the record without unnecessary loss of time appears to be a pragmatic attempt of the law givers to cover the risk of loss of evidence which occurs with the passage of time as a result of fading of human memory. The main object behind vesting of such power with a Judge or a Magistrate is to enable him for properly appreciating evidence given at an inquiry or trial. The power of local inspection cannot be delegated to any other agency, as has been held by the Hon'ble Supreme Court of Pakistan in the dictum reported as Asfandyar and another vs. Kamran and another (2016 SCMR 2084). Therefore, while exercising this power of local inspection, a Judge or a Magistrate is required to regulate the proceedings in the light of Maxim "Actus curiae neminem gravabit" i.e. an act of the Court should prejudice no man.

8.Our system for criminal dispensation of justice even from the investigation stage is adversarial in its nature. The Police Officer conducting investigation

into an offence has been enjoined upon to collect the evidence having nexus with the case, irrespective of the fact that it is in favour of the prosecution or the defence and after forming a mature opinion regarding the involvement or otherwise of the accused in the crime under investigation, he is bound to forward/submit it in the form of a report before the Court. Preparation of a crime's site plan at the inception of investigation, as aforesaid, significantly is a wise step to preserve the relevant and available information about the place of occurrence. It may be observed that tendering the site plain in evidence besides producing its maker as a witness, affording a fair opportunity to cross-examine such witness, by the adversaries, is a pragmatic effort to enable the Judge/Magistrate/Court to visualize the crime scene, for appreciating properly the evidence brought before it/him, at trial. Under Section 540 Cr.P.C a Court trying an accused is also vested with the power to examine any person in attendance or to summon any person as a witness, though not summoned as a witness or recall and re-examine any person already examined, if his evidence appears to be essential for just decision of the case. The defence, at the same-time, is permitted to produce evidence or any person as a witness in its defence also.

9.In the light of above discussion, it can safely be concluded that despite it being discretionary with the Judge or a Magistrate seized of an inquiry or trial to exercise, primarily suo-motu or on the application of a party, his powers under Section 539-B Cr.P.C for local inspection provided "It is in his opinion necessary to view for the purpose of properly appreciating the evidence given at such inquiry or trial", yet in view of the fact that the system for criminal dispensation of justice being adversarial in its nature, after production of site plan of the crime scene as evidence, and prosecution and the defence being at liberty to produce the evidence they wish, coupled with the fact that a Judge or a Magistrate is also empowered under Section 540 Cr.P.C as aforesaid during the trial, the existence of some exceptional and extraordinary reasons justifying the resort to exercise of such power

appears to be a sine qua none and the scope for exercise of power under Section 539-A Cr.P.C for local inspection becomes relatively narrow. However, exercise of power for the site inspection during an inquiry is envisaged differently.

10.After discussing the scope of Section 539-B Cr.P.C in the light of case law in detail, and while considering the facts and circumstances of instant case, it is observed that under Section 95 of the Provincial Motor Vehicles Ordinance, 1965, in case of an occurrence of an accident in which a motor vehicle is involved, a mechanism in detail has been provided for the inspection of the vehicle by the authority concerned. The ground on the basis of which the petitioner has made the request for site inspection to the Court is that the road on which the accident had taken place is relatively narrow and a car could not have been driven thereon negligently or rashly, appears to be fictional and result of imagination, particularly when the place of occurrence is not as such disputed, therefore, in absence of any exceptional circumstances justifying the Court to make a resort to local inspection appears to be fanciful and without force, thus cannot be entertained under the law. Neither any impropriety nor any illegality while rejecting the request of the petitioner could have been shown in the impugned orders passed by the courts below. Resultantly, the orders impugned are upheld and this miscellaneous application is **dismissed.**

Before parting with the order, it may be observed that in the case law cited by the learned counsel referred hereinabove, is outcome of laudable efforts for expounding the scope of provision of Section 539-B Cr.P.C made by their lordships but at the same time it does not advance the petitioner's cause, hence, it requires no separate discussion.

(ANWAARUL HAQ PANNUN)
JUDGE

APPROVED FOR REPORTING.

JUDGE

2023 LHC 7781

IN THE LAHORE HIGH COURT, MULTAN BENCH MULTAN

Case No Crl. Misc. No.8741-B of 2022

Maqbool Ahmad Versus The State etc.

05.01.2023 M/S Malik Ali Muhammad Dhol, Rao Sajjad Ali, Rana Mehboob Bin Khurshid and Anees Ahmad Alvi, Advocates with the petitioner. Mr. Muhammad Abdul Wadood, Addl. Prosecutor General for the State and Syed Naveed-ul-Hassan Bukhari, Assistant Advocate General along with Faisal Zahoor, Secretary Irrigation, South Punjab, Shakir Dawar CPO Multan, Kashif Aslam DPO Lodhran, Hakim Noul SP Legal, Qadeer Anwar DSP Legal/Incharge Investigation and Irshad ASI with record.

Through instant petition under Section 498 Cr.P.C, the petitioner Maqbool Ahmad Khan seeks pre-arrest bail in case/F.I.R No.664 dated 19.11.2022, offence under Sections 6(1) and 10(1) of the Punjab Essential Articles (Control) Act 1973 and 18(1) of the Punjab Fertilizers (Control) Order 1973, registered at Police Station City Kehror Pacca, District Lodhran.

2. Precisely, on 02.11.2022 at 9.40 A.M, the complainant along with his team checked the shop of the petitioner and took samples of fertilizer Sersubz Cane 26% Calcium Nitrate Rich Crop Agro Chemical, Sargodha, sent for its chemical analysis, which was found fake/unfit.

3. Arguments heard and record perused.

4. It is relevant to mention here that this Court, vide its order dated 22.12.2022 made the following observations:-

"According to the prosecution case, Muhammad Iqbal Assistant Director Agriculture procured sample from the sealed bags of Sarsabz Can Fertilizer, kept on the shop of Muhammad Siddique, situated at Kehror Pacca, sent for forensic analysis and on receiving report from the Lab., it was revealed that the same was substandard. Accordingly, Maqbool Ahmad Khan, present petitioner/sales officer along with owners of the shop and factory, which allegedly kept and prepared the substandard fertilizer, were booked in the instant F.I.R. but it is noted that no action whatsoever has been taken by the Agriculture Department or the police to arrest the owner of the factory (Rich Crop Agro Chemicals) nor any step had been taken to seal the stock/godown of the same or circulated in the whole country, meaning thereby that Agriculture Department has turned a blind eye to the issue.

2. Keeping in view this sorry state of affairs, the Secretary Agriculture South, Punjab and the Addl. I.G. (Investigation) are directed to appear in person to explain the situation. It is expected from both the officers that they will explain the reasons about the failure of prosecution, either to arrest the main culprit (owner of the factory), to seal the stock/godown and the measures/suggestions to curb this practice in future. The Addl. Advocate General and the Deputy Attorney General shall also appear in person to assist the Court and also ensure availability of both the above officers before this Court on the next date of hearing."

5. In response to the above order, the Secretary Agriculture, South Punjab and the Addl. I.G (Investigation) appeared before the Court. The Secretary Agriculture, South Punjab produced a letter bearing Endst. No.DS(A&M)SA/SP/4-9/2021 dated 02.01.2023, whereby in the light of

observations made by this Court, certain directions have been issued to the relevant quarters, in order to nip the lapses in the bud and to improve the standard of investigation as well as to fix the liability specifically of the responsible person regarding the commission of offence. For ready reference, the said letter is scanned and pasted as under:-

A

report on behalf of Addl. Inspector General of Police, South Punjab, Multan, bearing letter No.117/Legal dated 04.01.2023 has also been submitted in this regard which reveals that during the raid conducted on 27.12.2022, fake fertilizers were found in the factory/godown of accused Sadaqat Hussain (owner) situated at Hameed Town near Industrial Estate Multan, however, the said accused was not found there and a criminal case under the relevant provisions of law was registered against him at Police Station Muzaffarabad, Multan. The report further indicates that one of the owners of the company (Rich Crop Agro Chemicals) namely Abdul Basit has also been arrested in this case whereas the other owner namely Shahbaz Akram is on ad-interim pre- arrest bail. It has also been mentioned in the report that District Police Officer, Lodhran has written to the Secretary Agriculture, South Punjab, Multan to seal the aforesaid factory/godown.

6. It may be observed that good policing is the policing which is both effective and fair as well as with legitimacy on the basis of public consensus rather than repression. If the policing is ineffective, illegitimate or unfair in protecting the public against crime, it will lose the public's confidence. Therefore, it is expected that the police should have a high degree of professionalism and independence from any influences and should act in conformity with the law and established policies as well as on the basis of public consent (within the framework of the law) as evidenced by levels of public confidence. With this model in mind, an analysis of the current police investigation system can be made, identifying gaps and weaknesses and developing suggestions for its improvement. Accordingly, the officers in attendance are directed to adhere to the said mechanism strictly in accordance with law/rules.
7. Now coming to the facts of this case, it is straightway observed that the petitioner is merely a sales officer and not the manufacturer of the alleged substandard fertilizers allegedly recovered from the shop of

his co-accused, which had been purchased from the company in its sealed condition/form. Learned Law Officer, fairly concedes that there is no allegation of tampering or causing adulteration with the substance against the petitioner. The offences alleged against the petitioner do not attract the prohibition contained in Section 497 (1) Cr.P.C. In such peculiar circumstances sending the petitioners behind the bars would serve no useful purpose. Moreover, culpability of the petitioner would be determined by the learned trial court during trial after recording of evidence. Resultantly, instant petition is allowed and ad-interim pre-arrest bail already granted to the petitioner is confirmed, subject to his furnishing fresh bail bonds in the sum of Rs.1,00,000/- (Rupees one hundred thousand only), with one surety, in the like amount to the satisfaction of learned trial Court.

8. Office to transmit copy of this order to
   (i) The Inspector General of Police, Punjab,
   (ii) The Secretary Agriculture, Punjab, Lahore and
   (iii) The Prosecutor General, Punjab, Lahore for circulation of the same to all the concerned for their guidance and compliance therewith.

(Anwaarul Haq Pannun)
Judge

APPROVED FOR REPORTING.

Judge

2023 LHC 4435

IN THE LAHORE HIGH COURT, LAHORE

Case No Crl. Misc. No.33583-B/2023

Shahid Imran Versus The State etc.

31.05.2023. Mr. Muhammad Imran Suleria, Advocate assisted by Ms. Gulnaz Khalid Gondal, Advocate, with the petitioner. Ms. Rahila Shahid, Deputy District Public Prosecutor and Rashida Parveen, Assistant District Public Prosecutor along with Kausar Ijaz S.I. Mr. Irfan Mehmood, Advocate for the complainant.

Through this application under Section 498 of the Criminal Procedure Code, 1898 ("the Cr.P.C"), the Petitioner Shahid Imran seeks his pre-arrest bail, after having been denied the same relief by the Court of learned Addl. Sessions Judge, Sargodha, due to his alleged involvement in a criminal case registered vide F.I.R No.116 dated 10.03.2023, offence under Sections 365-B, 376 of the Pakistan Penal Code, 1860 ("PPC"), at Police Station Midh Ranjha, District Sargodha.

2. The allegation, in nutshell, against the petitioner is that he along with his co-accused, abducted Mst. Alina Kiran, school going daughter of the complainant and thereafter committed rape with her.

3. Learned counsel for the petitioner seeks confirmation of the petitioner's bail by invoking:-

(i) Article 35 of the Constitution of Islamic Republic of Pakistan,1973 ("the Constitution") i.e. the State shall protect the marriage, family, mother and the child, and

(ii) Section 79 PPC i.e. nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith, believes himself to be justified by law, in doing it, as well as agitating the grounds that:

(i) since contracting a marriage by a Muslim with a pubert girl under Muhammadan Law is permissible, as such, the petitioner has committed no offence, and

(ii) the petitioner has been falsely implicated in this case with mala-fide by the complainant/mother of the alleged abductee being unhappy on account of her daughter's marriage with the petitioner against her wishes.

4. While opposing the above said contentions, learned Law Officers assisted by learned counsel for the complainant argued that the petitioner abducted minor victim and had also committed rape with her; the abductee implicated the petitioner in her statements recorded under Section 161 and 164 Cr.P.C for commission of offence, in which he has been booked. He further contends that the defence plea of the petitioner is liable to be rejected on the grounds that the alleged Nikah of the petitioner with the minor abductee is in violation of provision of the Child Marriage Restraint Act, 1929 ("the Act of 1929"), that Section 375(d) PPC describes offence of rape by a man with or without consent of victim aged under sixteen years and the medical evidence renders corroboration to the prosecution's version; the petitioner has been found involved with the commission of alleged crime. Thus, in absence of any mala fide attributable to the complainant, victim and the police, particularly when the offence falls within the prohibitory clause, the petitioner is not entitled to the extra ordinary concession of pre-arrest bail.

5. Arguments heard and record perused.

6. Generally, in international diplomatic discourse, harmony is an agreed upon idea. It underlies today's significant investments in trade/business, cultural diplomacy, conflict resolution and peace building across the borders. The States cannot set in solo flight without honoring international laws & conventions as the states all over the planet are interdependent through trade & business and mutual exchange of technology, services, sources, manpower, skill & knowledge etc. Principles proclaimed in the Charter of the United Nations have been aimed at recognition of the inherent dignity and equal & inalienable rights of all members of the human family including children, which rights are the foundation of freedom, justice & peace in the world. It is the obligation of States under the Charter of the United Nations to promote universal respect for and observance & protection of human rights & freedoms, particularly those of children.

7. Under the Domestic and International Laws, the minors, being the most vulnerable class of individuals, have always been dealt with distinctly for substantial and valid reasons while enacting provisions of law to cater and safeguard their interests. Since an adult having acquired majority is presumed to be capable of understanding the consequences of his actions and is held accountable for the same, whereas such presumption inherently cannot be attached to the actions of a minor and the test of sufficient maturity coupled with the capability of understanding the consequences of his act, is deemed to be a test for holding him/her accountable. Thus, the law giving bodies world over have always been taking measures by way of different pieces of legislation in this regard.

8. For further elaboration, a reference of certain laws, presently in field in Pakistan, may be beneficial to advance the discussion in a purposeful manner. Sections 82 PPC & 83 PPC respectively prescribe that nothing is an

offence which is done by a child under seven years of age and by a child above seven years & under twelve years of age having not attained sufficient maturity of understanding to judge the nature and consequences of his acts. Noticeably Section 359 PPC states that "kidnapping a person from lawful guardianship" is one of two kinds of kidnapping. Furthermore, Section 361 PPC, states that kidnapping a minor from legal guardianship is an offence and is punishable under Section 363 PPC. Similarly, the provisions of Section 364-A PPC and 366-A PPC prescribe punishment for kidnapping or abduction of any person under the age of fourteen years and for inducing any minor girl under the age of eighteen years respectively. Moreover, Section 369 PPC distinctly prescribes punishment for kidnaping or abduction of any child under the age of ten years. Protection of Women (Criminal Laws Amendment) Act, 2006 introduced Section 375 PPC prescribing punishment for committing rape with a woman, with or without her consent, under sixteen years of age. Criminal Law (Second Amendment) Act, 2016 brought in action Section 377-A PPC & 377-B PPC respectively defining sexual abuse of a person aged less than eighteen years and punishment thereof. Even under Article 3 of the Qanun-e-Shahadat Order,1984, a person of tender age, in case of his appearance as a witness, is to be distinctly dealt with to adjudge his competency. More-so Section 497 (1) Cr.P.C envisages that the Court may direct any person under the age of sixteen years to be released on bail. For social re-integration of juveniles, the Juvenile Justice System Act, 2018 ("the JJSA"), was enacted which defines child a person who has not attained the age of eighteen years. Even Article 44 of The Limitation Act, 1908 (IX of 1908) provides that a ward after attaining age of majority may, within three years, file a suit seeking setting aside of a transfer of property given field by his guardian.

Certain other enactments have been enforced in Pakistan specifying age of majority for a minor/child as of eighteen years e.g. Section 2 (b) of the National Commission on The Rights of Child Act, 2017, Section 1 (d) of the Islamabad Capital Territory Child Protection Act, 2018 and Section 2 (g) of aforementioned Zainab Alert, Recovery and Response Act, 2020. Moreover Section 10 of the National Database and Registration Authority Ordinance, 2000 also prescribes entitlement of one for issuance of CNIC after attaining age of eighteen years. To the likes of famous maxim "meliorem conditioionem suam facere potest minor, deteriorem nequaquam" (A minor can improve or make his condition better, but in no way worse. As a rule minor cannot enter into any contract except for necessaries, nor do anything prejudicial to their interests, as they are not considered free agents acting for themselves.)", Section 11 of the Contract Act states that only a person having attained age of majority is competent to enter into a contract. Moreover, even in Civil matters, Order XXXII of the Code of Civil Procedure, 1908 ("the CPC") ensures detailed safe process that a suit on behalf of minor must be instituted through next friend and there must be appointed a guardian at litem to defend a suit instituted against a minor.

9. The United Nations Convention on the Rights of Child ("the UNCRC") was adopted by the United Nations General Assembly in 1989, which came into force on 02.09.1990. Reference of Article 1 of the UNCRC on the rights of child would not be out of context, which says that a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier. A convention of United Nations becomes legally binding to a particular State when that State rectifies it. Recognition of international standards of child rights by Pakistan has been

identified in case titled “Shahbaz Ahmad Vs. The State and others” (2021 P.Cr.L.J 1100) as that Pakistan has ratified core international human rights treaties/ conventions that cover diverse areas, including the rights of children. It has also been held by my learned brother Tariq Saleem Sheikh, J, in the judgment supra that “Pakistan has ratified core international human rights treaties/conventions that cover diverse areas, including civil and political rights, the rights of children, women and persons with disabilities. On 5 July 2011 she ratified CRPD. The general rule is that the provisions of a treaty are not automatically incorporated into municipal law and a country’s legislature must enact law to implement them. In Pakistan, even where such legislation has not been passed, the courts are required to interpret and apply every statute, as far as its language admits, in accordance with the principle of comity of nations and established rules of international law. Reliance is placed on The Hanover Fire Insurance Company v. Messrs Muralidhar Banechand (PLD 1958 SC 138), Al-Jehad Trust through Habibul Wahab Al- Khairi, Advocate, and 9 others v. Federation of Pakistan through Secretary, Ministry of Kashmir Affairs, Islamabad and 3 others (1999 SCMR 1379) and Human Rights Case No.29388-K of 2013(PLD 2014 SC 305)”.

> Pakistan, being a party/rectifying state to the UNCRC, has honored obligation to comply with its provisions by enacting certain laws like Zainab Alert, Recovery and Response Act, 2020, preamble whereof states that it is borne out of the necessity to make provisions for protection of missing and abducted children under the age of 18 years, which the State must ensure in light of various conventions that Pakistan is party to, with specific reference to the "United Nations Convention on the Rights of the Child". In addition thereto, Article 25-A has also been introduced in the Constitution. The UNCRC followed by chain of enactments discussed above have consistently set forth age of majority as eighteen years, which

constantly & consistently flow of legislative intent has to be given due consideration.

10. Much prior to partition of India and the legislation referred hereinabove by the International Community, the then assembly comprising over the Legislators representing diverse communities, while adopting a progressive outlook blended with a future vision, passed the law which is commonly known as "The Child Marriage Restraint Act, 1929" (the Act of 1929), irrespective of their religions, without madling with the personal law of any community and to eradicate a common social evil of child marriage in vogue in different communities. Vide the Act of 1929, a bar had been placed to restrain the child marriage having also been made punishable under Sections 4 to 6 thereof. Unfortunately, despite a lapse of long time, the practice of child marriage has not fully abated. The intent of the Act of has duly been encapsulated in its preamble i.e. to place a restraint against the solemnization of child marriage. Under clauses (a), (b) and (d) of Section 2 of the Act of 1929, as substituted by the Punjab Child Marriage Restraint (amendment) Act 2015 (XII of 2015), the words 'child', 'child marriage' and 'minor' have respectively been defined as that "Child means a person who, if a male, is under eighteen years of age, and if a female, is under sixteen years of age", "Child marriage means a marriage to which either of the contracting parties is a child" and "minor means a person of either sex who is under eighteen years of age."

11. While elaborating the penal provisions under Sections 4 to 6 of the Act of 1929 through the cases reported as "Mst. Tahira Bibi Vs. SHO, etc."(PLD 2020 Lahore 811), "Mst. Shahida Parveen and another Vs. Union Council Jaswal through Chairman and Secretary and 6 others" (P L D 2021 Lahore 783) and "Muhammad Safeer Vs. Additional Sessions Judge (West)

Islamabad and others" (P L D 2018 Islamabad 385), it has consistently been held that THREE kinds of persons i.e. firstly a male above 18 years of age who contracts child marriage, secondly person who performs, conducts or directs any child marriage and thirdly where a minor contracts a child marriage, any person having charge of the minor, whether as parent or guardian or in any other capacity lawful or unlawful, who does any act to promote the child marriage or permit it to be solemnized or negligently fails to prevent it from being solemnized. Under the codified law in field, i.e. The Child Marriage Restraint Act, 1929, sixteen years of age for a girl is considered to be a threshold for entering into a marital bond.

