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FOREWORD

It is both a privilege and a pleasure to write this foreword in honor of Mr. Justice Shakil Ahmad, whose distinguished career as a Judge of the Lahore High Court has been marked by dedication, wisdom, and an unwavering commitment to justice. Throughout his time on the Bench, Justice Shakil Ahmad has earned the respect of his peers, members of the Bar, and litigants alike for his impartiality, sound legal reasoning, and calm demeanor.

His lordship's judgments, spanning a wide range of legal areas-civil, constitutional, criminal, and family law are a testament to his deep understanding of the law and meticulous approach to each case. They are characterized by clarity, precision, and a keen sense of justice, offering much-needed guidance to the lower courts and the legal community. Justice Shakil Ahmad's ability to untangle complex legal issues and deliver reasoned decisions has made a lasting contribution to our legal system.

Justice Shakil Ahmad's courtroom presence has always been marked by humility, patience, and respect for all. He has remained a mentor and a figure of integrity, embodying the highest standards expected of those who hold judicial office. His exemplary character and dedication to ensuring fair and just outcomes have made him a source of inspiration, not only for his colleagues but also for the younger members of the legal profession.

As his lordship embarks on the next phase of life beyond the Bench, I do not doubt that his legacy will endure through the many judgments he has rendered and the lives he has touched. His contributions to the judiciary will continue to serve as a beacon for those who follow in his footsteps.

On behalf of the judiciary and the legal fraternity, I sincerely thank Mr. Justice Shakil Ahmad for his service and wish him all the best in his future endeavors.

(AALIA NEELUM)
Chief Justice

PROFILE

Mr. Justice Shakil Ahmad was born on 12.11.1962 in Bahawalpur. He did his matriculation from Abbasia High School Bahawalpur and graduation from SE College Bahawalpur. Attained Law degree from SM Law College, Karachi and did active practice as an advocate of District Courts, Bahawalpur from 1989 to 1990. After securing license of practice in High Court, had been practicing as an advocate High Court for about 9 years. Elected as General Secretary District Bar Association Bahawalpur in the year 1999.

Selected through competitive examination, as Additional District & Sessions Judge and joined service in Judicial Service on 01.08.2000. As Additional District & Sessions Judge, served in different areas like Sialkot, Mailsi, Chiniot, Summandri, Lahore, Dera Ghazi Khan & Rajanpur.

Promoted as District & Sessions Judge in the year 2009. Served as D&SJ/Judge, Anti Terrorism Court in different districts i.e. Dera Ghazi Khan and twice in Lahore. Was also posted as D&SJ/Judge, Special Anti Corruption Court, in Multan and Rawalpindi. Similarly he has been serving as District & Sessions Judge, in different districts; Rahim Yar Khan, Pakpattan, Vehari, Multan, Rawalpindi, Sheikhupura and Sahiwal. Also served as D&SJ/Special Judge Accountability Court in Multan and Rawalpindi. In addition to above postings, also served as D&SJ/Judge Banking Court, Lahore and D&SJ/Special Judge, Customs, Taxation and Anti-smuggling, Lahore. Served as Registrar, Lahore High Court, Lahore in the year 2018.

Participated in various workshops and training programs. Completed pre-service training at the Federal Judicial Academy in Islamabad from August 1, 2000, to September 9, 2000. Additionally,

attended capacity-building training for District and Sessions Judges at the Punjab Judicial Academy Lahore from May 7, 2012, to May 12, 2012 and another training session on Mental Health and Mens Rea on May 12, 2012 at the Punjab Judicial Academy Lahore. In collaboration with the British High Commission, participated in a workshop at the Punjab Judicial Academy from February 13 to February 16, 2018. Also completed the IST GPT (General Training Program for Sessions Judges), specifically the 78th One Week Training Court from February 9, 2015, to February 14, 2015. Received a certificate from the United States Department of Justice for successful participation in the SAARC Regional Judicial Conference in Dhaka, Bangladesh, held from August 26 to August 28, 2013. Was also awarded certificates for involvement in various workshops, including the "Capacity Building of Banking Court Judges and Bankers" conducted by the Punjab Judicial Academy Lahore on December 22-23, 2015.

Also served as Member, Punjab Service Tribunal, Lahore and from where he was elevated as Judge of Lahore High Court, Lahore on 07.05.2021 and confirmed on 04.11.2022.

TO BE PUBLISHED IN THE
GAZETTE OF PAKISTAN PART-III

GOVERNMENT OF PAKISTAN
MINISTRY OF LAW AND JUSTICE
*****

Islamabad, the 06th May, 2021

NOTIFICATION

No.F.5(1)/2021-A.II.- In exercise of the powers conferred by Article 197 of the Constitution of the Islamic Republic of Pakistan, the President is pleased to appoint the following persons as Additional Judges of the Lahore High Court, Lahore for a period of one year with effect from the date they make oath of their offices:-

1. Mr. Sultan Tanvir Ahmad
2. Mr. Muhammad Tariq Nadim
3. Mr. Ahmad Nadeem Arshad
4. Mr. Ali Zia Bajwa
5. Mr. Abid Hussain Chathha
6. Mr. Muhammad Shan Gul
7. Mr. Mohammad Raheel Kamran Sheikh
8. Mr. Muhammad Raza Qureshi
9. Mr. Anwaar Hussain
10. Mr. Muhammad Amjad Rafiq
11. Mr. Safdar Salim Shahid
12. Mr. Shakil Ahmad
13. Mr. Sohail Nasir

RAJA NAEEM AKBAR
Secretary

The Manager,
Printing Corporation of Pakistan Press,
Islamabad.

Copy to:-

1. Secretary to the President, President's Secretariat, Islamabad.
2. Secretary to the Prime Minister, P.M's Office Islamabad.
3. Secretary, Parliamentary Committee, Senate Secretariat, Islamabad.
4. Secretary Judicial Commission of Pakistan, Islamabad.
5. Registrar, Supreme Court of Pakistan, Islamabad.
6. Registrar, Lahore High Court, Lahore (with one each spare copy for the Hon'ble Judges).
7. Secretary, Office of the Attorney General for Pakistan, Islamabad
8. Secretary to Governor Punjab, Lahore.
9. Chief Secretary to the Govt. of Punjab, Lahore.
10. Accountant General, Punjab, Lahore.
11. S.O to Minister for Law and Justice, Islamabad.
12. P.S.O to Secretary, Ministry of Law and Justice, Islamabad.
13. LIS Wing, Ministry of Law and Justice, Islamabad.
14. Record.

(Saadat Iqtidar Alam)
Section Officer

OATH OF JUDGE,

LAHORE HIGH COURT, LAHORE

بسم الله الرحمن الرحيم

(In the name of Allah, the most Beneficent, the most Merciful)

I, Shakil Ahmad, *do solemnly swear that I will bear true faith and allegiance to Pakistan:*

That, *as Additional Judge of Lahore High Court for the Province of Punjab, I will discharge my duties, and perform my functions, honestly, to the best of my ability, and faithfully, in accordance with the Constitution of the Islamic Republic of Pakistan and the law:*

That *I will abide by the code of conduct issued by the Supreme Judicial Council:*

That *I will not allow my personal interest to influence my official conduct or my official decisions:*

That *I will preserve, protect and defend the Constitution of the Islamic Republic of Pakistan:*

And that, *in all circumstances, I will do right to all manner of people, according to law, without fear or favour, affection or ill-will.*

May Allah Almighty help and guide me (A'meen)

(SHAKIL AHMAD)
ADDITIONAL JUDGE
LAHORE HIGH COURT, LAHORE

OATH made before me, this 7th *day of May, 2021.*

CHIEF JUSTICE
LAHORE HIGH COURT, LAHORE

TO BE PUBLISHED IN THE
GAZETTE OF PAKISTAN PART-III

GOVERNMENT OF PAKISTAN
MINISTRY OF LAW AND JUSTICE
*****

Islamabad, the 3rd November, 2022

NOTIFICATION

No.F.5(1)/2021-A.II.- In exercise of the powers conferred under Article 193 of the Constitution of the Islamic Republic of Pakistan, the President is pleased to appoint the following Additional Judges of the Lahore High Court, Lahore to be the Judges of the said Court with effect from the date they make oath of their offices:-

1. Mr. Justice Shakil Ahmad
2. Mr. Justice Safdar Salim Shahid
3. Mr. Justice Ahmad Nadeem Arshad
4. Mr. Justice Muhammad Tariq Nadeem
5. Mr. Justice Muhammad Amjad Rafiq
6. Mr. Justice Abid Hussain Chathha
7. Mr. Justice Anwaar Hussain
8. Mr. Justice Ali Zia Bajwa
9. Mr. Justice Sultan Tanvir Ahmad
10. Mr. Justice Muhammad Raza Qureshi
11. Mr. Justice Raheel Kamran