12. Under uncodified Muslim law, which is mainly based upon the opinions of Muslim scholars, the competence of a girl to enter into a contact of marriage is dependent on attainment of puberty. Puberty is presumed at the age of fifteen years. According to "Fatawa Alamgiri", Page-93 of Vol-V, the lowest age of puberty as per their natural signs is 12 years in males and 9 years in females and if signs do not appear, both sexes are held to be adult on the completion of their age of 15 years. After copying out from Fatawa Alamgiri and Hedaya, the deduced principle is that a girl even having not attained puberty, but possessing discretion and sufficient understanding can enter into a contract of marriage, however; for its operation it will be dependent on the consent of the guardian, if there is one, but in the absence of any guardian it will take effect on her attaining of majority and ratifying the marriage contract. According to Paragraph-24 of Muhammadan Law, "When a marriage of a minor is contracted by any guardian other than the father or father's father, the minor has the option to repudiate the marriage on attaining the puberty, technically which is called the "option of puberty" (Khyar-ul-bulugh). After attaining puberty, right of repudiation of the marriage, in case of a female is lost if she had been informed of the marriage and she fails to repudiate the marriage without

reasonable delay. In case titled "Farooq Omar Bhoja Vs. Federation of Pakistan through Ministry of Law and Justice of Pakistan through Secretary, Islamabad" (PLD 2022 Federal Shariat Court 1), the Hon'ble Federal Shariat Court of Pakistan, after examining various practical aspects along with their implications, has observed that:-

> "Although majority of Muslim jurists are of the view that the Nikah of a minor girl is permissible, there are some jurists having opposing opinion also like Imam Ibn-e-Shabarma who was a Muslim jurists contemporary of Imam Abu Hanifa in Iraq along with him Qazi Abu Bakar Al-Ism also had opposing opinion. There are a few more in addition to them who have this opposing opinion, i.e., Nikah of a minor girl is not permissible in Islam which means both point of views do exist among Muslim jurists. (Reference: Al-Mughni Ibn-e-Qudaima, Volume-7, Page-487, Majmooa-i- Qawaneen-e-Islam, Volume No.1, Pages-214 and 215 by Dr. Tanzeel-ur-Rehman). Dr. Tanzeel-ur- Rehman (late) has dedicated a complete section of his book Majmooa-i-Qawaneen-e-Islam on this topic, although the whole section is very pertinent to this topic; however, the relevant portion of this section is reproduced hereinbelow for bringing clarity to the issue:-
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> 9. Setting a threshold of minimum age at 16 years for a girl by law will generally help the girls to get at least basic education. The importance of education is self-explanatory. The need of education is equally important for everybody irrespective of gender. That is why Islam has made the acquisition of education as mandatory for every Muslim. As mentioned in Hadith, it includes males and females both: Acquisition of knowledge is mandatory upon every Muslim."

> The use of such language by the Prophet (SAWS) accentuates the farziat of education in a Muslim society, and for every Muslim in all and any circumstances. Hence, education is one of the fundamental factors for personality development of every and any human person.

It has also been held by this Court in the case of "Mst. Tahira Bibi Vs. Station House Officer and others" (PLD 2020 Lahore 811) that "Due to child marriage, possibility/ chances/likelihood of infringement of fundamental rights of a child which have duly been guaranteed by the Constitution are enhanced---Right of life is not a mere right to exist or live, it also encompasses the idea of leading a meaningful and dignified life---Offering of an opportunity to get education by State is also a fundamental right of a minor, denial whereof may amount to denial to excel and progress in life." According to The Dissolution of Muslim Marriages Act, 1939, in case of non-consummation of marriage, the right of a female to repudiate it subsists till attaining the age of eighteen years, however, in the case of a male, this right continues until he has ratified the marriage either expressly or impliedly, by making payment of dower or by cohabitation." It may be observed that the option of puberty is a recognition of the difference of resultant implications between minority and majority. On attaining the majority being a sign of maturity, enables the individual to decide about the future of his/her marriage, contracted for him/her by father or guardian. Needless to observe that marriage being a civil contract concomitantly gives rise to serious consequences, not only to the parties to the marriage but also for the future generations including their relation with the society at large. The Hon'ble Federal Shariat Court, while considering the scope of consent of entering into the marriage and purposes thereof, in the case of "Muhammad Aslam Vs. the State" (2012 P. Cr. L J 11) has held that

“Awareness about marriage encompasses more serious matters than mere carnal knowledge (relating to physical feelings and desires of body). Therefore, Islam places conjugal consent over high pedestal of morality rather than carnality. Consequently, consenting adult is a person who has come of age enough, and therefore, responsible enough, to decide and understand consequences of marriage.”

13. To advance the discussion, a close reading of Section 2 the West Pakistan Muslim Personal Law (Shariat) Application Act, 1962, appears to be necessary having close nexus with the point in issue, for convenience and ready reference, is reproduced hereunder:

> 2. Application of the Muslim Personal Law:- Notwithstanding any custom or usage, in all questions regarding succession (whether testate or intestate), special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, legitimacy or bastardy, family relations, wills, legacies, gifts, religious usages or institutions, including waqfs, trusts and trust properties, the rule of decision, subject to the provisions of any enactment for the time being in force, shall be the Muslim Personal Law (Shariat) in case where the parties are Muslims.
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> [Emphasis supplied]

The bare reading of the above provision clearly manifests that application of Muslim Personal Law in relation to subjects mentioned in it, marriage etc. is subject to provision of enactments for the time being in force in Pakistan. It may not be out of place to mention that the Enforcement of Shari'ah Act, 1991 ("Act of 1991") was got enacted, to use it as a tool with a subjective approach to perpetuate the dictatorial designs under the influence of political heavy weight. Section 3 of Act of 1991 envisages that the Shari'ah i.e. the

Injunctions of Islam as laid down in the Holy Qur'an and Sunnah, shall be the supreme law of Pakistan and Section 4 thereof requires that the laws be interpreted in the light of Shari'ah. Reliance can be placed upon case titled "Mst. Mumtaz Bibi Vs. Qasim and others" (PLD 2022 Islamabad 228).

14. Although Pakistan predominantly consists of Muslim population, yet they stand divided in different sects. Without being prejudice to the discussion made hereinabove in paragraph No.12 of this order, it is a matter of common observation and practice that different school of thoughts of Muslims/sects of Islam are not in agreement with regard to age of majority of a minor/child. Even consequent upon the Enforcement of Act of 1991, because of sharp difference of opinion amongst the sects, as stated above, no substantial and considerable legislation could have been made. Therefore, as per mandate of Section 2 of the West Pakistan Muslim Personal Law (Shariat) Application Act, 1962 and the binding effect of ratio of Bhoja's case referred supra, it would be more advisable to get the provisions of the Act of 1929, strictly implemented being only piece of statutory legislation, to avoid professing effect of divided sectarian opinions likely to bring further divide in the society. Even otherwise, it would be quite pragmatic to prefer and rely upon enacted/codified laws and statutory provisions over the incompatible viewpoints of different sects in compliance with Article 4 of the Constitution. It is our heartfelt pride that the legislation in the shape of the Act of 1929 stressing on the age of minority was enacted in this region when it was being ruled by the colonial masters prior to awakening of rest of the world at large in the matter through the UNCRC.

15. Under Article 203-D(1) of the Constitution, the Federal Shariat Court has the jurisdiction to, either of its own motion or on the petition of a citizen of Pakistan or the Federal Government or a Provincial Government, examine and decide the question whether or not any law or provision of law is

repugnant to the Injunctions of Islam, as laid down in the Holy Quran and Sunnah of the Holy Prophet, hereinafter referred to as the Injunctions of Islam. More-over under Article 203-GG of the Constitution, such decision of the Federal Shariat Court shall be binding on a High Court and on all Courts subordinate to a High Court. The vires of Sections 4,5& 6 of the Act of 1929 were challenged before the Hon'ble Federal Shariat Court for seeking a declaration regarding the provisions to be un-Islamic. However, the Hon'ble Court inter-alia had unambiguously and authoritatively ruled that "in Islamic law, there is a well-developed concept of Sad-uz-Zaraey based on Quran and Sunnah, according to this principle it is also a duty of the State to control, curtail or curb any act in a society, which may lead to harmful consequences to society at large or to any of its segments, no matter how minor it is. According to this principle of Sad-uz-Zaraey, therefore, such enactment like the "impugned sections" of a law are not against Quran and Sunnah." The Hon'ble Federal Shariat Court in its judgment, while upholding the provisions of Sections 4,5& 6 of the Act of 1929, has sanctified the state's authority to legislate any law on the strength of the principle of Sad-uz-Zaraey and thus it stands settled that the provisions of Sections 4,5& 6 of the Act of 1929 are not un-Islamic.

16. Apart from the discussion made hereinabove, this Court is tempted to observe that while dealing with variety of litigation, as part of the Bench, it has been found that despite the Union Council under Section 9 the Act of 1929, is under a legal obligation to file a formal complaint against the persons liable to be punished, as discussed above, violating the provisions of the Act of 1929 before the Court to create deterrence in the society in general against such abuse of child marriage, yet the glaring shortfall, lapses, negligence and misconduct of state officials can palpably be found in existence somewhere behind the commission of almost all the offences. It

may also be pointed out that in most of the cases, after abduction of the minor girls, the delinquents hurriedly maneuver Nikahnamas to use it as a shelter by pleading it the marriage conducted in violation of the Act of 1929, for saving their skin from the punishment of the offence, which they have committed. In many cases, despite acknowledging marriage contracted in violation of the provisions of the Act of 1929 instead of facing the music for their wrong doings, in absence of a proper practical mechanism, all the persons which have duly been categorized in paragraph No.11 of this judgment unfortunately go escort free.

17. In addition to above, shorn of mechanical techniques, practices and application of law in a casual & negligent manner by the authorities & law enforcement agencies, all the state organs always required to co-operate, co-ordinate and assist each other in course of discharge of duties effectively so as to bring in clutches those who violate law and jump out of legal limits to infringe, breach, defeat, snatch and take away legal rights of fellow citizens. By setting the machinery in motion of some agencies of the government may activate the vigilant role of Union Council Authorities/Officials. A police Officer specifically with reference to clauses (d), (i), (r) of subsection (1) of Section 4 and of the Police Order 2002, subject to law, is required to collect and communicate intelligence affecting public peace and crime in general, detect and bring offenders to justice and prevent harassment of women and children in public places. Under Section 2(a) of the Order ibid, Police Officer is legally obliged to make every effort to afford relief to people in distress situations, particularly in respect of women and children. Bare reading of the above referred Sections reveals that the duties of the police officer vis-a-vis the children and the women, in view of their physical fragility, have specifically been amplified. It may not be out of context to state that the police under different statute has been conferred with the powers which are

diverse in their nature. Chapter XIV of Cr.P.C exhaustively deals with the investigation of offence/crime undertaken by a police officer. Needless to say that investigation means collection of the evidence with regard to reported offence. It will not be out of context to observe that collection of evidence means collection of evidence of both sides. The JJSA through Section 8 provides mode for determination of age of the juvenile through the Officer Incharge of the Police Station/Investigation Officer as well as by the Court dealing the matter under Section 167 Cr.P.C, on the basis of birth certificate, education certificates, any other document and, in absence of such document, age of juvenile accused on the basis of medical examination report. The Court seized with trial of the matter, in case of any dispute vis-a-vis age of a minor, however is inherently empowered to set the machinery of law in motion in accordance with the provision of the JJSA for the purpose of determination of age of child who is accused of an offence before it. It has surprisingly been noticed that no specific statutory provision has been enacted for determination of age of a minor abductee/victim in case of any dispute regarding his/ her age, however, there exists no bar in adopting the procedure akin to the procedure laid down in the JJSA, 2018 for substantial justice. Unless the investigation is complete, the Investigation Officer under the Code is bound to submit the interim report under Section 173 Cr.P.C within fourteen days and thereafter on the final conclusion of the investigation, a complete report is required to be submitted by him to the Court through the prosecution office. A public prosecutor is appointed under Chapter XXXVIII of Cr.P.C, to plead and prosecute in all Courts the cases under his charge. In order to eradicate formerly existing weaknesses in practice, the Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act, 2006 has been enacted to establish an independent, effective and efficient service for prosecution of criminal cases and to ensure prosecutorial independence as well as for better coordination in the Criminal

Justice System of the Province. The Prosecutor, under Section 9(5) of the Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act, 2006, on receipt of report under Section 173 Cr.P.C, including a cancellation report or report for discharge of a suspect or an accused, is mandated to scrutinize the same. The scope of power to conduct scrutiny of report has been examined in the case of "Nadeem alias Deema Vs. the District Public Prosecutor Silakot and 7 others" (2012 P. Cr. L J 1823) and after examining the word scrutinize in context with Section 9 (5) of the Punjab Criminal Prosecution's Act, it has been ruled that "Scrutinize means to examine a matter from all pros and cons and attend all its aspects with due care and caution inasmuch as to make deep search or inspect the matter in close, care and through manner". In the case of "Azizullah Khan Vs. SHO Police Station Saddar, Mianwali and 4 others" (2013 P. Cr. L J 1411) it has been observed that "keeping in view the subject in hand, if Section 9(5)(a) of the Act, ibid, is seen, the defect which a Public Prosecutor or a prosecutor is required to point out in report under Section 173, Cr.P.C. submitted may be a defect in investigation during the collection of facts which constitute as proof admissible in evidence against an accused person or the result constituted on the basis of which those collected facts which form the opinion of a police officer about the commission of an offence under which an accused is forwarded before a court for initiation of action under relevant provision of law." While having a combined object-oriented reading of the above quoted various provisions of different laws besides what has been considered above, there exists no impediment in concluding that the procedure contained in the JJSA may be adopted in case of any dispute regarding the age of the abductee/victim. It has been observed that while ignoring investigation on the aspect of age of victim in cases of abduction/marriages alarmingly the Investigation officers usually fail in discharge of their duties in this regard. In this backdrop, in cases of abduction of minor female especially, the

Prosecutor, under his statutory obligation, on scrutiny of the report/record has to find out as to whether besides the offence alleged against the accused, he/they have committed any other offence exclusively triable by a special Court and if he comes to a conclusion that the accused prima facie appears to have committed an offence under some other law, it will be quite lawful for him to refer the matter to the relevant department to achieve the object of better coordination amongst various limbs of justice system in line with the Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act, 2006, contained in its preamble so that the proper action may be triggered against the delinquent to bring the wrong doer to book. Such measures shall be quite in line with the law laid down in case titled "Aswad Iqbal Vs. R.P.O and others" (PLD 2020 Lahore 434) herein it has been held that "no crime should remain undetected nor any guilty person should go scot free nor any innocent person should face the rigor of prosecution." Needless to say that upon receiving intimation by the concerned Prosecutor, the relevant head of the department shall be under bounden duty to proceed strictly in accordance with law to bring the matter to its logical end.

18. The State had since fixed the age of minority/majority to protect the minors through the provisions of the relevant laws, which are presently holding the field, the non- compliance whereof would amount to frustrate the object behind the laws. Implementation of the statutory provisions of Act of 1929, read with all other allied enactments made by the legislature, while giving it a preference over uncodified divergent opinions of religious scholars, by way of strict compliance with the provisions pertaining to fixation of sixteen years of age of female for her marriage, as aforesaid, shall enable the state to discharge its international obligations being signatory to the UNCRC besides providing safeguard to the female minors from infringement of their fundamental rights guaranteed under Articles 4, 9, 14,

25 of the Constitution read with all other enabling provisions of law. It will also tend to create a sense of harmony with its consequential effect of definiteness about the law amongst various sections of the society.

19. To decide the fate of this petition, while weighing up the swinging contentions of parties projected through their counsels, on perusal of available record, it transpires that the age of alleged abductee, Mst. Alina Kiran, as per the medico- legal certificate issued by Dr. Mehwish Amin, M.O, after her physical/medical examination, is 13/14 years. The acclaimed marriage of the petitioner with the abductee, refuted by her, prima facie has illegally been contracted in clear violation of the provisions of the Act of 1929, which unambiguously prescribes sixteen years of age as threshold to enter into a marriage contract by a female and violation thereof is punishable under Section 4 of the Act ibid with imprisonment of six month and fine 50,000/- rupees. According to the celebrated maxim "Jus ex injuria non oritur" a right does not arise from a wrong, the petitioner prima facie himself has not only violated law, but with the same stroke he has dislodged legal & constitutional protection available with the alleged abductee under Article 4 of the Constitution. Whereas, the petitioner was bound to follow & abide by law prescribing age of majority whilst entering into contract of marriage, which obligation otherwise is clearly cast upon him by the Constitution through Article 5 (2) stating that "obedience to the Constitution and law is inviolable obligation of every citizen whereever he may be and of every other person for the time being within Pakistan". Moreover, as per section 375(d) PPC, the consent of a female below the age of sixteen years is otherwise immaterial. It is held in "Mst. Mumtaz Bibi" case supra that a Female child below the age of 18 cannot be deemed competent to freely grant her consent to enter into a marriage contract merely because she manifests the physical symptoms of having attained puberty. In addition to

above, the provision of Section 79 PPC apparently consists of two parts which can be read as follows:-

> (i) Nothing is an offence which is done by any person who is justified by law in doing it.
>
> (ii) Nothing is an offence which is done by any person who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law in doing it.

The Hon'ble Supreme Court of Pakistan has interpreted this provision in the case of "Malik Muhammad Mumtaz Qadri Vs. The State and others" (PLD 2016 SC 17) in the manner that

> "as regards the first part of section 79, PPC the accused person has to refer to and rely upon some express and existing legal provision which makes his act justified by law……As far as the second part of section 79, PPC is concerned, the accused person has to establish that by reason of a mistake of fact he believed in good faith that his act was justified by law and such belief that his act was justified by law was not based upon a mistake of law. This provision contemplates that if there had been no mistake of fact and if the fact perceived by the accused person to exist actually existed as a fact then the act of the accused person was such that it was justified by law. This provision also makes it clear that the accused person's belief in his act being justified by law should not be based upon a mistake of law. This provision further requires that the accused person must act in good faith."

20. The petitioner's banking upon the provision of Section 79 PPC, contained in Chapter IV of PPC dealing with subject of General Exceptions as his defence plea, in presence of clear provision of Section 2 of the West Pakistan Muslim Personal Law (Shariat) Application Act, 1962, and Sections 4, 5 & 6 of the Act of 1929 in the given circumstances of the case, requires appreciation of evidence and thus can be adjudged/entertained by the trial Court after recording evidence. It has been held by a Division Bench of this Court in the case of "Muhammad Adeel Vs. the State (2017 P Cr. LJ Note 227) that

> "accused cannot be pinned down to the plea taken by him either during investigation or before the Trial Court, unless the plea taken falls under the general exceptions provided under Chap.IV, P.P.C., which require the accused to discharge onus within the contemplation of Art. 121 of Qanun-e-Shahadat, 1984".

Even the argument of learned counsel for the petitioner seeking protection under Article 35 of the Constitution has failed to impress for a simple reason that the petitioner had maneuvered alleged marriage with the victim by violating the provision of law, hence in view of celebrated maxims that nobody can take advantage of his own wrong [Nullus Commodum Capere Potest De Injuria Sua Propria P L D 1964 Supreme Court 572, P L D 1976 Karachi 164, P L D 1970 B J 5, P L D 1969 Quetta 13] as well as that Court will not lend aid to person founding his cause of action upon an immoral or illegal act [Ex Dolo Malo Non Oritur Actio P L D 1977 Karachi 814]. It may be pointed out that the marriage being a civil contract inter-se the parties. A criminal court cannot go beyond the jurisdiction vested with it under the law. It can only try a person accused of an offence which is cognizable by it. A

Family Court established under Muslim Family Law Ordinance, 1961 (VIII of 1961) has the exclusive jurisdiction in matters enumerated in Schedule under Section 5 of the Family Court Act 1964 yet in view of law laid down in cases reported as "Dr. Sikandar Ali Mohi Ud Din Vs. Station House Officer and others" (2021 SCMR 1486) and "Mst. Shahida Parveen and another Vs. Union Council Jaswal through Chairman and Secretary and 6 others" (PLD 2021 Lahore 783), Civil & Criminal proceedings may run side by side.

21. Besides above, the petitioner has been specifically nominated in crime report with culpability of abduction and commission of rape with complainant's daughter namely Alina Kiran, supported by the statement of the alleged victim under Section 161 and 164 Cr.P.C which allegations find due corroboration with the medical evidence. The alleged victim was recovered by this Court during the proceedings of W.P No.14792/2023 (Mst. Rehmat Bibi Vs. District Police Officer, Sargodha, etc.". The petitioner was also found connected with the commission of offence during the course of investigation. Reasonable grounds thus exist to believe that the petitioner has committed non-bailable offence, the grant of pre-arrest bail being a discretionary relief essentially rooted into equity is only meant for innocent person involved in the case on account of mala fide or ulterior motive. Reliance with regard to said principles may be placed upon pronouncements in cases "Mir Muhammad and others Vs. National Accountability Bureau through Chairman and others" (2020 SCMR 168) and "Rana Abdul Khaliq Vs. The State and others" (2019 SCMR 1129). In absence of any mala-fide or ill-will of the complainant, victim or on part of the police for his false involvement in this case, the petitioner has failed to make out his case for confirmation of his ad-interim pre-arrest bail, as such,

instant petition is hereby **dismissed** and the ad-interim pre-arrest bail already granted to the petitioner vide order dated 19.05.2023 is recalled.

22. In view of above exhaustive discussion, it is felt appropriate that copy of this order be transmitted to I.G Punjab (Police), the Prosecutor General Punjab, the Director Local Government Punjab, for their perusal. The Prosecutor General Punjab, for "better coordination in the Criminal Justice System of the Province and matter incidental thereto", shall take measures in association with the I.G Punjab Police and the Director Local Government and frame the S.O.Ps if necessary, to enforce the law laid down through the judgments reported as "Mst. Tahira Bibi Vs. SHO, etc."(PLD 2020 Lahore 811) and "Zeeshan Ali Zafar Vs. S.H.O and others" (2021 MLD 880), to eradicate a continuing abuse of child marriage besides bringing the delinquents to book.

    Efforts of Mr. Rashid Mehmood, Civil Judge 1st Class/Research Officer, are highly appreciated for requisite commendable assistance rendered in the case in hand.

(ANWAARUL HAQ PANNUN)
JUDGE

APPROVED FOR REPORTING

JUDGE

2024 LHC 6266

IN THE LAHORE HIGH COURT, BAHAWALPUR BENCH, BAHAWALPUR

Case No Crl. Rev. No.136 of 2019

Kousar Abbas alias Piya Versus The State etc.

Date of Hearing: 02.01.2025

Petitioner by: M/s. Syed Zeeshan Haider and Syed Naeem Ali, Advocates.

State by: Jam Waheed Ahmad Bobra, Deputy District Public Prosecutor along with Khalil S.I. Rai Mazhar Hussain Kharal, A.A.G.

Complainant by: M/s. Sardar Abdul Basit Khan Baloch and Mr. Shah Hussain, Advocates.

Legal Assistance by:- Mr. Muhammad Zahid Farid and Muhammad Kalim Aslam Awan, Civil Judges 1st Class/Research Officers Lahore High Court.

ANWAARUL HAQ PANNUN, J. Kousar Abbas alias Piya, the petitioner was sent up to face trial in a criminal case registered vide F.I.R No.508 dated 20.12.2011, under Sections 324/337-C/337 F(ii) PPC, at Police Station Naushehra Jadeed, Ahmadpur East, District Bahawalpur, on a complaint in writing (Exh:PA) made by Qanbar Hussain, (PW-1) with the allegation that on 20.12.2011, in the evening, Mst. Tahira Bibi alias Guddi, his daughter had gone to house of her maternal uncle Madah Hussain. Due to absence of any of the inmates in their house, while she was on her way back to home, the petitioner gave churri blows hitting on her belly and neck, resultantly she fell down and upon her hue and cry, the complainant, his brother Abuzar and Madah Hussain attracted at the spot and witnessed the occurrence. They made an attempt to apprehend the petitioner, he however, succeeded to flee away while brandishing the Chhuri in his hand.

Motive behind the occurrence was dispute of her Rishta. After usual investigation, the accused was sent up to court, while taking cognizance, the learned trial Judge charge sheeted the accused, to which he pleaded not guilty and claimed trial. The prosecution had examined as many as 06-witnesses to prove the charge. The ocular account has been furnished by Qanbar Hussain, the complainant (PW 1), Abuzar Hussain (PW-2) and Mst. Tahira Bibi (PW-3); Muhammad Iqbal SI (PW-4) conducted investigation in case; Dr. Mehvish Pervaiz (PW-5) furnished medical evidence and Khawaja Muhammad Asif ASI (PW-6) is the recovery witness of the weapon of offence i.e. chhuri, allegedly recovered on pointing out of the petitioner in presence of PWs. After closure of prosecution's evidence, when examined under Section 342 Cr.P.C, the accused/petitioner, refuted all the allegations levelled against him and professed his innocence. The accused/petitioner first opted to examine himself under Section 340(2) of Cr.P.C, but later-on did not examine him. However, in his defence evidence, he produced Manzoor Hussain as DW-1 and Samar Abbas as DW-2 besides tendering documents i.e. certified copies of suit for restitution of conjugal rights Exh:DA and written statement Exh:DB. On conclusion of the trial, learned trial Judge convicted and sentenced the petitioner through the impugned judgment dated 21.12.2018 as under:-

(Under Section 324 PPC)

05-years R.I along with fine of Rs.30,000/- payable to the injured Mst. Tahira Bibi and in default of payment of fine to further undergo one month S.I.

(Under Section 337-D PPC)

To pay Arsh, 1/3rd of diyat i.e. Rs.10,51,847/-.

(Under Section 337-F(ii) PPC)

To pay Daman Rs.20,000/-. The Arsh and Daman amounts were ordered to be paid in lumpsum, recoverable as arrears of land revenue with the further direction that the convict shall remain in simple imprisonment till the payment of said daman amount. The convict has, however, been given the benefit of Section 382-B of Cr.P.C.

The petitioner being aggrieved, filed an appeal against his convictions and sentences whereas the complainant filed criminal revision petition, seeking enhancement of sentence of the petitioner. The learned Addl. Sessions Judge, Ahmadpur East, dismissed both the appeal and the criminal revision petition through the impugned consolidated judgment dated 27.05.2019. Hence, this criminal revision petition.

2. Arguments heard and record perused.

3. The ocular account as stated above has been furnished by Qanbar Hussain, the complainant (PW-1), Abuzar Hussain (PW-2) and Mst. Tahira Bibi, the injured (PW-3). They all despite lengthy cross-examination, remained un-waivered and their evidence had fully been corroborated by the medical evidence. Dr. Mehvish Pervaiz (PW-5) examined the injured Mst. Tahira Bibi, vide MLC (Exh:PF). She noted two injuries on the body of the injured i.e. injury No.1:- An incised wound of 8 x 1 cm x platysma muscle cut on left side of neck, declared as Ghair Jaifa Badiah Punishable under Section 337-F(ii) PPC. The injury No.2 “A stab wound of 2 x 2 x deep going left side of abdomen in left hypochondrium”, declared as Jurh Jaifah, as defined under section 337-C PPC and punishable under Section 337-D PPC”. The blood was oozing from the wound at the time of examination of the injured. Later-on Dr. Mehvish Pervaiz, PW-5 had formed her opinion on the basis of report of Dr. Umer Baloch M.O Surgical Unit-II, BVH, Bahawalpur which is to the effect that “exploratory laparotomy was done 300 ml fluid containing gut content was present, 2.

perforation in the body of stomach which were primarily closed. Abdomen washed drain placed closed in layers. So, in the light of report of M.O Surgical Unit No.II, injury No.2 was declared as Jurh Jaifah. It may be observed that in the Merriam Webster Medical Dictionary, the hypochondrium is defined as "Either hypochondriac region of the body, located beneath the lower ribs and above the abdomen." whereas in Dorland's Medical Dictionary, "One of the two regions of the abdomen that lie on either side of the epigastrium and below the ribs." Generally the term hypochondrium has the following dictionary meanings: (1) Anatomical Context: Either of the two regions of the upper abdomen situated on each side of the epigastrium and beneath the lower ribs. (2) Etymological Context: Derived from the Greek words "hypo-" (under) and "chondros" [cartilage, referring to the cartilage of the ribs]. The hypochondrium refers to an anatomical region of the human abdomen, located on either side of the upper abdomen, beneath the ribcage. It is divided into two parts i.e. the right hypochondrium which contains the liver [especially the right lobe], gallbladder, and part of the kidney and the left hypochondrium, contains the stomach, spleen, tail of the pancreas, part of the kidney, and parts of the colon respectively. The body cavity, on the other hand has been defined in the Oxford English Dictionary as "A hollow space within the body that contains organs or other structures, such as the thoracic cavity or abdominal cavity." In Merriam-Webster Medical Dictionary:- "A cavity in an animal body, specifically the coelom, which is the main body cavity housing organs." And in Cambridge Dictionary:- "An opening into the human body, such as the mouth, anus, or similar spaces that house internal structures." Thus, the body cavity means a part of the body under which vital organs are located. An injury penetrating into the body cavity wherein the vital organs are located is treated as Jaifah. Further collateral damage or injury to the internal organs referred hereinabove inside the abdomen is sufficient to bring the case within the purview of Jaifah. The argument of

learned counsel for the petitioner that since neither Dr. Omer Baloch, M.O Surgical Unit-II, BVH Bahawalpur, who as per prosecution, operated upon the injured Mst. Tahira Bibi himself appeared in the witness box nor the original Surgical Notes had been brought on record, rather the photocopy thereof had illegally been got exhibited as Exh:PH, which is inadmissible in evidence, thus no reliance could have been placed thereon and the conviction and sentence under Section 337-D PPC awarded to the petitioner, is liable to be set aside, is repelled for the simple reason that in view of statement of Dr. Mehvish Pervaiz, PW-5 and her observation, injury No.2 i.e. "a stab wound 2 x 2 x deep going left side of abdomen in left hypochondrium", clearly falls within the definition of Jaifah. The non-examination of Dr. Omer Balouch as PW as well as non-production of the original Surgical Notes in evidence, therefore, have no adverse bearing upon the prosecution's case, and the learned counsel for the petitioner can yield no fruit and draw any benefit on the strength of his argument that photocopy of the Surgical Notes has illegally been placed on record as Exh:PH. The reliance of the learned counsel for the petitioner on the case reported as "Pervaiz Khan versus The State"(PLD 1998 Lahore 84), being inapt in the facts and circumstances of instant case, does not advance the cause of the petitioner rather it affirms view of this court as discussed above. With due reverence to his Lordship Mr. Zafar Pasha Chaudhary, J, the relevant portion is reproduced hereunder:-

> "Body cavity does not denote only an area starting from upper part of the shoulder up to diaphragm and then from diaphragm to lower part of pelvis but it means a part of the body under which vital organs are located and if any injury penetrates into the body cavity and then enters that part of the body wherein vital organs are located, only then that can be treated as Jaifah and punishment can be awarded accordingly."

4. For what has been discussed above, both the learned Courts below have passed the impugned judgments while assigning cogent and valid reasons calling for no interference by this Court. In revisional jurisdiction under Section 439 Cr.P.C, this Court has to satisfy itself about the correctness, legality or propriety of any order/ judgment passed by a lower court and unless the impugned order/ judgment is found to be unreasonable causing miscarriage of justice or glaring irregularity materially affecting the proceedings or patent illegality vitiating the impugned decision, the same cannot be interfered with. No case for interference by this Court in the revisional jurisdiction is made out. Accordingly, this revision petition is **dismissed**.

(ANWAARUL HAQ PANNUN)
JUDGE

APPROVED FOR REPORTING

JUDGE

IN THE LAHORE HIGH COURT, MULTAN BENCH, MULTAN

Case No Crl.Misc.No.2446-H of 2020

Mst. Kausar Mai Versus SHO, etc.

28.02.2025 M/s Rana Muhammad Ashraf Jameel and Malik Tahir Iqbal, Advocates for the petitioner. Sardar Mehboob and Muhammad Ramzan, Advocates for respondent No.1. Malik Mudassir Ali, Deputy Prosecutor General along with Hassan Raza Khan CPO, Rab Nawaz SP, Naeem SP, Hakim Ali DSP (legal), Ibrar Inspector and Sabir S.I.

Through the instant petition under Section 491 Cr.P.C, the petitioner seeks recovery of her husband Shabbir Ahmad and her relative Fayyaz Hussain from the illegal, improper and unlawful detention of respondent No.1/SHO Police Station Basti Malook, District Multan.

2. Briefly, the facts of the case are that allegedly on 16.05.2020, SHO/respondent No.1 along with other police officials on his official vehicle, raided at the residence of the petitioner and took the aforesaid detenues in his custody besides taking away the dowry articles of the petitioner's daughters including gold ornaments weighing 2 ½ tolas and cash Rs.2,50,000/- and since then had detained them in the Police Station Basti Malook, District Multan, consequently, the petitioner approached him with a request to release the aforesaid detenues, who instead of paying any heed to her request, demanded illegal gratification. She has further averred that the alleged detenues are neither involved nor required in any criminal case and since 16.05.2020, they have not even been produced before any court of law and as such the custody of the alleged detenues with the respondents is illegal, hence this criminal miscellaneous petition.

3. Arguments heard and record perused.

4. According to the order sheet, on 21.05.2020, the Court was apprised that both the alleged detenues were formally arrested in a criminal case, but one of them namely Shabbir Ahmad had met his death last night during an attack launched by his cronies while he in pursuance of disclosure was being taken for effecting recovery of a rifle. SHO/Inspector Ibrar has stated that in this regard a separate criminal case vide F.I.R No.380 dated 20.05.2020, offence under Sections 302/324/353/ 186/224/225/148/149 PPC has already been registered at Police Station Basti Malook, District Multan.

5. In response to a Court query, he concedes that neither the departure of the police party from the Police Station along with Shabbir Ahmad (deceased) nor its return has been incorporated in the daily diary maintained at the Police Station. This fact was brought to the notice of CPO Multan, who has removed/transferred Ibrar Hussain Inspector/SHO along with all other officials whose names figure in the above referred F.I.R from their respective postings to ensure the fair investigation of the case. The matter was adjourned to 04.06.2020. On 04.06.2020, Muhammad Ibrar SHO/ Inspector, in response to a query, apprised that all the entries made in the daily diary during a month are subsequently collected and preserved in a binding shape and admitted default in maintaining the station diary/ roznamcha in terms of Chapter 22 of the Police Rules, 1934, therefore, a notice was issued to Muhammad Ibrar Inspector/SHO with a direction to submit a detailed report/reply. Furthermore, in compliance with the order dated 22.06.2020, whereby this Court issued a direction to Senior Superintendent of Police, Investigation, Multan to submit intimation to the I.G Punjab for issuance of SOPs/orders so that the order for maintaining the manual roznamcha may be complied with throughout the Punjab, Inspector General of Police, Punjab submitted his report along with copy of Notification dated 15.12.2017 regarding the amendments in the Police Rules, 1934 and copy of letter containing S.O.Ps for online F.I.R and daily diary.

6. Learned counsel for the petitioner, after perusing the report/comments, submits that a Judicial Inquiry regarding the murder of petitioner's husband (the alleged detenue Shabbir Ahmad) in the alleged fake police encounter is being conducted by the learned Sessions Judge, Multan, the petitioner would like to join the aforesaid inquiry proceedings, however, appropriate directions may be issued for future. Since the complaints against the Police for detaining the people illegally without showing their formal arrest, even in the cases they are required to the police, without maintaining the daily diary also are quite common, therefore, I feel it appropriate to issue certain guidelines for future.

7. The word 'Police' is derived from the Greek word 'Polis', which means a city. According to Black Law dictionary Tenth Edition "Police" means the Government department charged with the preservation of public order, promotion of public safety, and prevention and detection of crime. According to New Webster dictionary 1992, a department of government responsible for the preservation of public order, detection of crime and enforcement of civil law. For regulation and to re organize the police to make it a more efficient instrument for the prevention of the crime in British India, The Police Act (Act V) of 1861 was promulgated. Under Section 1 of this Act, all persons enrolled under this Act were included in the definition of "Police". This Act remained in force till 2002. It was repealed and substituted by the Police Order, 2002 (hereinafter to be referred as Police Order) wherein "Police" has been defined under Article 2 (xix) that 'Police or Police Establishment' means the police referred to in Article 6 [separate police establishment for each general police area] and includes all persons appointed as special police officers or additional police officers and all other employees of the police. Police Officer has been defined in Article 2 (xviii) a member of the police who is subject to this Order; Police Station has been defined in S.4(s) of Cr.P.C which means any post or place declared, generally or specially, by the [Provincial Government] to be a police-station, and includes any local area specified by the [Provincial Government] in this behalf. Officer in charge of

the police station commonly called as SHO (Station House Officer) as per Rule 22.1 of the Police Rule 1934, which have also been saved under Article 185 of the Police Order, 2002, ordinarily a sub-inspector who, in brief, is primarily responsible for effective management, discipline, crime control, execution of police duties, maintenance of records and upholding law and order, in addition to necessarily gaining detailed local knowledge, securing cooperation from community leaders (zaildars, inamdars, village headmen, chaukidars) and encouraging them to provide information and assistance. S.4 (p) Cr.P.C. defines "Officer incharge of a police-station." includes, when the officer incharge of the police-station is absent from the station-house or unable from illness or other cause to perform his duties, the police-officer present at the station-house who is next in rank to such officer and is above the rank of constable or, when the [Provincial Government] so directs, any other police-officer so present.

8. The Station Diary, or "roznamcha," is a crucial record maintained in every police station, documenting daily events and activities. It serves as the primary record of police affairs, ensuring effective monitoring, regulation, and accountability in discharge of duty. This diary records all major and minor incidents within the station's jurisdiction, balancing the rights of the accused, victims, and society. While some entries are expanded in other records, all significant details must be included. As a chronological log, it provides essential evidence for verifying the timing of police actions. As per Police Rules, 1934, Station Diary or daily diary is Register No.II of the Police Station which initially was maintained in accordance with section 44 of the Police Act 1861 (since repealed), according to which "it shall be the duty of every officer in charge of a police station to keep a general diary in such form as shall, from time to time, be prescribed by the [Provincial Government] and to record therein all complaints and charges preferred, the names of all persons arrested, the names of the complainants, the offences charged against them, the weapons or property that shall have been taken from their

possession or otherwise, and the names of the witnesses who shall have been examined" and by now in compliance with Article 167 of the Police Order 2002, which reads as "167. Maintenance of Daily Diary at a police station.– (1) A register of Daily Diary shall be maintained at every police station in such form as shall, from time to time, be prescribed and to record therein the names of all complainants, persons arrested, the offences charged against them, the weapons or property that shall have been taken from their possession or otherwise, and the names of the witnesses who shall have been examined. (2) The District and Sessions Judge of the district may call for and inspect such Diary, and Rules 48 & 49 of Chapter 22, Volume III of the Police Rules, 1934, in Form 22.48(1) i.e.

FORM No. 22.48(1)

REGISTER No. II. - THE STATION DAILY DIARY.

STATION _____ DISTRICT _____ The following officers were present at morning roll-call _____Sub-Inspector_____Assistant Sub-Inspectors _____head constables_____constables_____mounted head constables _____mounted constables. The remaining staff were _____on duty_____sick. The station is _____ under/over sanctioned strength. Remarks_____ Diary of the above station commencing at _____O'clock on the_____and ending _____O'clock on the _____

Serial No.	Name of reporter	Substance of report

Signature of_____

through a carbon copy process, in duplicate; one copy remains at the police station, while the other is sent daily to a designated Gazetted Officer or the Superintendent of Police. The Superintendent issues diary books quarterly and sets closing hours based on dispatch schedules. Entries, made by the officer in

charge or the station clerk, must be recorded promptly, numbered sequentially, and time stamped. If the time of receipt differs from the entry time, both are noted. Literate officers verify and sign their reports, and each entry is marked off with a line. The opening entry each day shall give the name of each person in custody, the offence of which he is accused, and the date and hour of his arrest, the name of each accused person at large on bail or recognizance and the date of his release on such security. The last entry each day shall show (a) the balance of cash in hand as shown in the cash account, and (b) the balance of the cattle pound account. Rule 22.49 requires that following matters shall, amongst others, be entered in daily diary (a) details of cattle seized in connection with cases or on suspicion, including case/ report references; (b) the day, hour, purpose, and names of persons registered under the Criminal Tribes Act, released convicts, or those under specific legal provisions; (c) arrival and departure times of all police officers, their duties, and ensure the entry is attested by the officer; (d) movements and duties performed by officers of head constable rank or above outside the police station (excluding investigations with case diaries), (e) all admissions to and releases from the cattle pound, including fines collected; (f) the receipt and dispatch of communications, property, cash, etc., with references to correspondence register numbers; (g) information on non-cognizable offences, potential breaches of peace, chaukidar visits, and inter jurisdictional police assistance requests; (h) all arrivals, dispatches, admissions, and removals of persons in custody or lock-ups, noting exact times; (i) the receipt, service, execution, and return of legal processes with exact dates and times; (j) report regarding property in the storeroom as per rules 22.15 and 22.18(2); (k) report of excess expenditure over the permanent advance as per rule 22.71; (l) entries of persons permitted into a tahsil treasury after office hours; (m) deposits or removals from the post office safe, detailing the articles and exact times, signed by the Postmaster; (n) all information on cognizable offences, actions under Section 157 Cr. P.C, and FIR details. Include

measures to inform Panchayats if applicable; (o) list of all papers pending for over a week in Monday's diary. Rule 22.50 provides the punishment for false entry that if any police officer who enters or causes to be entered in the daily diary a report which he knows, or has reason to believe, to be untrue, whether he has or has not been directed to make such entry by a superior officer, shall ordinarily be dismissed from service. Daily diaries as per Rule 22.51 may be destroyed two years after the date of the last entry. Besides other duties as per rule 22.4 (c) The station clerk (Rule 22.3: The police station clerk is a literate head constable, who under the control and supervision of the officer in charge of the police station, acts as clerk, accountant, record-keeper and custodian of Government and other property at a police station. He may be assisted by one or more assistant clerks) writes up the daily diary and other station house registers. He sees that the file of the Police Gazette is kept up to date, and that all orders and notices contained in it, which concern the staff or the work of the staff, are carefully noted and explained to all concerned. He registers all births and deaths reported at the station by the village watchmen. Notably, the amendments were made in rules 22.3 and 22.4 of Chapter XXII of Police Rules, 1934 Vide Notification dated 15.12.2017 under:-

22.3 Station Clerk:- (1) A Station Clerk shall:

(a) be a literate head constable or IT literate officer

In rule 22.4 for clause (a), the following shall be substituted

(a) He shall:

(i) maintain hard as well as soft copy (electronic copy) of the registers as per order of the Provincial Police Officer;

9. It appears that in pursuance of afore amendments Police Station Record Management System (PSRMS) is being used for computerization of daily diaries of police station, developed by the Punjab Information and Technology Board, Lahore (PITB), by using Wide Area Network (WAN)

networking to interlink all police stations record by taking services of PTCL/NTC, Wireless and other Cellular companies. According Rules, 22.4 (a) "Station Clerk will maintain hard as well as soft copy (electronic copy) of the registers as per orders of the Provincial Police Officer" In this regard, a detailed SOP for online FIR and Daily Diary has already been developed and circulated by the Deputy Inspector General of Police, Information Technology, Punjab, Lahore vide his office No. 3516/PS-DIG-IT, dated 01.03.2017 which is being implemented in its true letter & spirit. The online entries of daily diaries/roznamcha cannot be edited after the expiry of 08 hours. The online system of daily diaries (roznamcha) of Police Stations is linked with the offices of SHOs, DSP/ SDPOs, SSP, DPOs, RPOs and Inspector General of Police, Punjab, Lahore. They can open and see the entries of daily dairies of Police Stations of their respective area of Jurisdiction.