(RAJA NAEEM AKBAR)
Secretary

The Manager,
Printing Corporation of Pakistan Press,
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3. Secretary, Parliamentary Committee, Senate Secretariat, Islamabad.
4. Secretary, Judicial Commission of Pakistan, Islamabad.
5. Registrar, Supreme Court of Pakistan, Islamabad.
6. Registrar, Lahore High Court, Lahore (with one each spare copy for the Hon'ble Judges)
7. Secretary, Office of the Attorney General for Pakistan, Islamabad
8. Secretary to Governor Punjab, Lahore.
9. Chief Secretary to the Govt. of the Punjab, Lahore.
10. Accountant General, Punjab, Lahore.
11. D.S to Minister for Law & Justice, Islamabad.
12. P.S.O to Secretary, Law & Justice Division, Islamabad.
13. Joint Secretary (A/E), Law & Justice Division, Islamabad.
14. LIS Wing, Law & Justice Division, Islamabad.
15. Record.

(Sajjad Mustafa)
Section Officer (A-II)

OATH OF JUDGE,

LAHORE HIGH COURT, LAHORE

بسم الله الرحمن الرحيم

(In the name of Allah, the most Beneficent, the most Merciful)

I, Shakil Ahmad, *do solemnly swear that I will bear true faith and allegiance to Pakistan:*

That, *as Judge of Lahore High Court for the Province of Punjab, I will discharge my duties, and perform my functions, honestly, to the best of my ability, and faithfully, in accordance with the Constitution of the Islamic Republic of Pakistan and the law:*

That *I will abide by the code of conduct issued by the Supreme Judicial Council:*

That *I will not allow my personal interest to influence my official conduct or my official decisions:*

That *I will preserve, protect and defend the Constitution of the Islamic Republic of Pakistan:*

And that, *in all circumstances, I will do right to all manner of people, according to law, without fear or favour, affection or ill-will.*

May Allah Almighty help and guide me (A'meen)

(SHAKIL AHMAD)
JUDGE
LAHORE HIGH COURT, LAHORE

OATH made before me, this 4th *day of November, 2022*

CHIEF JUSTICE
LAHORE HIGH COURT, LAHORE

REPORTED JUDGMENTS

PLJ 2021 Cr.C. 1710

[Lahore High Court, Multan Bench]

Present: **SHAKIL AHMAD, J.**

SHOAIB SOHAIL--Petititoner

versus

STATE and another--Respondents

Crl. Misc. No. 3384-B of 2021, decided on 7.6.2021.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), S. 489-F--Bail after arrest, grant of--Dishonored of cheque--It is by now a settled principle of law that where case of petitioner does not fall within ambit of prohibitory clause grant of bail in such like cases is rule and refusal is an exception--If a person, otherwise is found entitled to concession of P.G. remained unable to hint out even a single bail, his liberty cannot be curtailed on ground of charge being of heavy amount--**Held:** By now it is settled principle of law that nobody can be detained by way of punishment when his person is no more required by police and his further detention would serve no useful purpose for prosecution except for some personal grudge of complainant--Courts of first instance should exercise discretion *qua* grant of bail in cases that are not covered under prohibitory clause of Section 497 of Cr.P.C. in light of guidance given by august Supreme Court of Pakistan in above hinted celebrated judgments--Bail was allowed. [Pp. 1711 & 1712] A & B

PLD 1995 SC 34 and PLD 2017 SC 733.

Malik Sajjad Haider Maitla, Advocate for Petitioner.

Mr. Ansar Yasin, Deputy Prosecutor General for State.

Mr. Daud Ahmad Wains, Advocate for Complainant.

Date of hearing: 7.6.2021.

ORDER

This is a petition filed under Section 497 Cr.P.C. by Shoaib Sohail petitioner seeking post arrest bail in case FIR No. 869 dated 23.9.2020 registered at Police Station Cantt, Multan for the offence under Section 489-F, PPC. Earlier applications of the petitioner for the same relief were dismissed by learned trial Court and learned Additional Sessions Judge *vide* orders dated 03.05.2021 and 06.05.2021, respectively.

2. Precisely allegation against the petitioner is that he issued a cheque amounting of Rs. 83,31,871/- in favour of the complainant and same was dishonoured on its presentation before the concerned bank.