10. This Court in view of importance of daily diary had ruled in case of “Mst. ASMAT PARVEEN vs. The STATE and another (PLD 2021 Lahore 105) that despite amendment made in rule 22.4 maintaining of manual roznamcha has not been prohibited rather it delineates that in addition to hard copy, soft copy (electronic copy) of the registers shall be prepared. Direction was issued to Inspector General of Police, Punjab/Provincial Police Officer to immediately issue instructions to the police hierarchy throughout the Punjab to start/keep maintaining manual roznamcha waqiati as per previous practice, besides the electronic copy. Failure to maintain daily diary/roznamcha is a clear violation of Article 167 of the Police Order, 2002 and Police Rules, 1934 which not only renders the diary entries unreliable and untrustworthy but also hampers judicial processes, as courts frequently rely on these records to extract crucial information for fair case resolutions. Deliberate omission of entries in the diary is often aimed at concealing misconduct within police stations especially where arrests are not recorded to bypass the 15-days custody limit under Section 167(2) of the Cr.P.C.,

blatantly violating Articles 9 and 10 of the Constitution, which safeguard the right to life, liberty, and due process. Such practices not only deprive individuals of their fundamental rights but also erode public confidence in law enforcement. The Court underscored the urgent need for accountability and strict compliance with legal provisions to uphold the rule of law and restore faith in the justice system. Reliance may be made upon the case of "Khatoon Bibi vs. The State and others" (2021 P.Cr.L.J 593). To curb down the illegal practice of police officials qua the arrest and production of accused before learned Area Magistrate following directions were issued in case of "Qari MUHAMMAD ATTA ULLAH vs DISTRICT POLICE OFFICER, SIALKOT and another" (PLD 2022 Lahore 224):-

> i) Whenever, a person is arrested in any case, his arrest be incorporated forthwith in computerized as well as manual roznamcha with date and time;
>
> with date and time;
>
> ii) Similarly, when an accused is taken out from the police station for any purpose, a rapat should be written in this regard, vice versa on his return this practice should be adopted;
>
> (iii) To make the process of entry in roznamcha transparent, it is ordered that entries in manual roznamcha (register No.2) be made through ball-point.
>
> (iv) More so, when the accused will be produced before the learned Area Magistrate for the physical or judicial remand, date and time of arrest must has been mentioned in the application for obtaining remand and in case of failure, learned Area Magistrate should refuse to entertain request of remand.
>
> (v) Police file/ case diaries should be retained at police station as provided in Rule 25.55 (3) of Police Rules, 1934

and whenever the investigating officer will proceed along with police file of case from police station for the purpose of investigation or any other purpose that facts should be incorporated in the roznamcha (register No. 2) and on return the same practice be also adopted, other than this, police file must be retained at police station.

Any defiance of supra mentioned directions, would amount to contempt of court and delinquent official/officers will also be proceedable under section 155-C of Police Order, 2002.

All the learned Sessions and Special Judges of the province are duty bound to check register No. 2 in the light of Rule 167 of Police Order, 2002.

In the case of "Muhammad Tariq v. Station House Officer, Police Station Saddar Jampur and another" (2019 P Cr. L J 1403), while highlighting the advantage of use of modern devices specially the computer, it was observed that

> "No doubt in the present days of life the computer is a great blessing and after initial invention of the same, it was modernized day by day and its use was made applicable for multi purposes. Visualizing the requirement of offices, different software's /programs were developed, whereby official record was computerized and now the computer is being used almost in every office without any impunity. Now a days data of different institutions is being connected to main server. Perhaps the purpose of this effort is to facilitate the general public so that a common person of the society may have access to different datas for getting first hand knowledge in every sphere of life. In this scenario, it can safely be presumed that the purpose of computerizing the police stations and connecting them with online system is to facilitate the

public so that wrong done to any person is remedied and his grievance is redressed immediately, naturally because if any person feels danger to his life or liberty, he would rush to police station. But, presently it has been noticed with great concern that after launching online system in police stations there are rampant complaints relating to different police stations for the reason that manual police registers are not being maintained at all. Even there are some reports that some police officers had laid off their hands from manual entries after online entering the data in the computer for some time or even in some cases after some days. It means that before making the data online they have sufficient time to make changes in the data for some ulterior motive and they can easily cover their misdeeds/wrongs committed by them. Moreover, the data available in the computers is not fully secured and it is vulnerable due to different factors. Presently it is common practice that due to different virus attacks, data can easily be destroyed and the online data may also become victim of different hackers who have expertise in hacking the data and now a days it has become a global problem that hackers hack different websites and destroy data. In order to cope with this situation internationally cyber laws are being promulgated and in our own country cyber laws are coming into force.

Now it is to be seen as to what safety measures can be adopted to secure the data of different police stations. There is no wrong in making the data of police stations online so that the public may have easy access to the record of police stations but at the same time we have to ensure safety of data at police stations. Before making any entry in the computer maintained at police station every movement/happening of police station

> must be entered in the roznamcha of police station. If any investigating officer writes police diary in the computer himself or gets it written through some I.T. literate person, before starting it he must write this fact in the roznamcha and after completing the police diary he should immediately take its print/hardcopy and maintain it in the relevant register. After taking the hard copy he should immediately write this fact in the roznamcha while mentioning the date and time. Every register of the police station as required under Police Rules, 1934 should be maintained properly before making the computer data online"

11. Our Constitution guarantees to the fundamental rights of citizens, chief amongst those rights are ordained in Article 9 (Security of person) that "no person shall be deprived of life or liberty save in accordance with law". Article 14 (Inviolability of dignity of man, etc.) mandates that (1) The dignity of man and, subject to law, the privacy of home, shall be inviolable. (2) No person shall be subjected to torture for the purpose of extracting evidence.

12. The Police Order 2002, Chief Executive Order No.22 of 2002 dated 14.08.2022, was promulgated and enforced inter-alia by stating that the Police has an obligation and duty to function according to the Constitution, Law and Democratic aspirations of the people and such functioning of the Police requires it to be professional, service oriented and accountable to the people. Under Articles 109 & 110 of the Order, a Criminal Justice Coordination Committee has been established in every District, comprising over head of the District Police, District Public Prosecutor, District Superintendent Jail, District Probation Officer, District Parole Officer, and head of investigation as its Secretary with District & Sessions Judge being its Chairperson to ultimately achieve the object behind the promulgation of the Order. A Sessions Judge is also Ex-officio Justice of Peace with his

power under Section 22 A(6) Cr.P.C to issue appropriate directions to the police authorities concerned regarding neglect, failure or excess committed by a police authority in relation to its functions and duties. Besides, he under Section 491 Cr. P.C had Power to issue directions of the nature of a habeas corpus. It is very important to point out that under Article 167 of the Order, it has been provided that a Register of daily diary shall be maintained at every Police Station in such form as shall, from time to time, be prescribed and to record therein the names of all complaints, persons arrested, the offences charged against them, the weapon and property that shall have been taken from their possession or otherwise and the names of the witnesses who have been examined. Under sub Article 2 of Article 167, a unique power has been vested in the District & Sessions Judge of the District to call for and inspect such diaries which contained very important information with their direct nexus with the functioning and accountability of the Police and to ensure protection of fundamental rights of the citizens. Under this Article, the Sessions Judge either on his own or on any information, irrespective of the source of such information can call for the record for inspection. The proper maintenance of daily diary, being an important document viz-a-viz the working of the Police or otherwise, has a direct nexus with its functioning. The online system regarding daily diary/roznamcha of Police Stations had already been linked with the offices of SHOs, DSPs, SDPOs, SSPs, RPOs and Inspector General of Police, Punjab. They can open and see the entries of the daily diary of Police Stations of respective areas of their jurisdiction, therefore, as required under Article 167(2) of the Police Orders 2002, the office of District & Sessions Judge of the District should also be linked with the same online system. Linking the office of the District & Sessions Judge with online system would reduce the physical distance and make the inspection of the daily diary register possible on one click. Such arrangement shall not only save the time but also be a swift, meaningful and a revolutionary step towards

achieving the object behind the promulgation of the Police Order and to ensure that the Police as a service oriented statutory body, regulates itself in accordance with the Constitution, law and democratic aspirations of the people. Needless to observe that all the District & Sessions Judges under Article 203 of the Constitution of Islamic Republic of Pakistan, 1973 are under the direct supervision and control of the High Court. A direction is, therefore, issued to the Inspector General of Police Punjab, to ensure online access to all the District & Sessions Judges throughout the Punjab in line with the SOPs circulated by the Deputy Inspector General of Police Information Technology Punjab, Lahore, vide his office No.3516/PS-DIG-IT dated 01.03.2017, or any other latest digitalization method in future, within a period of three months. A compliance report shall be submitted to the Registrar of this Court.

13. These are the detailed reasons of my short order dated 06.07.2020 which is reproduced below:-

> "For the reasons recorded in my separate detailed order of even date, instant habeas petition stands disposed of with the observation that the learned Sessions Judge, Multan will proceed with the Judicial Inquiry which has earlier been stopped vide dated 04.06.2020 in accordance with law."

I also duly appreciate the assistance rendered by Mr. Ejaz Ahmad Sipra, Civil Judge/Research Officer to deal with the issue discussed and dealt with hereinabove.

(ANWAARUL HAQ PANNUN)
JUDGE

APPROVED FOR REPORTING

JUDGE

IN THE LAHORE HIGH COURT, MULTAN BENCH, MULTAN

Case No: Crl.Misc.No.8745-B of 2022

Muhammad Sajjad Versus The State, etc.

19.07.2024 M/s Rana Muhammad Sajid and Muhammad Ramzan, Advocates with the petitioner. Mr. Muhammad Abdul Wadood, Addl. Prosecutor General for the State along with Malik Khalid ASI. Mr. Tahir Mehmood and Syed Naeem Ali, Advocates for the complainant. Legal assistance rendered by Mr. Ejaz Ahmad Sipra, Civil Judge/Research Officer.

By means of instant petition, the petitioner has prayed for the grant of pre-arrest bail in a criminal case registered vide FIR No.848, dated 15.11.2022, offence under section 489-F PPC, at Police Station Saddar, District Vehari with the allegation that he without making requisite arrangements with the bank ensuring that the cheque on its presentation, shall be honoured, had dishonestly issued cheque No.21094143 of his A/C No.9011177819910000, FINCA Micro Finance Bank Ltd. dated 20.09.2022 worth Rs.2,45,000/- to the complainant for fulfillment of his financial obligation, which on its presentation before the concerned bank, stood dishonoured.

2. At the very outset, the complainant, duly identified by his learned counsel as well as police official in attendance, states that as the petitioner had redressed his grievance, therefore, he has no objection to the acceptance of instant bail petition/cancelation of the case or acquittal of the accused of the charge. The original compromise deed executed between the parties has been handed over to the Investigating Officer, whereas photocopy of the same is placed on record of this petition.

3. Learned Addl. Prosecutor General assisted by learned counsel for the complainant, in view of compromise arrived at between the parties and in the light of provisions of Section 345(1) Cr.P.C, do not oppose this petition.

4. Subsection (1) and subsection (2) of Section 345 Cr.P.C mainly bifurcate it viz-a-viz the compounding of offences into two classes i.e. without permission or with permission, of the court, respectively. For ready reference, the provision of section 345 Cr.P.C is reproduced as under:-

> 345. Compounding offence: (1) The offences punishable under the sections of the Pakistan Penal Code specified in the first two columns of the table next following may be compounded by the persons mentioned in the third column of that table:-

Offence	Sections of the Pakistan Penal Code applicable	Persons by whom offence may be compounded.
Uttering words, etc., with deliberate intent to wound the religious feelings of any person.	296	The person whose religious feelings are intended to be wounded.
Causing hurt		Omitted
Wrongfully restraining or confining any person.	341, 342	The person restrained or confined.
Assault or use of criminal force.	352, 355, 358	The person assaulted or to whom criminal force is used.
[xxxxxx	Xxxxx	Xxxxxx]
Mischief when the only loss or damage caused is loss or	426, 427	The person to whom the loss or damage is caused.

damage to a private person.		
Criminal trespass	447	The person in possession of the property trespassed upon.
House-trespass	448	
Dishonestly issuing a cheque for repayment of loan or fulfilment of an obligation.	489-F	The person in whose favour cheque issued.
Criminal breach of contract	490, 491, 492	The person with whom the offender has contracted.
Adultery	497	The husband of the woman.
Enticing or taking away or detaining with criminal intent a married woman	498	
Defamation	500	The person defamed.
Printing or engraving matter knowing it to be defamatory.	501	
Sale of printed or engraved substance containing defamatory matter, knowing it to contain such matter.	502	
Insult intended to provoke a breach of the peace.	504	The person insulted
Criminal intimidation	506	The person

except when the offence is punishable with Imprisonment for seven years.		intimidated.
[Act caused by making a person believe that he will be an object of divine displeasure.	508	The person against whom the offence was committed].

(2) [subject to sub-section (7), the] offences punishable under the sections of the Pakistan Penal Code specified in the first two columns of the table next following may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the persons mentioned in third column of that table.

Offence	Sections of the Penal Code applicable	Persons by whom offence may be compounded.
-	-	-

(2-A)……..

(3)……..

(4)……...

(5)……

(5A)…….

(6)…….

[(7) No offence shall be waived or compounded save as provide by this section and section 311 of the Pakistan Penal Code, 1860 (Act XLV of 1860)].

5. It is quite vivid on bare reading of Section 345 Cr.P.C that the legislature has objectively bifurcated it into two parts. Upon drawing a comparison between subsection (1) and (2) of Section 345 Cr.P.C independently, it has become unequivocally clear that all the offences under Pakistan Penal Code, specified in the first two columns of the table under Section 345(1) Cr.P.C (hereinafter to be called as specified offences) are compoundable without permission of the Court, by the persons mentioned in its third column, at any time during trial or pending appeal. The role of the Court in the specified offences, in case of compounding of such offences, is thus confined to give effect to such compromise by way of recording an acquittal of charge of the accused, resulting into termination of the prosecution, reliance is placed upon the case reported as "Tariq Mehmood Vs. Naseer Ahmed and others"(PLD 2016 SC 347) and "Salman Khalid Vs. The State and others" (PLD 2020 Lahore 97), whereas the offences specified in first two columns of the table, next following subsection (2) of Section 345 Cr.P.C, punishable under Pakistan Penal Code, can only be compounded by the persons, mentioned in the third column, with the permission of the Court, before which any prosecution for such offences is pending. Such permission is, however, further subject to the conditions mentioned and detailed in subsection (7) of 345 Cr.P.C.

6. It has been observed that Chapter XXIV of Cr.P.C including the provision of Section 345 Cr.P.C, comprises over the General Provisions as to Inquiries and Trials. All these provisions obviously shall become operative after the Court had taken cognizance of the offences either upon a police report under Section 173 Cr.P.C or it had already passed an order under Section 204 Cr.P.C in a privately instituted complaint. The tabular statement of offences as contained in Schedule-II of the Code of Criminal Procedure, 1898 shows that all the specified offences, except the offences

under Section 489-F and 506-B PPC, are bailable and even the police is well within its competence to release a person accused on bail in such offences.

7. In furtherance of above discussion, it is observed that the legislature has purposefully dispensed with the persons mentioned in column No.3 of the table from seeking permission of Court, for compounding the specified offences, even the Court had already taken cognizance of the offences as discussed above, in order to achieve the object behind the legislative intent of this provision, the matter can be viewed yet from another angle. A State being a political and legal entity is characterized by four essential and basic elements (i) Population (ii) Territory (iii) Government and (iv) Sovereignty. The Sovereign exercises the State powers through various organs/departments of the Government, to be regulated under the relevant statutes. To maintain public peace and tranquility in a democratic dispensation enabling the individuals, to lead their lives by enjoying their fundamental rights guaranteed and bestowed upon them through a supreme instrument commonly known as the Constitution, is the fundamental duty of the State. It is further observed that to curb and control the crime in the shape of public wrong, a cause of breach of peace and a source of disturbance for the citizens as aforesaid to the enjoyment of their fundamental rights, being a primary duty of the State, is discharged by it, by establishing an official framework, duly backed by law. After going through various experiences, under different political dispensation for the prevention and detection of the crimes, and to achieve the aforesaid object and to make it more efficient instrument, a police force was re organized under the Police Act (Act No.V) of 1861. The word Police has been defined under Section 1 of the Police Act 1861 as “it includes all persons who shall be enrolled under this Act”; as per section 2(xviii) of the police order,

2002, ‘Police Officer’ means a member of the police who is subject to this Order & under 2(xix)‘Police or Police Establishment’ means the police referred to in Article 6 and includes (a)all persons appointed as special police officers or additional police officers under this Order; and (b) all other employees of the police”. The Police as a public authority, exercise state powers in discharge of its duties and perform its functions. The Officer Incharge of a Police Station, upon receiving an information of commission of a cognizable offence is obliged to proceed under Section 154 and in case of non-cognizable offence under Section 155 Cr.P.C and investigate the matter to be carried out in terms of Section 156(1) Cr.P.C and in the light of Police Rules, 1934. The Police Rules had already been adopted under Section 185 of Police Order 2002, by extending it the statutory backing. The exercise of power by a statutory authority, is duly protected under the doctrine of statutory presumption being genuine, under Article 129(e) of the Qanun-e-Shahadat Order 1984 and Article 150 of the Islamic Republic of Pakistan, 1973, such formidable statutory protections cannot be summarily dismantled unless found either to be patently illegal, based on no lawful reason, mala-fide, or wholly without lawful authority. Reliance may conveniently be placed upon case reported as “Muhammad Ejaz Vs. the State and another”(2021 SCMR 387). The Officer Incharge, after finding out the truth or otherwise of the matter, during his investigation, is duly authorized to recommend the case for its cancelation on the grounds (i) found to be maliciously false or (ii) false owing to mistake of law or fact or (iii) to be non-cognizable or (iv) matter for a civil suit, unless the investigation of a case is transferred to another police station under Rule 25.7 [Cancellation of a case in one police station and registration in another] or District under Rule 25.8 [Cases which may be lawfully investigated in more local areas than one] or the investigation has

been transferred under Article 18 (6) of Police Order 2002. Strictly speaking, in the Code of Criminal Procedure, 1898, there exists no express power for cancelation of FIR, however, an FIR can be cancelled by a Magistrate under Rule 24.7 of the Rules, 1934 and the law laid down in the case of "Bahadur and another Vs. The State and another" (PLD 1985 SC 62), wherein it had been ruled that although "neither section 173 Cr.P.C nor any other provision of the Criminal Procedure Code specifically deals with the question of cancellation of a registered criminal case, such a power was found to be "inherent in section 173 read with Section 190 of the Code of Criminal Procedure though the language of subsection (3) does not specifically apply to the case" by agreeing with the cancellation report/ recommendations, provided the same has duly been forwarded by Superintendent of Police with independent opinion formulated in a supervisory capacity and by the Prosecutor in the light of Section 9(4) along with his assessment as to the availability of the proposed evidence by visualizing its evidentiary worth, being an expert in law, possibly entailing into conviction of an accused and applicability of offences, under Section 9(7) of the Punjab Criminal Prosecution Service Act, 2006. Reliance is placed upon the case reported as "Ehsan Ullah Chaudhry Vs. the Staten and 3 others" (PLD 2023 Lahore 233) and "Ali Mansoor Vs. Area Judicial Magistrate, etc." (PLJ 2024 Lahore 315).

8.The above discussion un-hesitantly has lead this Court to conclude that the legislature in order to achieve its object, encapsulated in Section 345(1) Cr.P.C, has allowed the persons mentioned in third column of the table, to compound the specified offences, without seeking permission of the Court, even after taking cognizance. While dispensing with permission of Court for compounding the offence by the relevant person, the legislature, in absence of any bar, in fact left a window opened and has permitted to adopt

this approach, that as a result of compounding of specified offences prior to submission of a report under Section 173 Cr.P.C i.e. at the stage of pre-arrest or post-arrest bail or on intervention of the respectable, or otherwise preferably reducing the same into writing, during the investigation, for the police to restrain itself from undertaking the cumbersome business of investigation into such cases except bringing on record the material relating to the compounding and prepare a cancellation report, instead of utilizing their skills and time in other matters requiring their urgent attention, for placing it as aforesaid before a Magistrate for passing an appropriate order. The Magistrate, in order to satisfy himself, regarding the genuineness of the compromise, arrived at between the parties may summon the complainant/person to verify the factum of compromise before passing an appropriate order for cancellation of a case. Needless to observe that an order of cancellation of FIR is like burial of a dead-body in a grave. It may be emphasized that a recourse to this approach in relation to the specified offences by the entire hierarchy from Police to the learned Magistrate, would save the parties from facing the agony of fruitless proceedings to be carried out by the Courts besides saving their hard earned money and other resources. It would also save the public time and shall also lessen the burden of the already overburdened Courts. Moreover, such a proactive approach on part of the Police and the Magistrate would amount to dispensing the public with speedy justice in accordance with the spirit of Article 4 of the Constitution of Islamic Republic of Pakistan, 1973.

9. Now coming to the present case it has been observed that since the offence is compoundable, therefore, keeping in view the compromise arrived at between the parties and the law laid down by this Court in case reported as “Salman Khalid Vs. The State and others” (PLD 2020 Lahore 97), instant petition is allowed and subject to his furnishing fresh bail bonds

in the sum of Rs.100,000/- (one lac) with one surety in the like amount to the satisfaction of learned trial Court, ad interim bail already granted to the petitioner is confirmed.

10. Office is directed to transmit copy of this order to the Registrar of this Court, who shall circulate the same to all the Sessions Judges of the Punjab, Inspector General of Police, Punjab and Prosecutor General Punjab for guidance and information to the concerned quarters.

(ANWAARUL HAQ PANNUN)
JUDGE

APPROVED FOR REPORTING

JUDGE

IN THE LAHORE HIGH COURT, BAHAWALPUR BENCH, BAHAWALPUR

Crl. Rev. No.54 of 2020

Abdul Hameed alias Meeda Versus The State, etc.

Date of Hearing: 06.01.2025

Petitioner by: M/s. Syed Zeeshan Haider and Syed Naeem Ali, Advocates.

State by: Mirza Mr. Javed Iqbal Bhaaya, Assistant District Public Prosecutor. Rai Mazhar Hussain Kharal, A.A.G.

Complainant by: M/s Muhammad Umair Mohsin and Pervaiz Akhtar, Advocates.

ANWAARUL HAQ PANNUN, J. Abdul Hameed alias Meeda, the petitioner and Muhammad Bilal, his co-accused, were sent up to face trial in a criminal case registered vide F.I.R No.303 dated 15.11.2011, under Sections 324/336/337-D/337-F(v)/34 PPC, at Police Station Dhanote, Kehror Pacca, District Lodhran, on a complaint in writing (Exh:PA) made by Khuda Bakhsh, (PW-1) with the allegation that on 15.11.2011 at about 12.20 p.m., the complainant along with Siddique came at the shop of his brother Azhar Iqbal, situated at Dhanote Railway Bazaar. Azhar Iqbal, while leaving them on the shop, for recharging his cell-phone by way of easy-loading and as soon as he started heading towards the relevant shop, Muhammad Bilal, Abdul Hameed alias Meeda, the petitioner while armed with pistol 30 bore came there on motorcycle Honda 125/CC, bearing registration No.1052 and they deboarded. Muhammad Bilal raised lalkara that he will not be spared and in the meanwhile, the petitioner made fire shot with his pistol, hitting on right side of his back. The complainant along with PWs tried to apprehend the accused but they while boarding on their motorcycle and brandishing the pistol, fled away from the spot. The motive behind the occurrence was an exchange of hot words between the accused and the injured Azhar Iqbal. After usual investigation, the accused were sent up to court, while taking cognizance, the learned trial Judge charge sheeted the accused, to which they

pleaded not guilty and claimed trial. The prosecution examined as many as 11-witnesses to prove the charge. The ocular account has been furnished by Khuda Bakhsh, the complainant (PW-1) and Azhar Iqbal, the injured (PW-2); Khalil Ahmad 6/HC (PW-3) chalked out the formal FIR (Exh:PB); Dr. Muhammad Rafiq (PW-4) initially examined the injured Azhar Iqbal and found the following injuries on his body:-

> **Injury No.1**:- as per chart a wound was present at the back of abdomen near and to the right of mid line at the level of L-1 (Wound of entry).
>
> **Injury No.2**:- a lacerated septic wound 10mm x 8mm seen on front of the abdomen. The 5 cm below to left costal margin and 5 cm lateral to midline(wound of exit). All the injuries were kept under observation. That subsequently according to Exh-PE he declared the injuries due to fire arm.
>
> **Injury No.3:-** That on report of CT scan, there was fracture of spine lamina of LII and body of LIII vertebrae.
>
> **Result of injuries**
>
> **Injury No.1:-** Itlaf-i-Salahiyyat-i-udw (two legs, urinal bladder, anal sphincter, potency of penis).
>
> **Injury No.2:-** Jurh Jaifah and
>
> **Injury No.3:**- Jurh Ghair Jaifa Hashimah.

According to report Exh:PK, prepared by Dr. Muhammad Sajjad Hussain, Registrar Neuro Surgery Ward Bahawalpur (PW-9), the injured Azhar Iqbal sustained paraplegia (complete spinal injury) fecal and urinary incontinence. Dr. Captain Muhammad Siddique Tahir (PW-10) issued surgical notes (Exh:PG) and he explained firearm injury in the abdomen with entry wound on the right lower back and exit wound on the interior abdomen wall on left side. He also declared that the injured sustained paraplegia of the legs below knee joint, done laparotomy, mesentery tear, vide his report Exh:PL;

Muhammad Majeed (Ret.) ASI (PW-5), Munir Ahmad ASI (PW-7) and Azhar Hussain ASI (PW-11) conducted the investigation; Mulazim Hussain 421/C(PW-6) is the witness of recovery of pistol 30 bore allegedly recovered on pointing out of the petitioner from the graveyard whereas, Qaiser Abbas 110/C (PW-8) is the recovery witness of motorcycle allegedly produced by brother of the accused Bilal to the I.O. The prosecution also produced certain documents Exh:PA to Exh:PL. After closure of prosecution's evidence, when examined under Section 342 Cr.P.C, the accused/ petitioner, refuted all the allegations levelled against him and professed his innocence. The accused neither opted to examine themselves under Section 340(2) of Cr.P.C, nor to produce evidence in their defence. On conclusion of the trial, learned trial Judge convicted and sentenced the petitioner and his co-accused through the impugned judgment dated 21.01.2020 as under:-

The accused Muhammad Bilal

(Under Section 324 PPC)

Sentenced to five years RI as Ta'zir along with fine Rs.45000/- and in default thereof to further undergo 02 months S.I. He will pay compensation of Rs.1,00,000/- to injured Azhar under Section 544-A Cr.P.C and in default thereof to further undergo 04-months S.I. Benefit of Section 382-B Cr.P.C has however been extended to him.

The accused/petitioner Abdul Hameed alias Meeda

(Under Section 324 PPC)

07-years R.I along with fine of Rs.45,000/- and in default thereof to further undergo 02-months S.I.

(Under Section 336 PPC, Itlaf-i-Salahiyyat-i-Udw of two legs)

07-years R.I as Taz'ir and to pay Arsh amount as value of Diyat (as per fixed by Government notification 2019 2020) u/s 337R PPC to the injured.

(Under Section 336 PPC, Itlaf-i-Salahiyyat-i-Udw of Urinary Bladder)

07-years R.I as Taz'ir and to pay Arsh amount as value of Diyat (as per fixed by Government Notification 2019 2020) u/s 337Q PPC to the injured.

(Under Section 336 PPC, Itlaf-i-Salahiyat-e-Udw of anal sphincter)

07-years R.I as Taz'ir and to pay Arsh amount as value of Diyat (as per fixed by Government notification 2019 2020) u/s 337Q PPC to the injured.

(Under Section 336 PPC, Itlaf-i-Salahiyat-e-Udw of Potency of Penis)

07-years R.I as Taz'ir and to pay Arsh amount as value of Diyat (as per fixed by Government notification 2019 2020) u/s 337Q PPC to the injured.

(Under Section 337-F(v) PPC for causing fracture of spine lamina of L2 of the injured)

05-years R.I as Taz'ir and to pay Rs.1,00,000/- as Daman to the injured.

(Under Section 337-F(v) PPC for causing fracture of body of L3 vertebrae of the injured)

05-years R.I as Taz'ir and to pay Rs.1,00,000/- as Daman to the injured.

The convict shall also pay Rs.1,00,000/- as compensation to the injured under Section 544-A Cr.P.C. and in default thereof to undergo 04-months S.I.

The benefit of Section 382-B Cr.P.C has however been extended to the convict. All the sentences shall run concurrently. Till the payment of daman and Arsh, the convict will remain in jail. The value of Diyat according to Notification of Government of Pakistan for year 2019 20 is Rs.23,20,202/- for 30630 grams of silver as prevailing rate at the time of order (judgment) of

payment which is held for determination of Arsh amount in respective conviction of the offender.

The petitioner and his co-accused Muhammad Bilal being aggrieved, filed separate appeals against their convictions and sentences whereas the complainant filed criminal revision petition, seeking enhancement of their sentences. The learned Addl. Sessions Judge, Lodhran, allowed the appeal of co-accused Muhammad Bilal and acquitted him of the charge, whereas the appeal of the petitioner and revision petition of the complainant were dismissed through the impugned consolidated judgment dated 20.06.2020. Hence, this criminal revision petition.

2. In pith and substance, learned counsel for the petitioner with reference to section 71 PPC, while relying upon judgments of "Jalal Khan vs. Government" (PLD 1952 Azad J. & K 8), "Ghulam Hassan and another vs The State" (1969 P.Cr.L.J 151), "Faiz Muhammad vs the State" (1981 P.Cr.L.J 12), " Allah Ditta and another vs. The State" (1984 P.Cr.L.J 433), "Bashir Ahmad vs The State" (1985 P.Cr.L.J 1516), "Ghulam Maqsood vs The State" (2002 YLR 513), "Muhammad Sarfraz vs. The State" (2009 YLR 1131) contends that the punishments awarded to the petitioner under Sections 336,337 F(v) PPC, simultaneously under section 324 PPC being made up of different offences, is not sustainable. On the other hand, learned counsel for the complainant, with reference to exception contained in Section 71 read with Section 324 PPC and under Section 337-W PPC contends that the argument of learned counsel for the petitioner is self-defeating, and has defended the impugned judgment.

3. Arguments heard and record perused.

4. The kinds of punishments to which the offenders are liable under the Pakistan Penal Code, 1860 (hereinafter to be called as The Code) have been mentioned in detail in Section 53, Chapter III of Punishments, upon reading

the same together with general explanations as contained in Chapter II along with the definitions of the aforesaid punishments in Section 299 of the Code, it depicts the following picture:-

> **Firstly, Qisas;** means punishment by causing similar hurt at same part of the body of the convict as he has caused to the victim or by causing his death if he has committed qatl-i-amd in exercise of the right of the victim or a wali.
>
> **Secondly, Diyat** means the compensation specified in section 323 PPC [The value of Diyat shall, subject to Injunctions of Islam as laid down in Holy Quran and Sunnah and keeping in view the financial position of the convict and heirs of the victim, have to be fixed by the Court which shall not be less than the value of thirty thousand six hundred and thirty grams of silver. For the purpose of subsection (1) of 323 of the Code (value of Diyat), the Federal Government shall, by Notification in the official Gazette, declare the value of silver' on the first day of July each year or on such date as it may deem fit, which shall be value payable during a financial year] payable to the heirs of the victim.
>
> **Thirdly, Arsh:** The specified compensation to be paid to the victim or his heirs under Chapter II.
>
> **Fourthly, Daman:** The compensation determined by the Court to be paid by the offender to the victim for causing hurt not liable to arsh.
>
> **Fifthly, Ta'zir:** Punishment other than qisas, Diyat, arsh or daman.

Sixthly, Death {Section 46 PPC} denotes the death of a human being, unless the contrary appears from the context {Notes} permanent cessation, cessation of all vital functions and signs irreversible cessation of circulatory and respiratory functions including the brain stem.

Seventhly, Imprisonment for life {Section 45 PPC} the word life denotes the life of a human being unless the contrary appears from the context.

Eighthly, Imprisonment which is of two descriptions, namely: (i) Rigorous i.e., with hard labour; (ii) Simple;

Ninthly: Forfeiture of property;

Tenthly: Fine.

5. Needless to say that an attempt to commit a crime consists of the ingredients i.e. (i) the intent to commit the crime; (ii) performance of some overt act towards the commission of the crime; and (iii) failure to consummate its commission on account of the circumstances beyond the control of the offender. The legislature in its own avowed wisdom, had enacted inter-alia the provision of Section 324 PPC which reads that "whoever does any act with such intention or knowledge, and under such circumstances, that, if he by that act caused Qatl, he would be guilty of Qatl-i-amd, shall be punished with imprisonment of either description for a term which may extend to ten years but shall not be less than five years, if the offence has been committed in the name or on the pretext of honour, and shall also be liable to fine, and, if hurt {according to Section 44 of the Code the word "injury" denotes any harm whatever illegally caused to person in body, mind, reputation or property, whereas according to Section 332 of The Code, causing pain, harm, disease, infirmity or injury to any person or impairing, causing disability, disfigurement, defacing or dismembering any

organ of the body or part thereof of any person without causing his death is said to causing hurt".} is caused to any person by such act, the offender shall in addition to the imprisonment and fine as aforesaid be liable to the punishment provided for the hurt caused". Provided that, where the punishment of the hurt is Qisas, which is not executable, the offender shall be **liable to Arsh**.

6. The injury in its characteristics is more distinguishable from the hurt because of its corporeal effect. The hurt, under the law as explained above, has been divided into various types and kinds.

(a) itlaf-i-udw {dismembering, imputation, severing any limb or organ of the body of another person}.

(b) itlaf-i-salahiyyat-i-udw {destroying or permanently impairing the functioning power or capacity of an organ of the body of any other person, or causing permanent disfigurement}.

c) Shajjah {causing on the head or face of any person any hurt which does not amount to Itlaf-i-Udw or Itlaf-i Salahiyyat-i-Udw} is of six kinds i.e. (a) Shajjah-i Khafifah {causing injury without exposing bone of the victim} (b) Shajjah-i-mudihah{exposing any bone of the victim without dislocating it}, (c) Shajjah-i-hashimah {fracturing the bone of the victim and without dislocating it, (d) Shajjah-i-munaqqilah {causing fracture of bone of the victim and thereby dislocating of bone (e) Shajjah i-ammah {causing fracture of the skull of the victim so that the wound touches the membrane of brain (f) Shajjah-i-damighah {causing fracture of skull of the victim and the wound ruptures the membrane of the brain.

d) Jurh {causing on any part of the body of a person, other than the head or face, a hurt which leave a mark of the wound, whether temporary or permanent} is of two kinds (a) Jaifah {causing jurh in which the injury extends to the body cavity of the trunk (b) Ghayr-Jaifah {causing jurh which does not amount to jaifah} is of six kinds (a) Damiyah{in which the skin is ruptured and bleeding occurs (b) Badiah {cutting or incising in the flesh without exposing the bone (c) Mutalahimah {lacerating the flesh (d) Mudihah {exposing the bone} (e) Hashimah {fracture of bone without dislocating it, (f) Munaqqillah {fracturing and dislocating the bone}.

(e) all kinds of other hurt: includes hurt (i) by rash or negligent driving (ii) by mistake (iii) by means of poison (iv) to extort confession or to compel restoration of property and (v) other hurts.

7. From the above, it is quite obvious that the provision of Section 324 PPC consists of two parts i.e. commission of an act with intention or knowledge to commit Qatl-i-Amd; whereas in the second part the effect of all above noted components i.e. act, intention and knowledge has been described. The intention of accused qua commission of an offence becomes quite evident from his action. The failure in achieving his object by the accused, because of the circumstances beyond his control shall be immaterial in constituting the offence under Section 324 PPC. Thus, availability of incriminating material on record showing the fulfillment of above noted conditions, would be sufficient to convict an accused for making an attempt to commit Qatl-i-Amd independently, and in case of causing any hurt, in view of intention of the legislature, duly encapsulated in this provision, the offender can further be convicted and sentenced for the hurt caused distinctly.

8. In view of above narrated factual as well as the synopsis containing the relevant legal provisions, to examine the weight and strength of arguments of the parties noted above, it is felt appropriate to reproduce hereunder the provision of Section 71 PPC in its verbatim at the first instance:-

> **71. Limit of punishment of offence made up of several offences.** Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, **unless it be so expressly provided.**
>
> Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or
>
> Where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence,
>
> the offender shall not be punished with a more severe punishment than the Court which tries him could award for anyone of such offences.
>
> **Illustrations**
>
> (a) A gives Z fifty strokes with a stick. Here A may have committed the offence of voluntarily causing hurt to Z by the whole beating, and also by each of the blows which make up the whole beating. If A were liable to punishment for every blow, he might be imprisoned for fifty years, one for each blow. But he is

liable only to one punishment for the whole beating. (b) But if, while A is beating Z, Y interferes, and A intentionally strikes Y, here, as the blow given to Y is no part of the act whereby A voluntarily causes hurt to Z, A is liable to one punishment for voluntarily causing hurt to Z, and to another for the blow given to Y.

9. Section 71 of P.P.C. being a controlling provision, unambiguously speaks of limit of punishment to be inflicted upon an accused for having committed an offence made up in parts constituting separate offences instead of punishing him for each such separate offence. However, at the same time, it cannot be ignored altogether that the legislature has created an in-built exception to the general rule contained in the provision by employing conspicuously specific wording to the effect "unless it be so expressly provided". In-fact it appears that this provision of Section 71, PPC has been enacted to save an accused from double jeopardy by way of recording conviction and awarding him the sentence for the same twice.

10. In the facts and circumstances of instant case, after due appraisal of oral and medical evidence, it has been held by both the courts below through their judgments impugned herein that the petitioner is guilty of making a fire shot with his pistol, hitting on the right side of back of injured Azhar Iqbal (PW-2), which is a vital part of his body, and had also further caused Itlaf-e-Salahiyyat-i-Udw of two legs, urinary bladder, anal sphincter, potency of penis and fracture of spine lamina of L2, fracture of body of L3 vertebrae and as such the injured had been rendered to a living corpse, thus the convictions and sentences awarded to the petitioner, when viewed through the prism of Section 337-W PPC which states that "where an accused causes more than one hurt, he shall be liable to arsh specified for each hurt

separately", and as such the argument of learned counsel for the petitioner is repelled being self-destructive and suicidal. In revisional jurisdiction under Section 439 Cr.P.C, this Court has to satisfy itself about the correctness, legality or propriety of any order/judgment passed by a lower court and unless the impugned order/judgment is found to be unreasonable causing miscarriage of justice or glaring irregularity materially affecting the proceedings or patent illegality vitiating the impugned decision, the same cannot be interfered with. No case for interference in the impugned judgments, which have been passed by both the courts below after proper appreciation of evidence and law, is made out. Accordingly, this revision petition is **dismissed**.

11. I also duly appreciate the assistance rendered by Mr. Muhammad Zahid Farid Wattoo and Mr. Ejaz Ahmad Sipra, Civil Judges/Research Officers, to deal with the issue discussed and dealt with hereinabove.

(ANWAARUL HAQ PANNUN)
JUDGE

APPROVED FOR REPORTING

JUDGE

IN THE LAHORE HIGH COURT, LAHORE

Crl. Rev. No. 21000 of 2024

Kiran Bibi Versus Addl. Sessions Judge, etc.

06.03.2025 M/s. Mirza Muhammad Islam and Ch. Basharat Ali, Advocates for the petitioner. Ms. Rahila Shahid, Deputy District Public Prosecutor for the State. M/s. Muhammad Hussain Awan, Muhammad Irshad Jadran and Irfan Ghaus Ghumman, Advocates for private respondents.

Through this criminal revision petition, the order dated 08.06.2023, passed by learned Addl. Sessions Judge/GBV/Special Court, Pasrur has been challenged, whereby the learned trial Judge while deleting the offence under Section 354 PPC of the charge, has held that since all the remaining offences are not scheduled offences, and as such are exclusively triable by the Court of learned Judicial Magistrate and consequently, referred the file to the learned District and Sessions Judge, Sialkot for its further entrustment to the court of competent jurisdiction for trial.