3. I have heard the learned counsel for the parties, the learned Deputy Prosecutor General and perused the record with their able assistance.

4. Learned counsel for the complainant and learned Deputy Prosecutor-General remained unable to hint out even a single circumstance whereby case of the accused/petitioner may fall within the purview of exceptions in view of the dicta laid down in case titled *"Tarig Bashir v. The State"* (PLD 1995 SC 34) to decline the relief of post arrest bail to the accused/petitioner. It is by now a settled principle of law that where the case of the petitioner does not fall within the ambit of prohibitory clause grant of bail in such like cases is rule and refusal is an exception. Apart, if a person, otherwise is found entitled to the concession of bail, his liberty cannot be curtailed on the ground of the charge being of heavy amount. By now it is settled principle of law that nobody can be detained by way of punishment when his person is no more required by police and his further detention would serve no useful purpose for prosecution except for some personal grudge of the complainant. Apex Court has reaffirmed dicta laid/down in above referred case law in case *"Muhammad Tanveer v. The State and another"* (PLD 2017 SC 733) in the following terms:

> *"In the case of Tariq Bashir v. The State (PLD 1995 SC 34) this Court has taken notice of stock of prevailing circumstances where under-trial*

prisoners ore sent to judicial lock-up without releasing them on bail in non-bailable offences punishable with imprisonment of less than 10 years. It was held that "bail in such offences shall not be refused. "This Court took further pains by reproducing the entire provision of Section 497, Cr.P.C. and further held that "grant of bail in such offences is a rule and refusal shall be an exception, for which cogent and convincing reasons should be recorded. " While elaborating exceptions, albeit it was mentioned by this Court that if there is a danger of the offence being repeated if the accused is released on bail, then grant of bail may be refused like the two Courts below in this case have held but it was further elaborated that such opinion of the Court shall not be founded on mere apprehension and self assumed factors but the same must be supported by cogent reasons and material available on record and not to be based on surmises and artificial or weak premise."

While taking note of deteriorating condition of the under-trial prisoners in the jail, Apex Court further observed as under:

"It is settled principle of law that once the Legislature has conferred discretion on the Court to exercise jurisdiction in particular category of offences without placing any prohibition on such discretion then, the Court shall not import to the provision of law, reasons or factors alien thereto and not specifically mentioned in the Statute.

Today very prison is accommodating convicted and under-trial prisoners more than double of its capacity and allied facilities besides the State authorities are involved on daily basis in transporting such under-trial prisoners from the prisons to the Court premises on every date of hearing, involving risk and extra expenditure from the public exchequer while on the other hand the dependent family members, especially the school going children of the under-trial prisoners charged for such offences are left without proper care and supervision

of the father or mother when their parents are sent to jail, therefore, their academic career is always at stake and they are tempted and persuaded to indulge in unsocial or anti-social activities ultimately landing them in the field of crimes, which is not good for the society at large."

It is high time that the Courts of first instance should exercise the discretion *qua* grant of bail in cases that are not covered under the prohibitory clause of Section 497 of Cr.P.C. in the light of guidance given by the august Supreme Court of Pakistan in the above hinted celebrated judgments.

5. The upshot of above discussion is that 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. 500,000/- with two sureties in the like amount to the satisfaction of learned trial Court.

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

PLJ 2022 Lahore 584

[Multan Bench Multan]

***Present*: SHAKIL AHMAD, J.**

ABDUL ZAHOOR--Petitioner

versus

JUDGE FAMILY COURT, MULTAN and another--Respondents

W.P. No. 220 of 2022, decided on 2.2.2022.

Family Courts Act, 1964 (XXXV of 1964)--

----S. 9--Punjab Family Courts (Amendment) Act, 2015--Closing of petitioner--Non-filing written statement by petitioner--Judge Family Court proceeded to close right of petitioner--Neither petitioner file written statement on day when he entered appearance before Judge Family Court nor submitted written statement on successive five adjourned dates for a period converting more than five months--Petitioner willfully and by design tried to prolong litigation and did not comply with order of court for submission of written statement.

[Pp. 584, 585 & 587] A, B & C

PLD 1981 SC 246; PLD 1974 SC 139 *ref.*

Mr. Mujeeb-ur-Rehman Hashmi, Advocate for Petitioner.

Haji Dilbar Khan Mahaar, AAG for State.