2. Precisely, necessary facts for disposal of instant revision petition are that the petitioner had lodged a criminal case vide FIR No.323 dated 15.09.2020, offences under Sections 354/337-F(i)/ 337-A(i)/337-L(2)/452/147/149 PPC with Police Station Sabaz Peer, District Sialkot with the allegation that on 03.09.2020 at about 8.30 a.m., respondents No.2 to 13 along with one Saeen, armed with sotas made criminal trespass in her haveli, caught hold her; Niamat Ali raised lalkara that he be killed; Waseem, started collecting articles, snatched Rs.50,000/- from mother of the petitioner and gave beating to the complainant and her mother. The accused persons caught hold Ameen Bibi, the petitioner's mother, from her hair, dragged her at thoroughfare in naked condition exposing her to the people of the vicinity.

3. It has borne out from the record that after some investigation, an interim/incomplete report was submitted under Sections 354/337-F(i)/337-A(i)/337-L(2)/452/147/149 PPC on 13.04.2021; after taking cognizance, the learned Magistrate 1st Class, Pasrur on 16.09.2021, framed the charge against the accused persons namely Muhammad Saeen, Samra Bibi, Muhammad Waseem, Nargis Bibi, Humaira Bibi and Niamat Ali accordingly, to which, they pleaded not guilty and claimed trial. On 23.05.2022, a complete challan was also sent to Court under the same offences, whereupon the learned Judicial Magistrate 1st Class, Pasrur, once again framed the charge on 05.10.2022, to which the accused pleaded not guilty and claimed trial and the case was adjourned for prosecution's evidence. The learned Magistrate Section 30, Pasrur, later-on, vide his order dated 14.02.2023 made the observations to the effect that:-

> "as per Amendments in criminal law in shape of Anti Rape Act, 2021, a Special Court for dealing with the matters relating to gender violence and rape offences etc. is designated and above said matters are to be heard by same Court constituted in this regard, therefore, this court has no mandate to hear the matter any longer. Resultantly as per circular No.3289 dated 14.10.2022 issued by the Worthy Sessions Judge, Sialkot, this case file is humbly transmitted to the GBV/Special Court of Pasrur for 23.02.2023."

The learned Addl. Sessions Judge/GBV Court, Pasrur, on 23.02.2023, upon receiving the case file, proceeded with the case and vide his order dated 24.03.2023, after framing the fresh charge against the accused persons for the same offences i.e. under Sections 147/149, 452, 337-F(i)/337-A(i)/337-L(2) and 354 PPC, to which the accused pleaded not guilty and claimed trial, summoned the prosecution's evidence. Thereafter, the learned Addl. Sessions Judge/GBV/Special Court, Pasrur, vide his impugned order dated

08.06.2023, apart-from deleting the offence under Section 354 PPC of the charge, ordered to place the file before the learned Sessions Judge, Sialkot for its onward entrustment to the Court of learned Judicial Magistrate Section 30, Pasrur with the following observations:-

> "Record of instant case has been meticulously apprized while keeping in juxta-position Anti Rape (Investigation and Trial) Act, 2021. Preamble of ibid Act reflects that it came into existence to ensure the expeditious redressal of rape and sexual abuse in respect of women and children and in recent amendment bill 2022 in the Anti Rape Act (Investigation and Trial) Act, 2021. Word "sexual offenders" has been used for the such culprits, whereas, the instant case as per factual matrix available on record is simple case of fight and house tress-pass. To solidity the version of complainant no recovery memo of torn apparels of alleged victim finds placed on record. Moreover, intention to outrage modesty for the purpose of rape or sexual abuse to bring this case under the pail of special Court constituted under Section 3 of the ibid Act is missing. Hence, Court is of the considered opinion that offence "under Section 354 PPC" is not made out. Thus same is deleted. Remaining offences which are already existence or made out from the available record are not scheduled offences and exclusively triable by the Court of learned Judicial Magistrate.
>
> 2. Ergo in the given facts and circumstances propriety demands that instant case which heard and adjudicated upon by the concerned Court of learned Judicial Magistrate Section 30. So the instant file be placed before Worthy District &

Session Judge Sialkot on 14.06.2023 to seek its benign indulgence for appropriate orders."

4. Arguments heard and record perused.

5. The entire controversy, described above, has since arisen due to deletion of Section 354 PPC of the charge, therefore, it appears to be expedient to reproduce the said provision for its examination in depth being quite relevant "Assault or criminal force to woman with intent to outrage her modesty. Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both". The assault or use of criminal force with intent to outrage the modesty of a woman, by an offender is the foundational requirement to constitute the offence under Section 354 PPC. Since the word "modesty" has not been defined in the Pakistan Penal Code, therefore, a resort shall have to be made to its dictionary meanings and import. Black's Law Dictionary refers to "modesty" as a quality of decency or propriety, particularly regarding dress, demeanor, or behavior, without providing its specific definition in the context of sexual offenses. In the Oxford English Dictionary "modesty" is defined as "behavior, manner, or appearance intended to avoid impropriety or indecency." In Cambridge Dictionary as "the quality of not being too proud or confident about yourself or your abilities; the quality in women of behaving and dressing in ways that do not attract sexual attention." The word "modesty", was interpreted by the Indian Supreme Court, in the case of "Rupan Deol Bajaj v. KPS Gill (AIR 1996 SC 309), influencing the legal thought in Pakistan as "modesty is an attribute associated with a woman, and it is the essence of a woman's womanhood. An act that violates the dignity of a woman may be considered as outraging her modesty." Moreover, sexual abuse having its nexus with the Act, also has been defined in Black's Law Dictionary as "any physical or

non-physical act of a sexual nature performed on another person without their consent, including molestation, harassment, exploitation, or any other act intended to sexually violate the victim." In Oxford English Dictionary as "the action or an act of subjecting someone to unwanted sexual activity." In Merriam-Webster Dictionary as "the infliction of sexual contact upon a person by forcible compulsion; also: engaging in sexual contact with a person who is below a specified age or incapable of giving consent." In Cambridge Dictionary as "the harmful use of sexual actions or words towards another person, especially a child, in a way that is against the law." In UN Definition (General Context) as "actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions." In view of above described definitions of modesty and sexual abuse, it may be observed that an act outraging a woman's modesty (Section 354 PPC) escalates to sexual abuse if the following elements are found present (1) Presence of Sexual Intent (a) "modesty" involves actions that are indecent but may not be overtly sexual (b) Sexual abuse explicitly includes sexual intent to exploit, harm, or degrade. (2) Physical Violation (a) "modesty" can be outraged without physical contact (e.g. verbal harassment), (b) Sexual abuse typically involves physical acts like groping, molestation, or assault, but it can also include non-physical coercion (e.g., forcing someone to view explicit material). (3) Severity and Impact (a) Actions that insult modesty may offend dignity or decency but stop short of sexual harm. (b) Sexual abuse causes deeper emotional or physical harm and violates the victim's bodily autonomy.

6. Moreover, it is settled that the Courts are supposed to interpret the law in such a manner that the same may not defeat the object of legislation under interpretation rather it should be made in aid to the legislature. Reference can be made to the case of "Tahir Naqash and others vs. The State and others"(PLD 2022 Supreme Court 385), "Abwa Knowledge Pvt. Ltd. and another vs. Federation Of Pakistan and another" (PLD 2021 Lahore 436),

“Muhammad Asghar and 3 others vs. Station House Officer and 2 others” (PLD 2020 Lahore 87). The Preamble of any statute is deemed to be a key to understand and interpret its provisions. Reliance is made upon the cases of “Ismaeel vs. The State” (2010 SCMR 27), “Khan Gul Khan and others vs. Daraz Khan” (2010 SCMR 539), “Muhammad Tariq Khan vs. Khawaja Muhammad Jawad Asami and others” (2007 SCMR 818) and “Fazal Dad vs. Col.(Rtd.) Ghulam Muhammad Malik and others” (PLD 2007 Supreme Court 571). The object and purpose of The Anti-Rape (Investigation and Trial) Act, 2021, hereinafter to be called as The Act, has fully been embodied in its preamble, which in its verbatim is reproduced for better comprehension. “An Act to ensure expeditious redressal of rape and sexual abuse crimes in respect of women and children through special investigation teams and special Courts providing for efficacious procedures, speedy trial, evidence and matters connected therewith or incidental thereto.” It may be relevant to state that in a case titled “Sumaira Vs. The State etc.”(2024 P.Cr.L.J 1783), this Court emphasized the aims and objects of the Anti-Rape (Investigation and Trial) Act, 2021 and held that:

> "Parliament has enacted the Anti-Rape Act to assure various fundamental rights guaranteed by the Constitution and to discharge obligations under international law to address the issue of sexual violence and bring offenders to justice. To this end, the Act provides for efficient procedures, speedy trials, evidence and matters connected therewith or incidental thereto. It may be highlighted that being a special legislation, it has precedence over all other general laws on the subject it covers.... The Anti-Rape Act aims to effectively deal with the rape and sexual abuse crimes mentioned in its Schedules (which are hereinafter referred to as the "Scheduled Offences") committed against women and children. It outlines a framework to check the said crimes by establishing (i) Anti-

> Rape Crisis Cell, (ii) Special Sexual Offences Investigation Units, (ii) Independent Support Advisors, (iv) Special Prosecutors, (v) Special Courts, (vi) a register of sex offences, and (vii) Fund to carry out the purposes of the Act. Each thread is meticulously braided; a break in any of them would render the statute ineffective. In light of the principles discussed above, the courts must interpret the Anti-Rape Act liberally and purposively. They must adopt the construction that advances rather than defeats the statute's objectives."

7. In order to achieve the envisioned objectives behind the Act, right from the stage of investigation to the conclusion of trial, the legislature has incorporated several provisions providing a coherent mechanism to ensure its effective implementation. A Judge of Special Court shall have to be appointed for a period of three years on the terms and conditions, to be determined by the Federal Government. He can only be removed before expiry of his tenure if he is found guilty of misconduct. However, a Judge of Special Court can be transferred, during his tenure as aforesaid to another Special Court within the same Province by the Chief Justice of the High Court concerned after recording reasons. The trial of the scheduled offences, as defined in Section 2(f) and 2(g) ["Schedule" annexed to this Act]& [as set out in the Schedules against a “victim" or a “child" as defined in this Act] ordinarily has to be conducted by the Special Court, within whose territorial jurisdiction, the offences have been committed. While considering the gravity and sensitivity as well as its implications on the society, a timeline of four months has been provided for expeditious disposal of the cases registered under scheduled offences. The Special Court for achieving the aforesaid purpose has been mandated not to accede to request for adjournments more than two times during the trial of the case, out of which, one adjournment shall be subject to payment of cost by the person seeking adjournment, to quell the unhealthy trend of causing delay in trial to achieve

their hidden objectives on one pretext or the other by the parties. In case, the defence counsel, does not appear after two consecutive adjournments in the Court for furtherance of proceedings, the Court may appoint another defence counsel with at-least seven years standing in the criminal matters, out of a penal of defence counsels/Advocates, to be maintained by the Special Committee, to defend the accused. The appointment of a defence counsel with such standing, as aforesaid, would ensure that the accused is represented through a mature and experienced lawyer, possessing reasonably sufficient experience and a legal acumen to rule out the possibility of any improper defence representation. In addition to above, in case of an appeal by an aggrieved person against judgment passed by the Special Court, the same shall preferably be decided within a period of six months. To control the unnecessary delay for the expeditious decision of an appeal, a restriction has also been placed by prescribing that not more than two consecutive adjournments on behalf of the parties shall be granted even at appellate stage. It is very important to highlight that upon commencement of the Act, the trial of scheduled offences pending in other Courts shall stand transferred to Special Court having jurisdiction under this Act. The Special Court shall proceed with the case from the stage at which it was pending immediately before its transfer and shall not be bound to recall or re-hear any witness who had already given evidence and may act on the evidence and procedure already adopted and complied with respectively before the transfer of the case by the previous Court. It is settled proposition of law that a Special Law has to prevail over the ordinary provision of law. Reliance in this regard may be placed upon cases reported as “Muhammad Iqbal Vs. Nasrullah” (2023 SCMR 273) and “Syed Mushahid Shah Vs. Federal Investment Agency” (2017 SCMR 1218). Any amendment in the existing law or utterly a new legislation, unlike the substantive law, relating to the procedure shall be operative retrospectively. Reliance may be placed upon cases reported as “Commissioner Inland Revenue, Lahore Vs. Messrs Millat Tractors Limited,

Lahore and others" (2024 SCMR 700), "Muslim Commercial Bank Limited Vs. Muhammad Anwar Mandokhel and others" (2024 SCMR 298) and "Maqbool Ahmad and another Vs. The State" (2007 SCMR 116). The Act has not taken away either the right of a fair trial duly guaranteed in Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973 or right of appeal of the parties. It has changed the forum of trial only for the purpose of expeditious disposal of the cases involving the scheduled offences by specially trained Judicial Officers in this regard. In course of a trial, if the Special Court is of the opinion that any of the offences with which the accused has been charged is not a scheduled offence, the Court shall record its opinion under Section 16(3) of the Act, akin to the exercise of power under Section 227 of the Code of Criminal Procedure, 1898, i.e. "power to alter or add to any charge at any stage before judgment is pronounced has been vested with the Court trying an offence, however such alteration or addition shall have to be read and explained to the accused", which is also applicable to the proceeding before the Special Court, because the Court has to try him for scheduled offences. A Special Court, however can also try an accused for other offences, though not listed in the schedule, if the same had been committed along-with the scheduled offences, being un-segregable and concomitant to each other, having their inter-se deep nexus, including where the provisions of the Anti-Terrorism Act, 1997 (Act XXVII of 1997) are invoked or invokable in respect of offences under this Act. It is quite axiomatic that an accused charged with a minor offence, having lesser sentence cannot be convicted and sentenced for an offence entailing graver sentence, without giving him the opportunity by way of framing of charge afresh and also giving him the opportunity to defend himself, though vice versa is permissible.

8. In order to examine an important aspect of the matter as to whether it is advisable for a criminal Court trying an offence, to order the deletion of an offence during the trial by making a tentative assessment of the material on

record, without recording evidence (examination-in-chief, cross-examination and re-examination of the witnesses), as laid down in the case of "Asad Nawaz vs. Zulifqar Afzal Khan and Others" (2019 P.Cr.L.J 883), "Daim vs. The State" (2021 P.Cr.L.J 958), for giving its conclusive finding on that regard. Suffice it to observe that in view of power vesting with the Court under Section 16(3) of the Act read with Section 227 Cr.P.C, as discussed above, it is the prerogative of the Court to exercise its power at which stage of trial, it deems appropriate. Besides the above, a Court, trying an offence, is also equipped with vast powers to acquit the accused of the charge at any stage of the proceedings, if it comes to the conclusion that on the basis of incriminating material/evidence available on record, there exists no probability of the accused being convicted of any offence.

9. Perusal of record reveals that in the instant case, the observations as contained in the impugned order dated 08.06.2023 passed by the learned Addl. Sessions Judge/GBV/ Special Court, Pasrur, that "instant case is simple case of fight and house trespass, no recovery memo of torn apparels of alleged victim finds placed on record, intention or outrage modesty for the purpose of rape or sexual abuse to bring this case under the pail of special Court constitute under Section 3 of the ibid Act is missing, hence, the offence under section 354 PPC is not made out, thus is deleted" have not been found by this Court to be unfounded, at present. No illegality, perversity or jurisdictional defect in the impugned order has been found, calling for any interference by this Court justifying the revisional power for setting aside the impugned order.

10. For what has been discussed above, instant petition having no substance is hereby **dismissed.**

I appreciate the efforts of Mr. Ejaz Ahmad Sipra, Civil Judge/Research Officer who collected and provided relevant material in support of question involved in this case.

(ANWAARUL HAQ PANNUN)

JUDGE

APPROVED FOR REPORTING

JUDGE

IN THE LAHORE HIGH COURT, BAHAWALPUR BENCH, BAHAWALPUR

W.P No.2062 of 2023

Umar Sheraz Versus Govt. of Punjab, etc.

J U D G M E N T

Date of Hearing.	07.01.2025.
Petitioner by:	M/s. Ch. Muhammad Jamil, Ch. Riaz Ahmad and Miss Noreen Atta, Advocates.
Official respondents by:	Rai Mazhar Hussain Kharal, A.A.G.

Anwaarul Haq Pannun, J. Through this writ petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner has assailed the order dated 02.03.2023 passed by the Superintendent of Police, Punjab Highway Patrol, Bahawalpur Region Bahawalpur/respondent No.3 whereby, the petitioner, despite being successful throughout the selection/recruitment process, was refused his appointment letter as Constable in the Police Department.

2. Precisely, the factual matrix of instant writ petition is that the petitioner submitted his application with a requisite affidavit against Minority Quota, for his appointment as Constable in the Punjab Highway Patrol, in response to an advertisement, inviting applications from the eligible candidates for their recruitment by respondent No.2/DIG (Establishment-II), Central Police Office, Lahore. He was declared successful throughout the process of recruitment, as aforesaid, yet he was not issued his appointment letter, constrained of the situation, the petitioner had to file Writ Petition No.6630 of 2022/BWP, which was disposed of, vide order dated 30.11.2022 as follows:-

> "Learned counsel for the petitioner does not press this petition and would be satisfied if copy of this petition alongwith all annexures is forwarded to respondent No.3 who will consider it as a "representation' of the petitioner and decide the issue in hand after affording opportunity of hearing to all concerned including the petitioner through a well-reasons speaking order, strictly in accordance with law and in the light of judgments of this Court reported as Waseem Yaqoob Vs. Govt. of the Punjab and others (2018 PLC (C.S) 454) and Inamullah Vs. Govt. of KPK through Chief Secretary and 3-others (2017 PLC (C.S) 926) as early as possible.
>
> 2. Order accordingly".

The Superintendent of Police, Punjab Highway Patrol, Bahawalpur Region Bahawalpur/respondent No.3 dismissed the representation of the petitioner, vide its order dated 02.03.2023. Hence this petition with the following prayer:-

> "By accepting this writ petition the impugned order dated 02.03.2023 passed by respondent No.3 by which respondent No.3 declared the petitioner as unfit for police department and stopped the appointment letter of the petitioner, is illegal against the law and facts, may kindly be set aside, respondent No.3 may kindly be directed to issue the appointment letter for constable in PHP Region Bahawalpur in favour of the petitioner, without any further delay in the interest of justice".

3. In compliance with the order dated 17.03.2023, respondents No.2 & 3/police department have filed their report and para-wise comments, perusal whereof, in pith and substance discloses that position of the petitioner being on merit is not disputed, however, it has been maintained that during his character/antecedents verification, it came to light that previously, the

petitioner was challaned in a criminal case registered vide FIR No.319/2014 dated 08.08.2014, offence under Section 377 PPC at Police Station Faqeerwali, District Bahawalnagar. He had although been acquitted of the charge on the basis of compromise, vide judgment dated 27.03.2015 by the trial Court, yet the petitioner while submitting his application along with a sworn affidavit did not disclose this fact, therefore being guilty of making this concealment, in the light of instructions issued by the office of Inspector General of Police Punjab, vide its office letter No.AD-III/6066-6104/XV dated 20.05.2022 & Addl. IGP/PHP Lahore vide letter No.14234/OSI/ PHP/HQ dated 05.09.2022, the petitioner was not issued his appointment letter. Along with the comments, a copy of letter issued by Government of the Punjab Police Department, to all heads of police in Punjab bearing No. SE-IV/7317-70/II, dated 26.06.2014 is appended, whereby "the competent authority has decided in principal that all those candidates who, during character verification, have been found involved in criminal cases (either under trial or acquitted on multiple grounds) shall not be appointed in Police Department as constable".

4. Arguments heard and record perused.

5. In the facts and circumstances of instant case, a question regarding the legality and sustainability of adverse consequences, effecting the fundamental rights due to previous involvement of the petitioner in a criminal case despite he had been acquitted of the charge, as contained in the impugned order, based upon the letter bearing No.AD-III/6066-6104/XV dated 20.05.2022 & Addl. IGP/PHP Lahore vide letter No.14234/OSI/ PHP/HQ dated 05.09.2022, and initial policy instructions vide letter No.SE IV/7317-70/II, dated 26.06.2014, has emerged as a pivotal point, seeking its determination authoritatively, which requires an elaborate discussion, therefore, the same is being made hereunder.

6. Under Section 154 and 155, Part-V, Chapter XIV of the Code of Criminal Procedure, 1898 [Information to the police and their powers to investigate] every information relating to the commission of a cognizable offence, whether given orally or in writing to the officer-in-charge of the police station, has to be reduced into writing and signed by the person giving it and its substance is entered in a book to be kept by such officer in the form prescribed by the Provincial Government in this behalf, [The original copy of FIR shall be a permanent record in the Police Station] WHEREAS when an information in non-cognizable cases is given to officer-in-charge of a police station, he is obliged to enter the substance of such information in a book kept for the purpose and refer the informant to the Magistrate. Thereafter the officer incharge of the police station is required under Section 156(1) of Cr.P.C to investigate [investigation includes, as per Section 4(l) of Cr.P.C; all the proceedings under the Code for the collection of evidence conducted by a police-officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf] the cases cognizable by the police registered under Section 154, Cr.P.C, in the light and guidance as contained in the Police Rules, 1934, hereinafter to be called as Rules, 1934, which stands adopted under Section 185 of the Police Order, 2002 by extending the requisite statutory backing to ensure continuity in police administration and procedure previously governed by the Police Act 1861. The officer-in-charge cannot start investigation in non-cognizable offences, without securing permission from the Magistrate and once it is granted, the investigation shall be conducted in the same manner as the offences were cognizable, yet the arrest of an accused can only be made after issuance of a warrant by a magistrate, as warranted by Section 155(3) of Cr.PC and Rule 25.11(2) of the Rules, 1934. A Police Officer making an investigation as required under Rule 25.53 has to enter the proceedings he had undertaken day by day in a case diary, and submit in the same prescribed manner for cognizable cases. The nomination of a person as an accused in the FIR or through some

supplementary or subsequent statements cannot necessarily be equated with involvement of such accused in the commission of offence. The Investigating Officer, is under a legal obligation as mandated by Rule 25.2(3), to investigate the matter with an object to discover the actual facts of the case and to find out the truth of the matter while considering all the versions of the incident brought to his notice from all possible angles and to cause arrest of the real offender or offenders. The Investigating Officer, thus, is required not to commit himself prematurely to any of the view of the facts for or against any person. A police officer however under Rule 26.1 of the Rules, 1934 is authorized to arrest any person, who, in his opinion formed objectively, has been concerned in any cognizable offence or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, without a warrant. The power of the police regarding arrest of the accused without a warrant is, permissive and not obligatory. Ordinarily no person is to be arrested straightaway only because he has been nominated as an accused person in an FIR or in any other version of the incident brought to the notice of the Investigating Officer by any person until the investigating officer is satisfied that there exists, as aforesaid, sufficient justification for his arrest, in the light of relevant provisions of the Cr.P.C and the Rules, 1934. It is significant to highlight that under Rule 26.2 of Police Rules 1934, the police officer has been vested with the power to defer the arrest of a person accused of an offence until the investigation is sufficiently complete. In a case titled “Mst. Sughran Bibi Versus The State” (PLD 2018 SC 595), the apex Court has observed that “ordinarily no person is to be arrested straightaway only because he has been nominated as an accused person in an FIR or in any other version of the incident brought to the notice of the Investigating Officer by any person until the investigating officer feels satisfied that sufficient justification exists for his arrest and for such justification he is to be guided by the relevant provisions of the Code of Criminal Procedure, 1898 and the Police Rules,

1934. According to the relevant provisions of the said Code and the Rules, a suspect is not to be arrested straightaway or as a matter of course and, unless the situation on the ground so warrants, the arrest is to be deferred till such time that sufficient material or evidence becomes available on the record of investigation prima facie satisfying the investigating officer regarding correctness of the allegations leveled against such suspect or regarding his involvement in the crime in issue." Reliance can also be placed upon the case reported as "Shahzada Qaiser Arfat alias Qaiser Vs. The State and another" (PLD 2021 SC 708), "Sarwar and others Vs. The State and others" (2014 SCMR 1762).

7. A police officer, in case of arrest of an accused on his own whims and wishes, cannot detain such person for an indefinite period. He is required, as warranted by Rule 25.56 read with Section 61, Cr.P.C having its roots in Article 10 (2) of the Constitution of Islamic Republic of Pakistan, 1973, to get the arrest and detention of an accused regulated for the purpose of further investigation. The Police Officer has to make an application in accordance with the provisions of section 167, Cr.P.C, on an incomplete charge sheet [in Form 25.56(1)] along with the case diaries or its copies, whereupon, the Magistrate can authorize the detention of the accused not exceeding fifteen days in the whole to complete the investigation or discharge such person under Section 63 Cr.P.C owing to deficit evidence. However, the Investigating Officer, if upon further investigation finds out that in the attending circumstances of the case, the allegations levelled against the accused, appear either to be false or there exists no sufficient incriminating material on record, implicating him with the commission of alleged offence, he is not denuded of his power to release the accused on his executing a bond to appear before Magistrate if and when so required, under Section 169 Cr.P.C (see Rana Farhan-ul-Hassan and another Vs. the State and another" (2007 P. Cr. L J 570)), and on the other hand, if he finds that there is sufficient evidence or reasonable grounds exist, he shall forward the accused

under custody under Section 170 of Cr.P.C to Magistrate to take cognizance of offence and try the accused or send him for trial to the competent court of jurisdiction. Furthermore, the officer-in-charge of the police station is under a statutory obligation to forward a complete or incomplete report under section 173 of Cr.P.C, placing the name of accused, against whom, in his opinion, sufficient evidence connecting him with the commission of offence has been found, in its column No.3, whereas the name of the accused against whom there existed a deficient evidence or who had been declared proclaimed offender shall be entered in column No.2 thereof respectively yet the entry of proclaimed offender shall be made with red ink, after making requisite compliance with Section 9(4) and 9(7) of the Punjab Criminal Prosecution Service Act, 2006, in a prescribed form to Magistrate either to take cognizance of the offence or send it for the trial to the court of competent jurisdiction, and if it appears from such report to the Magistrate that the accused placed in column No.2 of the report due to deficiency of incriminating material against him, has already been released on bond, shall by applying his judicial mind to the material placed before him, make an order for discharge of such bond or otherwise as he thinks fit. It may also be important to highlight that upon withdrawal of prosecution by the Public Prosecutor under section 494(a) Cr.P.C, prior to framing of charge, the accused is discharged. The above narrated procedure for investigation into the offences, irrespective of their seriousness or heinousness, leaves no room in lawfully assuming that while empowering the police officer to investigate the crime, and the Magistrate, with his supervisory power over investigation, on each and every step, an emphasis has been laid to safeguard the human liberty, guaranteed as a fundamental right under Article 9 of the Constitution of Islamic Republic of Pakistan, 1973.

8. In addition to above, the Police officer, after investigation, is also authorized to recommend the case for its cancelation. Strictly speaking, in the Code of Criminal Procedure, 1898, there exists no express power for

cancelation of FIR. However, an FIR can be cancelled by a Magistrate under Rule 24.7 of the Rules, 1934 and in the light of law laid down in case of "Bahadur and another Vs. The State and another" (PLD 1985 SC 62), which is being consistently followed, wherein, it has authoritatively been ruled that although "neither section 173 Cr.P.C nor any other provision of the Criminal Procedure Code specifically deals with the question of cancellation of a registered criminal case, such a power was found to be "inherent in section 173 read with Section 190 of the Code of Criminal Procedure though the language of subsection (3) does not specifically apply to the case" by agreeing with the recommendations/cancellation report, provided the same is forwarded by Superintendent of Police with independent opinion formulated in a supervisory capacity and the Prosecutor as required under Section 9(4) of the Punjab Criminal Prosecution Service Act, 2006 on the grounds (i) found to be maliciously false or (ii) false owing to mistake of law or fact or (iii) to be non-cognizable or (iv) matter for a civil suit, unless the investigation of a case is transferred to another police station under Rule 25.7 [Cancellation of a case in one police station and registration in another] or District under Rule 25.8 [Cases which may be lawfully investigated in more local areas than one] or the investigation has been transferred under Article 18 (6) of Police Order 2002. Reliance is placed on the case reported as "Ehsan Ullah Chaudhry Vs. the Staten and 3 others" (PLD 2023 Lahore 233) and "Ali Mansoor Vs. Area Judicial Magistrate, etc." (PLJ 2024 Lahore 315). An order of discharge of an accused puts the FIR in hibernation whereas the cancellation of FIR is like burial of a dead-body in a grave.

9. The matter can be viewed through the same prism yet from another angle. Article 9 of the Constitution of Islamic Republic of Pakistan, 1973, ordains that "no person shall be deprived of their life or liberty except in accordance with the law." In criminal jurisprudence, the state's power to arrest, detain, or punish an individual directly impacts the right to liberty. To ensure that such actions conform to the due process of law, the Code of Criminal Procedure,

1898 (Cr.P.C.), provides a structured framework, through classification of the offences and the provisions relating to bail, thereby reinforcing the principles enshrined in Article 9. Under Section 4(o) of the Cr.P.C., an "offence" is broadly defined as any act or omission made punishable by law, encompassing crimes under the Pakistan Penal Code (PPC), 1860, as well as other special and local laws. However, all offences are not treated alike. The severity and impact of an offence on society necessitate a differentiated legal response. To maintain this balance, Section 4(b) Cr.P.C. classifies offences into bailable and non-bailable categories, to ensure that the legal system does not impose undue restrictions on liberty in less severe cases while maintaining relative strict control for graver offences. In bailable offences, Section 496 Cr.P.C. guarantees the accused's right to bail, ensuring that an individual is not unjustly detained for minor offences, which has been embodied in the light of the guarantee contained in Article 9 preventing the unnecessary deprivation of liberty and upholding the principle that an accused should not suffer undue hardship before conviction. Conversely, Section 497 Cr.P.C. governs non-bailable offences, where bail is not an absolute right of an accused, which can however be availed subject to judicial discretion to be exercised by the relevant Court. Even the prolonged detention without trial being in contradiction to the essence of Article 9, has been recognized a good ground for the release of an accused on bail to prevent arbitrary or indefinite deprivation of liberty. For further reinforcement of these principles, Section 498 Cr.P.C. empowers the High Court and the Court of Sessions to grant pre-arrest bail, ensuring a safeguard by way of judicial oversight against potential misuse of power. All this aligns with the doctrine of presumption of innocence, which remains a cornerstone of criminal law, and ensures that an individual is not treated as guilty until proven otherwise through a fair and impartial trial [see "Sardaran Bibi Vs. State" (2024 SCMR 1116), "Zaheer Sadiq Vs. Muhammad Ijaz" (2017 SCMR 2007), "Mst. Anwar Begum vs. Akhtar Hussain alias Kaka"

(2017 SCMR 1710)]. Thus, the interplay between Article 9 of the Constitution and the procedural safeguards embedded in the Cr.P.C. reflects a harmonized legal structure designed to balance individual freedoms with the imperatives of justice and public order. While the state holds the authority to punish offenders in the interest of law and order, this authority is not absolute; it must operate within the framework of legality, due process, and judicial oversight. By ensuring that no person is deprived of liberty without lawful justification, the legal system upholds the fundamental tenets of justice, fairness, and human dignity, making Article 9 not just a constitutional guarantee but a living principle that shapes the administration of criminal justice in Pakistan. It may not be out of place to point out that even Section 426 Cr.P.C. allows the appellate courts to suspend a sentence pending appeal, and as such prevents a convict from being unnecessarily deprived of his liberty while exercising his legal right to challenge the verdict.

10. Ordinarily upon a report under Section 173 Cr.P.C with a sufficient incriminating material against the accused, or in a private or suo-motu complaint, the Magistrate while proceeding under Section 190 of Cr.P.C, takes cognizance of offence or has to send the case to the Court of competent jurisdiction. However, sometimes certain extra ordinary situations occur i.e. if the Magistrate fails to pass any order in respect of an accused, placed in column No.2 of report under Section 173 Cr.P.C, either requiring him to submit a bond for his appearance in the court to face the trial or his bond is not discharged or such an accused is not summoned even on the request of the complainant or the state at a later stage of the trial and the order of non-summoning to the accused or otherwise to face trial, are either upheld or set aside respectively by the higher fora or an order due to non-appearance of complainant/evidence under Section 249 Cr.P.C for stopping the proceedings, is passed or a discharge order of an accused as a result of withdrawal from prosecution prior to framing of charge, by a Public

Prosecutor under Section 494(a) Cr.P.C is made, to the prejudice of the accused, without any fault on his part, therefore, a question would arise as to whether the fate of such accused despite owing to his inherent presumption of innocence or not, in absence of pronouncement of a final judgment, shall remain uncertain and hanging just because of pendency of his criminal case. Since the inherent presumption of innocence attached to a person accused of an offence, unless proven guilty is rooted deeply in right of life guaranteed under Article 9 of the Constitution of Islamic Republic of Pakistan, 1973, therefore, such pendency would not affect right of such accused. Reliance is placed upon case reported as "Sohail Aslam Vs. The State" (2017 YLR 1383), "Sadar alias Sadaruddin and another Vs. The State"(2023 P.Cr.LJ 874). Irrespective of the above situation, ordinarily the proceedings against an accused facing trial terminate either in the form of acquittal, under section 249-A Cr.P.C [power of magistrate to acquit accused at any stage], 245 of Cr.P.C [acquittal after trial by the magistrate], 265 K Cr.P.C [power of Court of Sessions to acquit the accused at any stage], 345 Cr.P.C [acquittal as a result of compounding of offences with or without permission of Court] or by delivering a judgment under Section 366 Cr.P.C or under section 494(b) Cr.P.C [as a result of withdrawal from prosecution, after a charge has been framed or when under the Code no charge is required, with the consent of the Court by the Public Prosecutor] or culminate into judgment of conviction.

11. It may be significant to point out that on completion of the case/conclusion of trial originated on a report under Section 173 Cr.P.C, a charge sheet slip commonly called as "saza slip" in compliance with the rule 27.2, is filled in, under the order of the Criminal Court trying the case and returned to the office of the Senior Superintendent of Police. Such result is entered in the General Crime Register and the English Register of Cognizable Offences and is also communicated to the Police Station concerned. A carbon copy of the charge sheet slip [in Form 27.2 (1)(a)] is submitted to the District Crime Record Bureau of the concerned District

Headquarter for record by the Prosecution Branch concerned. In addition to above, the particulars of the charge sheet slip, are also scribed under sub Rule 5 of 24.5. (First Information Report Register) Rules 1934 on the reverse of the original copy and the slip is returned to the Superintendent's office.

12. On the other hand, in-spite of there being a judicial consensus that a private complaint [Complaint means as defined under section 4(h) of Cr.P.C "the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person whether known or unknown, has committed an offence, but it does not include the reports of a police-officer], is an alternate remedy yet Unlike a case instituted upon a police report, no such rule exists in the Police Rules, 1934 putting the police under an obligation to maintain the record regarding the persons accused of an offence, facing the trial in a private complaint within the territorial limits of relevant Police Station. However, in case of culmination of a complaint into conviction in certain cases, the Magistrate under High Court Rules and Order Volume III Chapter 11 Part G [Information of conviction in complaint cases to be furnished to the police] is obliged to furnish the police with such information.

13. Furthermore, a record is also maintained relating to conviction and orders to execute bonds in all cognizable police cases, as warranted by Rule 27.29 of Rules, 1934, by making entries in this regard in (a) the Urdu General Crime Register and the English Register of Cognizable Offences maintained in the office of the Superintendent (b) the First Information Report Register, maintained at the police station reporting the offence. The detail of convictions and the orders passed in certain offences is also entered (c) the Conviction Register to fulfil the purpose of Section 75 of Pakistan Penal Code [Enhanced punishment for certain offences under Chapter XII or Chapter XVII after previous conviction], in each police station as prescribed in Chapter XXII of the Police Rules, 1934[The Police Station]. A Conviction

Register under Rule 22.60 of Rules, 1934 is maintained separately. Entries in this register are confined only in respect of offences mentioned in rule 27.29 of Rules, 1934. It may be reiterated that original copy of FIR is retained as a permanent record in the police station. Similarly, the conviction register is also a permanent record of the crime and criminals of each village and of previous convictions, and is to a great extent the basis for the preparation of history sheets and other measures of surveillance.

14. In addition to the above exceptional situations, highlighted in paragraph No.10 of this judgment and irrespective of gravity or heinousness of the charge, owing to inherent innocence attached to a person accused of an offence, the acquittal of an accused by a competent court of jurisdiction, bestows a double presumption of innocence upon him. Reliance in this regard is placed upon the dictum of law laid down in the case of “Shahid Abbas Vs. Shahbaz and others” (2009 SCMR 237),“Sardaran Bibi Vs. The State and others” (2024 SCMR 1116), “The State through PG Sindh and others vs. Ahmed Omar Sheikh and others” (2021 SCMR 873), “Zaheer Sadiq vs Muhammad Ijaz and others” (2017 SCMR 2007). Since, the word “acquittal” has not been defined in Criminal Procedure Code, 1898, therefore, to find out its meaning, extent and scope, a resort is being made to its ordinary dictionary meanings. In Corpus Juris Secundum Part 1-A at page 285 the word acquittal has been defined as "discharged, released from a debt, duty, obligation, charge, or suspicion of guilt; or set free or judicially discharged from an accusation.", In Black's Law Dictionary 5th Edition the word acquittal has been given the meaning "The legal and formal certification of the innocence of a person who has been charged with crime; deliverance or setting free a person from a charge of guilt; finding of not guilty. Also, one legally acquitted by a judgment rendered otherwise than in pursuance of a verdict, as where he is discharged by a Magistrate because of the insufficiency of the evidence, or the indictment is dismissed by the Court for non-prosecution. Or, it may occur even though the question of guilt or

innocence has never been submitted to a jury, as where a defendant, having been held under an indictment on information, is discharged because not brought to trial within the time provided by statute." In Encyclopaedia Britannica Volume-1, 15th edition at page 67 acquittal, in criminal law has been defined as "Acknowledgment by the Court of the innocence of the defendant or defendants. Such a judgment may be made by a jury in trial or by a Judge who rules that there is insufficient evidence either for conviction or for further proceedings. An acquittal removes all guilt in law: An acquittal "in fact" occurs when a jury finds the defendant not guilty". In Wharton's Law Lexicon- acquittal is defined as "quie tus" which means as "Freed or acquitted; discharged of all further liability." The above reproduction of the definition or the meanings of word "acquittal" would clearly show that once a person charged with certain offences by judicial order is acquitted, the verdict means a formal certification of the innocence of such person. The above definitions have found their judicial recognition in a number of cases decided by the Superior Courts of the Country. Reliance is placed upon case reported as "Chaudhry Abid Raza Vs. Election Tribunal Punjab/Lahore High Court, Lahore and 3 others" (PLD 2008 Lahore 200). In case of "Muhammad Jamil Khan Versus Irfan Ellahi" (2016 MLD 1118) the acquittal has been dealt as under:

> "Acquittal means to declare a person accused of a crime to be innocent, while on the contrary, discharge means to release someone from custody, or allow someone to leave, or to pay of."

15. It has been a consistent view of the Superior Courts pronounced in various judgments having its binding effect in terms of Articles 189 and 201 of the Constitution of Islamic Republic of Pakistan, 1973 that all acquittals are certainly honourable and there can be no acquittal, which may be said to be dishonourable. Reliance in this regard is placed upon case

reported as “Faraz Naveed Versus District Police Officer Gujrat and another” (2022 SCMR 1770), “Chairman Agricultural Development Bank of Pakistan and another Versus Mumtaz Khan”(PLD 2010 SC 695), “Mumtaz Ali Shah Versus Chairman, Pakistan Telecommunication Company Ltd. HQ., Islamabad and 6 others” (PLD 2022 SC 1060), “Attaullah Sheikh Versus WAPDA and others” (2001 SCMR 269) and “Dr. Muhammad Islam Vs. Government of N.W.F.P through Secretary Food, Agricultural, Live Stock and Cooperative Department, Peshawar” (1998 SCMR 1993).

16. A State, indeed being a political and legal entity is characterized by four essential elements (i) Papulation (ii) Territory (iii) Government (iv) Sovereignty. The Government is in-fact an organized structure comprising over various institutions/ departments, commonly called the statutory authorities, responsible for governance and administration. Every entity exercising governmental authorities despite its distinctly defined sphere is part of the State. It may be emphasized that crime is a public wrong and not a personal wrong. The breach and violation of a public right effects the whole community and as such amounts to harm the society in general. It is one of the basic duties of the State to curb this menace and to devise a mechanism by establishing institutions to bring the offenders, if any, to book for maintaining peace and tranquility in the society besides punishing the wrong doers in accordance with law. The Police, in any criminal justice system, plays a significant role by arresting the suspects, investigating the crimes by way of collection of evidence, for their onward forwarding and submission through the relevant Prosecution Agency to the Court of competent jurisdiction for holding a trial of a person accused of an offence for the determination of his innocence or otherwise. The State is represented in the Court of Law either through a Public Prosecutor or an

Advocate General to be appointed under Section 6 of the Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act, 2006 (III of 2006) and Article 140 of the Constitution of Islamic Republic of Pakistan, 1973, respectively in the Province of the Punjab, by the government with the responsibility to ensure that the justice system is duly and diligently served on its behalf. The relationship between the Police and the Prosecution is always characterized by collaboration and distinction viz-a-viz their role as well. The Courts by following the relevant applicable procedural law, in compliance with Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973, hold the trial in discharge of their sacred duty to decide finally about the fate of the accused either in the shape of acquittal or conviction by delivering its judgment.