Mr. Aftab Hussain Malik, Advocate for Respondent No. 2.

Date of hearing: 2.2.2022.

ORDER

Instant petition has been filed under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 to assail order dated 20.11.2021 passed by learned Judge Family Court, Multan, whereby right of Abdul Zahjoor (petitioner herein) to submit written statement was closed.

2. Heard learned counsel for the parties and record so annexed with the petition perused.

3. Learned counsel for the petitioner contends that learned Judge Family Court proceeded to close the right of petitioner in undue haste on technical ground. Learned counsel, however, could not refute the fact that the petitioner through his counsel entered appearance before learned Judge Family Court on 14.06.2021. Neither petitioner filed written statement on the day when he entered appearance before learned Judge Family Court nor submitted written statement on successive five adjourned dates for a period covering more than five months till 20.11.2021 when impugned order was passed by learned Judge Family Court. Procedure for submission of written statement has been specified in Section 9(1) of the Family Courts Act, 1964 (hereinafter referred to as the 'Act, 1964'). For the facility of ready reference, said provision is reproduced hereunder:

> *"[S. 9. (1) Written statement.--On the date fixed under clause (a) of sub-section (1) of Section 8, the plaintiff and the defendant shall appear before the Family Court and the defendant shall file his written statement, and attach therewith list of his witnesses alongwith a precise of the evidence that each witnesses is expected to give."*

Section 9(1) ibid has been amended by the Punjab Family Courts (Amendment) Act, 2015 (hereinafter referred to as 'Punjab Amendment'), which is reproduced hereunder for the facility of ready reference:

> *14(1) On the date fixed under Section 8, the defendant shall appear before the Family Court and file the written statement, a list of witnesses and gist of evidence, and in case the written statement is not filed on that date, the Family Court may, for any sufficient reasons which prevented the defendant from submitting the written statement, allow the defendant to submit the written statement and other documents on the next date which shall not exceed fifteen days from that date."*

In view of above hinted provision of law, the petitioner/defendant was required to have filed written statement on the date of his appearance before the learned Judge Family Court and an adjournment to submit his written statement could have only be granted to the petitioner only for the sufficient reasons so disclosed by him that prevented him from submitting the same on the date of his appearance and next date allowed by the learned Judge Family Court should not exceed 15 days from the date when the petitioner/defendant appeared before the learned Judge Family Court and in case petitioner fails to submit written statement on the subsequent date, his defence has to be struck off in view of newly inserted seb-section (5 A) of Section 9 through Punjab amendment. For the facility of ready reference, section (5A) is reproduced hereunder: -

> *17(5A) If the defendant fails to submit the written statement on or before the date under seb-section (1), the defence of the defendant shall stand struck off and the Family Court shall decide the case under the law."*

As per above referred provisions, petitioner's right to submit written statement was to be struck off on the next date of hearing *i.e* 12.07.2021 when he failed to file written statement, although next date was granted in utter disregard of provisions of Section 9 (1) of the Punjab Amendment, whereunder next date should not have been granted beyond period of fifteen days. Despite the grace rather unnecessary leniency shown by learned Judge Family Court and that too in disregard of above hinted provisions of law, petitioner failed to file written statement and case was again adjourned for 11.09.2021 but on that date petitioner again failed to file the written statement. Submission of learned counsel for the petitioner that on these two dates learned Presiding Officer was on leave therefore non-filing of written statement on these two dates cannot be attributed to petitioner, on the face of it, is not only naive but also ridiculous, for the simple reason that absence of learned Presiding Officer in no way could have caused any hindrance in the way of the petitioner to comply with the order for submission of written statement by submitting written statement before the Court even the learned Judge Family Court was on leave as it was the judge who was on leave not the Court. It may further be seen that on the subsequent adjourned date *i.e* 13.10.2021 again written statement was not filed and learned Judge Family Court again proceeded to adjourn the case merely on the request of learned counsel for the petitioner by remaining in total oblivion to the above hinted provisions of the Punjab Amendment and finally on 20.11.2021, learned Judge Family Court proceeded to close the right of the petitioner to submit written statement. Learned counsel for the petitioner failed to advance any plausible reason or ground for not submitting written statement before the learned Judge Family Court for the period of more than five months. It may be advantageous to refer at this juncture that the provisions of Section 12-A of the Act, 1964 provide period of six months for the decision of a family case whereas in the instant

case, it took period of around more than five months requiring the petitioner to file his written statement and even the same was not submitted till the impugned order was passed on 20.11.2021. Instant is a classic example of indolence on the part of the petitioner at one hand and on the other, showing of unnecessary and undue grace by learned Judge Family Court in granting successive dates in a mechanical manner for submission of written statement and that too in disregard of the provisions inserted through Punjab Amendment Undeniably, right of defence is fundamental right of the opposing party but at the same time parties to a lis have to show due diligence in-safeguarding their legal rights and a party cannot be allowed to unnecessarily prolong the legal proceedings at his own whims and caprice. The Courts are well within jurisdiction to regulate the trial proceedings as per the dictates of relevant provisions of law and make their best efforts to conclude the trial within the prescribed period and would not allow a latish litigating party to jeopardize the ends of justice by procrastinating the lis and by militating against the provisions of law aimed at swift decision of family matters. It is well established principle of law that this Court in exercise of constitutional jurisdiction has only to see that whether the Court/tribunal acted without jurisdiction or had violated the statute or law laid down by the superior Courts. Reliance in this regard may safely be placed on cases reported as *"Muhammad. Sharif and another v. Muhammad Afzal Sohail etc.*"(PLD 1981 Supreme Court 246), and *"Muhammad Hussain Munir and others v. Sikandar and others"* (PLD 1974 SC 139). At the cost of repetition, it may be observed that learned counsel for the petitioner failed to point out even a single instance/reason justifying non-submission of written statement on the part of the petitioner for the period of more than five months and this is clearly suggestive of the fact that the petitioner willfully and by design tried to prolong the litigation and did not comply with the order of the Court for submission of written statement.

Law indeed favours the vigilant and not the indolent. In the instant case, it was not merely indolence on the part of the petitioner rather his conduct *qua* non-compliance of order for submission of written statement was contumacious. Learned counsel for the petitioner has failed to point out any valid ground wherefrom it may even remotely be considered that learned Court below while passing the impugned order has acted either without jurisdiction or the impugned order has been passed in violation of any law.

4. The upshot of above discussion is that petition in hand is devoid of any force, therefore, the same is dismissed.

(K.Q.B.)

PLJ 2022 Cr.C. 977

[Lahore High Court, Multan Bench]

***Present*: SHAKIL AHMED, J.**

MUHAMMAD IMRAN--Petitioner

versus

STATE and another--Respondents

Crl. Misc. 1185-B of 2022, decided on 3.3.2022.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), S. 489-F--No prohibitory clause--Post arrest bail--Grant of--Petitioner is named in the FIR and there is no denial to the fact that the cheque in question pertained to petitioner's bank account, yet the offence under Section 489-F, PPC with which petitioner has been charged, entails punishment up to three years as such the same fell outside the prohibitory clause of Section 497, Cr.P.C.--Petition in hand is allowed. [P. 978] A

PLD 1995 SC 34 *ref.*

Ch. Abdul Rehman Zouq, Advocate for Petitioner.

Syed Nadeem Haider Rizvi, Deputy District Public Prosecutor for State.

Mr. Tariq Mehmood Dogar Advocate for Complainant.

Date of hearing 3.3.2022.

ORDER

Instant petition has been filed under Section 497, Cr.P.C. by Muhammad Imran petitioner seeking post arrest bail in case FIR No. 443 of 2021 dated 04.11.2021 registered at Police Station Bahadur Shah, District Sahiwal for the offence under Section 489-F, PPC. Earlier applications of the petitioner for the same relief were dismissed by learned Magistrate 1st Class,

Sahiwal and learned Additional Sessions Judge, Sahiwal *vide* orders dated 01.02.2022 and 11.02.2022, respectively.

2. Precisely allegation against the petitioner is that he issued a Cheque No. 19694137 amounting of Rs. 10,00,000/- in favour of before the complainant and same was dishonoured on its presentation the concerned bank.