17. Chapter XXXI "Of Appeals" the Code of Criminal Procedure, 1898 or other laws provide a right of appeal, against any acquittal order/judgment passed by any Court other than High Court to (i) the Provincial Government under Section 417 (1) Cr.P.C through a Public Prosecutor (ii) complainant in case of a private complaint, after seeking special leave to appeal, under Section 417(2) of Cr.P.C. (iii) an aggrieved person under Section 417(2-A) Cr.P.C, to challenge the verdict of acquittal alleging the same to be illegal, perverse, capricious, resulting into miscarriage of justice before the High Court. Even a High Court or a Court of Sessions under Section 435 of Cr.P.C, is vested with the power to call for and examine the record of any proceedings before any inferior Criminal Court for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed. In case of non-filing of any appeal or exercise of Revisional Power by the Superior Court, as described hereinabove, any judgment including the judgment of an acquittal attains finality, perpetuating the presumption of innocence.

18. Although the concept of separation of power allows every organ of the state to operate within its allotted sphere independently under the constitution and law, yet the verdicts of the Courts, have to be accepted by all other authorities being legally and constitutionally binding upon them. The power of judicial review, vesting with the judicature, places the Courts at a distinct and easily distinguishable higher pedestal as compared to rest of the state organs despite they also exercise the state power within the sphere allotted to them. A defiance of judicial verdicts would amount to undermine the principle of separation of power. It may be added to emphasize that under Article 189 of the Constitution of Islamic Republic of Pakistan, 1973, any decision of the Supreme Court deciding the question of law or is based upon or enunciating a principle of law shall be binding on all other Courts in Pakistan. Furthermore, Article 190 of the Constitution ordains that all executive and judicial authorities throughout Pakistan shall act in aid of the Supreme Court objectively. Reliance is placed upon case reported as Hasnain Raza Vs. Lahore High Court, Lahore" (PLD 2022 SC 7). Even an obiter dicta of Supreme Court has its binding effect. Reliance is placed upon case reported as "Justice Khurshid Anwar Bhinder and others Vs. Federation of Pakistan and another"(PLD 2010 SC 483) and "Dr. Iqrar Ahmad Khan Vs. Dr. Muhammad Ashraf and others" (2021 SCMR 1509). The rule of law un-hesitantly binds every one including the state organs not to exceed the limits circumscribed by law in any manner and as such, every state institution including the Police are supposed to show regards towards the decisions rendered by the courts, as a result of their judicial review, and lack the legal authority to defy the judicial verdicts through standing orders or any other means because of Article 4 of the Constitution of Islamic Republic of Pakistan, 1973 emphasizes the rule of law. Adoption of such an approach would ensure the promotion of concept of accountability and

equality, conveying a message that no one is above the law. Reliance is placed upon case reported as "Suo Motu case No.1 of 2022 and Pakistan Peoples Party Parliamentarians (PPPP) through its Secretary General and 4 others Vs. Federation of Pakistan through Secretary, Ministry of Law and Justice and 4 others" (PLD 2022 SC 574) wherein the concept of rule of law has meticulously been compounded.

19. Now coming to the facts of instant case, it is empathetically observed that the respondents in their report and parawise comments have not disputed the position of the petitioner being otherwise eligible and on merit for his recruitment as Constable in Punjab Highway Patrol Bahawalpur Region. It has, however, been maintained that during his character/antecedents verification, it surfaced that the petitioner was previously involved in a criminal case registered vide FIR No.319/2014 dated 08.08.2014, offence under Section 377 PPC at Police Station Faqir Wali, District Bahawalnagar and though he had been acquitted of the charge in aforesaid case, vide judgment dated 27.03.2015 by the learned trial Court, but he did not disclose this fact while submitting his sworn affidavit along with his application for recruitment and as such he made a concealment, therefore, in the light of instructions issued by the office of Inspector General of Police Punjab, vide its office letter bearing No.AD-III/6066-6104/XV dated 20.05.2022 & Addl. IGP/PHP Lahore vide letter No.14234/OSI/ PHP/HQ dated 05.09.2022, which are based upon the initial policy instructions vide letter No.SE-IV/7317-70/II, dated 26.06.2014, stating "all those candidates who, during character verification, have been found involved in criminal cases (either under trial or acquitted on multiple grounds) shall not be appointed in Police Department as Constable" and while relying upon Rule 12.14 of the Police Rules, 1934 that "Recruit shall be of good character and great care shall be taken in selecting men of type

suitable for police service" he has been refused the appointment letter and his representation was also dismissed, vide order dated 02.03.2023. The comments filed by the respondents are based upon their suicidal defence. The petitioner in compliance with the following requirement as contained in the advertisement:-

تمام امیدواران کو بیان حلفی جمع کروانا ہوگا کہ وہ کسی قسم کی ایف آئی آر (FIR) یا مقدمہ میں نامزد/ملوث/مطلوب نہ ہیں۔ غلط بیان حلفی جمع کروانے کی صورت میں امیدوار کو پولیس میں بھرتی کے لیے تا حیات نا اہل قرار دیا جائے گا اور قانونی کاروائی عمل میں لائی جائےگی۔

submitted his sworn affidavit, to the following effect:-

حلف نامہ

1. حلفاً بیان کرتا ہوں کہ میں کسی قسم کی ایف آئی آر یا مقدمہ میں ملوث/مطلوب نہ ہوں۔ محکمہ کو اختیار ہو گا کہ اس ضمن میں غلط بیانی کی صورت میں مجھ پولیس میں بھرتی کیلئے تاحیات نا اہل قرار دے دے اور قانونی کارروائی عمل میں لائی جائے۔
2. ----------
3. ----------

محمد شیراز

20. The above reproduced relevant excerpts of the advertisement and affidavit show that the petitioner was required only to disclose about the detail of any criminal case either pending investigation or trial against him, therefore, the affidavit submitted by him appears to be in accordance with the requirement of the department and in compliance with the advertisement. Presently, no criminal case is registered or pending against the petitioner. The petitioner, in the given circumstances, was not obliged to disclose about his previous involvement in any criminal case, therefore,

the non-mentioning about his previous involvement and also his subsequent acquittal, vide order/judgment dated 27.03.2015, by the learned trial Court, about 5 ¾ years, even prior to inviting of applications for recruitment, did not amount to any concealment, rendering him "unfit" for his recruitment. Even otherwise, the acquittal of the petitioner had neither been challenged by the Provincial Government nor by any aggrieved person alleging the same being illegal, perverse, capricious, resulting into miscarriage of justice, and as such, the same had attained finality, perpetuating the presumption of double innocence in his favour, in a society, where false implication with ulterior motive is an open secret. Upon earning an acquittal of the charge by a court of competent jurisdiction, the slat containing the credentials of the petitioner had become free of any stigma/embellishment and the inherent innocence attached to him, as such, has become doubled, particularly when his acquittal has already attained finality. Therefore, in a parliamentary form of the Government like ours, the Government is collectively responsible and accountable as well therefore, the Government cannot be allowed to blow hot through its one department and cold by the other in the same breathe by sitting over the judgment passed by a court of competent jurisdiction to circumvent and contravene the judicial verdict by issuing any instruction, letter, order, circular, memo or through any of its other action to the prejudice of the constitutionally guaranteed fundamental rights under Part-II, Chapter 1 (Fundamental Rights) of the Constitution of Islamic Republic of Pakistan, 1973 of an individual citizen/petitioner.

21. In addition to above, it may be significant to point out that although a Surveillance Register X, Bad Character Rolls dispatched X(A) and Bad Character received X(B) of Rules, 1934 are maintained in accordance with orders contained in Rule 23.4, 23.5 and 23.16 of the Rules 1934, however, the entries made therein have to be destroyed two years after the dates of

last entries, and such entries are not perpetual in their nature and effect. It may further be added that mere registration of an FIR cannot be used as a definitive test to label accused of having a bad character.

Reliance is placed upon case reported as "Rizwan Ali Sayal versus Federation of Pakistan and others" (PLD 2024 Lahore 54). An inherent presumption of good character which includes both reputation and disposition, is attached to every person unless it is proved to be relevant under The Qanun-e-Shahadat Order (X of 1984). Furthermore, it is an appropriate moment to highlight and amplify that the objects behind maintaining the permanent record in the shape of original copy of FIR in the Police Station and record of conviction in the relevant conviction register of the crime and criminals of each village and of the previous convictions, to a greater extent, is meant for providing basis for the preparation of history sheets, other measures of surveillance and research purpose, as noticed above, only and in absence of any other clear in eligibility, attributable to an individual, cannot adversely affect the rights of a person. In the list of cherished fundamental rights enumerated and guaranteed as aforesaid in the Constitution, the rights regarding the security of person (Article 9), freedom of trade, business or profession (Article 18) have a paramount position. Undeniably, every citizen, who applies for a government job is entitled to it unless the government can establish some reasons for denying such employment. The right to livelihood is an undeniable right for individuals, as employment serves as the primary source of their livelihood. This right should be protected as a fundamental right. This is the "liberty" right-liberty to work-which is the very essence of Article 9, 18, 27 and 38 (c) of the Constitution and denial of a government job is a serious blow to any citizens. It has been held in case reported as Abdul Wahab and others Versus HBL and others"(2013 SCMR 1383) that *"the right to life of a person/ citizen shall include the right to livelihood*

and right to livelihood, therefore cannot hang on to the fancies of individuals in authority; the employment is not a bounty from them (individuals in authority) nor can its survival be at their mercy".

22. In the light of above discussion, by allowing the instant writ petition, the impugned order dated 02.03.2023 passed by respondent No.3 is set aside being illegal, as such of no legal effect with all consequential implications, and having been passed without lawful authority. Consequently, the respondents are directed to issue formal appointment orders in favour of the petitioner against the post, he had applied for within fifteen days after receipt of the copy of the order under intimation to DR Judicial of the Court.

23. Office is directed to transmit copy of this judgment to the Inspector General of Police, Punjab and Prosecutor General Punjab for information.

I appreciate the efforts of Mr. Muhammad Zahid Farid and Ejaz Ahmad Sipra, Civil Judges/Research Officers, who collected and provided relevant material in support of question involved in this case.

(ANWAARUL HAQ PANNUN)
JUDGE

APPROVED FOR REPORTING

JUDGE

IN THE LAHORE HIGH COURT, LAHORE

Case No Writ Petition No.6284 of 2021

Malik Atta Muhammad **Versus** Malik Sarfraz Abbas, etc.

14.03.2022 M/s. Kashif Haroon Ch. and Sohail Majeed Khan, Advocates for the petitioner.

Nemo for the respondents.

Through the instant writ petition, the petitioner has called in question the vires of the order dated 13.02.2019, dismissing his application under order VII Rule 11 CPC by learned Civil Judge 1st Class, Lahore and the order dated 22.10.2020 passed by learned Addl. District Judge, Lahore, upholding the above order while dismissing the petitioners' revision petition.

2. The factual background of this case, in brief, is that the plaintiffs (hereinafter to be referred as the respondents) filed a suit on 02.05.2009 for specific performance along with perpetual injunction on the basis of an agreement to sell dated 29.12.1998, without citing any witness of the alleged transaction, either in the disputed agreement to sell or in the plaint, against the defendant, their real uncle (hereinafter to be referred as the petitioner); that they have purchased 1/3rd Share out of total land measuring 6-kanals 02 Marlas, comprising Khasra No.1985, Khewat No.305, Khatooni No.551, as per Jamabandi for the year 1993-94 Hadbust Mouza Attoke Awan, Tehsil Cantt. District Lahore from the petitioner, vide aforesaid agreement to sell against the total consideration of Rs.1,30,000/-, out of which, they had paid Rs.40,000/- as earnest money and the possession of the suit property, as part performance, was also delivered to them. The petitioner has resisted the suit while denying the execution of agreement to sell through his written statement. He also filed an application under Order VII Rule 11 CPC, mainly on the grounds that the suit is badly hit and barred by limitation; that neither the disputed agreement to sell had been attested by two marginal witnesses,

as required under Article 17 of the Qanun-e-Shahadat Order, 1984 (hereinafter to be referred as the Order), nor the presence of any witness at the time of execution of agreement to sell has even been mentioned in the plaint; that the execution of the agreement to sell cannot be proved as required under Article 79 of the Order ibid, therefore, the plaint may be rejected. The application was contested by the respondents, yet, they failed to mention even the names of the proposed witnesses of the execution of the disputed agreement to sell in their reply and had merely stated that the petitioner never denied the execution of the alleged agreement to sell rather had expressly admitted its execution before people of the vicinity and other relatives who shall be produced before the Court at the time of recording of evidence. The learned trial Court, dismissed the application under Order VII Rule 11 CPC, vide its order dated 13.02.2019 with the observations that:-

> "Bare perusal of plaint discloses cause of action in favour of the respondents. The court fee stamp papers have already been submitted. Thus, provisions of Order VII Rule 11 of CPC are not attracted in the present proposition. Under the circumstances, in the interest of justice, the application is dismissed. No order as to costs."

Being aggrieved, the petitioner filed revision petition, which has also met the same fate as the same has also been dismissed, vide order dated 22.10.2020 passed by learned Addl. District Judge, Lahore, hence, this writ petition.

3. No one has entered appearance on behalf of the respondents. In his written request for an adjournment, learned counsel for the respondents has stated that he is busy in some family function, while giving preference to his personal engagement over his professional duty, as on previous date of hearing, the position was also same, therefore, the reason being not tenable, his application is rejected and the respondents are proceeded against exparte.

Arguments of learned counsel for the petitioner have been heard and record perused.

4. **Under Article 202** of the Constitution of Islamic Republic of Pakistan 1973, the High Court has been empowered to make rules, which, for convenience of reference, is reproduced as follows:-

> "202. Rules of Procedure. Subject to the Constitution and law, a High Court may make rules regulating the practice and procedure of the Court or of any court subordinate to it."

The High Court Rules and Orders further provide guidelines in Vol-I Chapter -1 Part-C Rule 6 that:-

> If the plaint discloses no cause of action, or is barred by any law on the statements made therein, or if the relief claimed is under-valued or the plaint is not sufficiently stamped and the plaintiff fails to correct the valuation or pay the deficiency in the Court-fee within the time fixed by Court the plaint should be "rejected" under Order VII, Rule 11, reasons being recorded by the Presiding Officer in support of the order.

In addition to above, under Section 122 of the Civil Procedure Code, 1908 (Part X, Rules) Power of certain High Courts to make rules:-[The High Courts] may, from time to time after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules annul, alter or add to all or any of the rules in the First Schedule.

> It may be relevant to point out that these rules have survived through 'saving clauses' of successive constitutions (See Article 244 of Constitution 1956, 225 of Constitution 1962

and 268(1) of the Constitution 1973). The rules are primarily a collection of instructions in summarized form, which explain and interpret the laws that are frequently referred to in the Courts.

5. As far as the contents of Order VII Rule 11 CPC are concerned, certain parameters have been encapsulated in it to scrutinize the plaint to control frivolous litigation in limine. Prior to amendment/substitution of clause (d) of the above said Rule by Notification No. 237/Legis/XI-Y-26, dated 15 August 2018, issued by the Lahore High Court, Lahore, it was as under:-

> **11. Rejection of plaints: The plaint shall be rejected in the following cases:-**
>
> a) …….
>
> b) …….
>
> c) …….
>
> d) where the suit appears ***from the statement in the plaint*** to be barred by any law.

The Clause (d) of the Rule by Notification No. 237/Legis/XI-Y-26, dated 15 August 2018, issued by the Lahore High Court, Lahore, published in the Punjab Weekly Gazette, Part-III, dated 22 August 2018, pp. 270-286, r. 6 and came into force on 1st November 2020 through Notification No. 250/Legis/XI-Y-26, dated: 23 October 2020, published in the Punjab Weekly Gazette, Part-III, dated 28 October 2020, p. 225.

Order VII Rule 11 Clause (d) supra after amendment reads as under:-

> **11. Rejection of plaint.–** The plaint shall be rejected in the following cases:–
>
> (a) ……
>
> (b) ……

(c) …….

(d) where the suit appears, ***from the record available with the court***, to be barred by any law.

By introducing amendment in clause (d) of Rule 11 of Order VII CPC, the scope for rejection of plaint has palpably been enlarged. As defined in amended clause (d) of Rule 11 of Order VII CPC, the term record available with the Court includes (i) Pleadings as defined in Rule 1 of Order VI; (ii) Documents attached with plaint under Rule 14 of Order VII; (iii) Form No.14 as required under Order IX-A, stating separately admitted and disputed facts; (iv) Documents attached with the written statement or relied upon by the defendant under Order VIII; (v) Examination and proceedings under Order X; (vi) Any admissions made by parties during the proceedings of a suit under Order XII; (vii) Documents produced by parties under Rule 1 of Order XIII; of CPC. In sum and substance, prior to the above amendment, it was mandated that, if from the statement in the plaint only, it appears that the suit is barred by any law, the plaint could have been rejected, whereas the amendment in clause (d) of supra Rule presently mandates that when the cause, mentioned in the suit, from the record available with the Court, appears barred by any law, the Court is competent to reject the plaint. Such power is vested in the Court to control frivolous and vexatious litigation right from the inception of the suit as the continuation of proceedings would bear no fruitful result rather shall be an exercise in futility and abuse of process of Court and wastage of public time at the expense of other litigants.

6. Before treading ahead, it would be advantageous to examine the scope of the term “barred by law” as mentioned in clause (d) of Order VII Rule 11 CPC. According to the Black's Law Dictionary, “bar” means, a plea arresting a law suit or legal claim. It means as a verb, to prevent by legal objection. According to the Black’s Law Dictionary, “barred” means obstructed by bar. Subject to hindrance or obstruction by a bar or barrier

which, if interposed, will prevent legal redress or recovery, as, when it is said that a claim or cause of action is “barred by the statute of limitation.” According to Ramanatha Iyar's Law Lexicon, “bar” is that which obstructs entry or egress; to exclude from consideration. According to the K J AIYAR judicial Dictionary, word bar of resjudicata means as “impediment to further action”. From above definitions it can be deduced that the barred means no further action shall be taken on cause if no fruitful result is expected.

7. It may be quite relevant to emphasize that Article 17 of The Qanun-e-Shahadat Order, 1984, i.e. competence and number of witnesses in its clause 2(a) makes it obligatory that matter pertaining to financial or future obligations, if reduced into writing, it becomes mandatory that such instrument shall be attested by two men or one man and two women, so that one may remind the other, if necessary and evidence shall be led accordingly. Article 79 when read with Article 17 of ibid, further restricts that any document shall not be used as evidence until two witnesses have been called for the purpose of proving its execution. It is thus clear that unless and until the above referred mandatory conditions are not fulfilled, the document pertaining to financial and future obligation cannot be entertained and admitted in evidence in support of a claim made in the suit, therefore, in absence of fulfillment of the above conditions, the further proceedings, in any suit, would be a mere futile exercise and mere wastage of precious time of the Court. Reliance is placed upon a case reported as “Hafiz Tassaduq Hussain Versus Muhammad Amin through legal heirs and others”(PLD 2011 SC 241).

8. The combined reading of Rule 11 of Order VII of CPC, Articles 17 and 79 of the Qanun-e-Shahadat Order, 1984, provides that while considering the facts of case before it, if it suffers from above mentioned flaws, the Court should not hesitate in exercise of its powers to reject the plaint to nip the evil in the bud. In case titled as

"SIKANDAR ALI and 2 others Versus BADDAR-U-DIN and 4 others" (2019 C L C 1046) it was held that:-

> The provision of Order VII rule 11, C.P.C. does not place any such restriction, rather it lays that an incompetent suit must be buried in its inception, if it is found to be falling within the ambit of clause (d) of rule 11 of Order VII of the C.P.C.

9. So far as the facts of instant case are concerned, the alleged agreement to sell dated 29.12.1998, on the basis of which the respondents have instituted their suit, is not an admitted document. It has not been attested by any of the marginal witnesses. Even in their pleadings, name of none of the witness has been mentioned as attesting witness of the alleged agreement to sell. Moreover, even in their written reply, which they had filed in response to application under Order VII Rule 11 CPC, the respondents have pleaded that the petitioner never denied the execution of alleged agreement to sell rather he had admitted its execution before the people of vicinity and other relatives who shall be produced before the Court at the time of recording of evidence. Therefore, in view of above undisputed and undeniable factual position, since the alleged agreement to sell dated 29.12.1998 lacks the mandatory requirements under Articles 17 and 79 of the Qanun-e-Shahadat Order, 1984, and as such the same cannot be used as evidence, hence the continuation of proceedings before the learned trial Judge, shall be nothing but futile exercise and abuse of process of Court, which cannot be allowed as aforesaid at the expense of public time, which should be consumed by the Court meaningfully in other matters requiring its urgent attention and serious consideration.

10. For what has been discussed above, by allowing this writ petition, the impugned orders dated 13.02.2019 and 22.10.2020, passed by learned Civil Judge 1st Class and the learned Addl. District Judge, respectively are hereby set aside declaring the same to have been passed illegally being result of failure of jurisdiction vested in the Courts below and as such being of no legal effect; consequently, the application under order VII Rule 11 CPC filed by the petitioner is accepted and the plaint of the respondent's suit is rejected.

(ANWAARUL HAQ PANNUN)
JUDGE

APPROVED FOR REPORTING

JUDGE