3. Having heard learned counsel for the parties and learned DDPP, it has been noticed that although the petitioner is named in the FIR and there is no denial to the fact that the cheque in question pertains to petitioner's bank account, yet the offence under Section 489-F, PPC with which petitioner has been charged, entails punishment upto three years as such the same fell outside the prohibitory clause of Section 497, Cr.P.C. It is by now a settled principle of law that where case of an accused does not fall within the ambit of prohibitory clause, grant of bail in such like cases is rule and refusal is an exception. There is no cavil to the proposition that in appropriate cases bail can be withheld in cases falling outside the purview of prohibitory clause provided there exist some recognized exceptional circumstances, however in the case in hand learned counsel for the complainant and learned DDPP remained unable to hint out even a single circumstance whereby case of the petitioner may fall within the purview of exceptions in view of the dicta laid down in case titled *"Tariq Bashir v. The State"* (PLD 1995 SC 34) to decline the relief of post arrest bail to the petitioner.

4. The upshot of above discussion is that 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. 200,000/- with two sureties in the like amount to the satisfaction of learned trial Court.

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

PLJ 2022 Cr.C. 1044
[Lahore High Court, Multan Bench]

***Present*: SHAKIL AHMAD, J.**

MUHAMMAD IMRAN and another--Appellants

versus

STATE and another--Respondents

Crl. A. Nos. 1435, 1361 & Crl. Rev. No. 479 of 2019,
heard on 2.3.2022.

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

----Ss. 302 / 337-A(ii) / 337-A(i) / 337-F(vi)/337-F(i)/148/149--Conviction and sentence--Acquittal of co-accused--Difference in venue of occurrence--Belated recording of FIR--Conflict in between evidence of ocular account--Benefit of doubt--Venue of occurrence as per the contents and even examination of the witness is utterly in contradiction with the contents of scaled and un-scaled site-plan--Belated recording of the FIR would give rise to strong presumption that was drafted after due consultation and deliberations by assigning specific roles to the six accused persons including a woman accused with some ulterior motives and design--PW gave photographic narration of the injuries said to have been caused by each accused and same in ordinary course of nature was not possible--Possibility of narration of sequence of the incident given by complainant being tutored, cannot be ruled out--PW was discharged by the hospital but he did not move any application for registration of case--All three witnesses of ocular account seem to have concealed the facts and happenings--Evidence of witnesses of ocular account cannot be considered as trustworthy and confidence inspiring--Conflict in between evidence of ocular account and medical evidence in fact has caused a serious dent to the prosecution evidence--Motive part has already been disbelieved by the trial court--When ocular account as discussed in preceding paragraphs is not worthy of credit, reliance cannot be placed on recoveries which are only corroborative in nature--Appellants are acquitted. [Pp. 1054, 1055, 1056, 1057, 1058 & 1059] A,B,C, D, E, F, G, H, K & L

2021 SCMR 873; 2015 SCMR 840 *ref.*

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

----Ss. 302/337-A(ii)/ 337-A(i)/ 337-F(vi)/ 337-F(i)/148/149--Acquittal of co-accused--Both the acquittal co-accused were attributed specific roles in the occurrence and evidence against them was same but trial court proceeded to acquit them--Such eye-witness could not be relied upon for the purpose of convicting another accused without independent corroboration. [P. 1058] I

2020 SCMR 319; 2015 SCMR 1142; 2008 SCMR 6 *ref.*

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

----Ss. 302 / 337-A(ii) / 337-A(i) / 337-F(vi) / 337-F(i) / 148 / 149--Injured witness--Mere injury present on the person of a witness cannot make him a truthful witness. [P. 1058] J

2011 SCMR 323 *ref.*

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

----Ss. 302 / 337-A(ii) / 337-A(i) / 337-F(vi) / 337-F(i) / 148 / 149--Injured witness--If the witnesses, even though the injured witnesses, did not come out with the whole truth, their evidence could not be used for convicting some of the accused keeping in view the principle as enshrined in *Maxim "falsus in uno falsus in omnibus'* particularly where truth in the case was mixed very heavily with something which was untrue and both the parties did not disclose true and real facts--If it would become almost impossible to separate the truth from the heap of falsehood, leaving the court with no other option out to acquit the remaining accused persons by extending them benefit of doubt. [P. 1059] M

2019 SCMR 1949 *ref.*

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

----Ss. 302 / 337-A(ii) / 337-A(i) / 337-F(vi) / 337-F(i)/148/149--Benefit of doubt--As per saying of the Holy Prophet (peace be upon him) the

mistake in releasing a criminal is better than punishing an innocent person. [P. 1059] N

PLD 2002 SC 1048 *ref.*

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

----Ss. 302/337-A(ii) / 337-A(i) / 337-F(vi) / 337-F(i) / 148/149--Benefit of doubt--If a single circumstance that creates reasonable doubt in the mind of a prudent person accused would be entitled to get the benefit thereof not as a matter of grace but as a matter of right.

[P. 1060] O

2009 SCMR 230 *ref.*

M/s. Tariq Mehmood Dogar, Khawaja Qaisar Butt, Nasir Mehmood Balouch. Advocates for Appellants.

Mr. Muhammad Javaid Iqbal, Advocate for Complainant.

Malik Riaz Ahmed Saghla, Additional Prosecutor General for State.

Date of hearing: 2.3.2022.

JUDGMENT

Muhammad Imran and Muhammad Sohail through Criminal Appeal No. 1435 of 2019, whereas Khadi Hussain and Muhammad Shoaib through Criminal Appeal No. 1361 of 2019 have challenged their conviction and sentences. They along with Abid Hussain and Kaneez Mai were indicted and tried by learned Additional Sessions Judge, Multan on the charge under Sections 302, 337-A(i), 337-A(ii), 337-F(i)5 337-F(vi), 148, 149, PPC in case FIR No. 344 of 2018 dated 05.09.2018 registered at Police Station Saddar, Multan. Learned trial Court, on conclusion of trial *vide* judgment dated 09.12.2019 (impugned judgment) acquitted co-accused Kaneez Mai and Abid Hussain by extending them benefit of doubt and proceeded to convict the appellants and sentenced them as under:

(1): ***Muhammad Imran***:

Convicted under Section 302(b) of PPC and sentenced to undergo imprisonment for life as Ta'zir and was directed to pay Rs. 1,00,000/-

to the legal heirs of the deceased as compensation under Section 544-A of Cr.PC or in default, to further undergo six months SI.

*(2): **Muhammad Sohail:***

Convicted under Section 302(b) of PPC and sentenced to undergo imprisonment for life as Ta 'zir and was directed to pay Rs. 1,00,000/- to the legal heirs of the deceased as compensation under Section 544-A of Cr.PC or in default, to further undergo six months SI.

*(3) **Khadim Hussain**:*

Convicted under Section 337-A(ii) of PPC and sentenced to pay Arsh of Rs. 1,02,797/- to injured Muhammad Siddique and tor undergo imprisonment for three years.

*(4): **Muhammad Shoaib:***

Convicted under Section 337-A(ii) of PPC and sentenced to pay Arsh of Rs. 1,02,797/- to injured Muhammad Suleman and to undergo imprisonment for three years.

Benefit of Section 382-B, Cr.P.C. was extended to all appellants, complainant Muhammad Siddique Ahmad has filed Criminal Revision No. 479 of 2019 seeking enhancement of sentence of appellants. Since all these matters have originated from the impugned judgment dated 9.12.2019, the same are being decided through this single consolidated judgment.

2. Muhammad Siddique Ahmad, the complainant moved an application (Exh:PH) before SHO Police Station Sarddar Multan, stating therein that he and his brothers namely Muhammad Usman & Suleman had a General Store in Usmania Bazaar and his brother Muhammad Farooq had a crockery shop there; on 03.09.2018 at about 01:00 P.M, when complainant along with his brothers Usman and Salman was present at General Store and Muhammad Farooq was also present on his shop, Khadim Hussain armed with sota, Sohail Ahmad armed with sota, Muhammad Imran armed with Rifle 7-MM, Shoaib armed with iron rod, Abid Husain and Kaneez Bibi armed with bricks came at the shop of Farooq; Imran gave blow of rifle batt on left side of head of complainant's brother and Sohail gave sota blow hitting on back side

of head of Farooq, who became unconscious and fell down; When Usman and Salman came at the spot for rescue, Shoaib gave iron rod blow hitting on back side of head and Sohail gave sota blow hitting on left arm of Usman; Sdhail gave another sota blow hitting on left leg of Usman. Shahab-ud-Din, cousin of the complainant when tried to rescue, Khadim Hussain gave sota blow hitting on left side of head of Shahab-ud-Din; Shoaib gave iron rod blow hitting on back side of head of Salman; Abid hit a brick on left cheek of Shahab-ud-Din and Kaneez Bibi hit brick on his forehead on right side; Abid hit brickbat on backside of head of Salman; Khadim Hussain gave sota blow hitting on head of the complainant and Shoaib gave iron rod blow hitting on right side of head of the complainant; Khadim Hussain gave sota blow hitting on right side of head of the complainant; Kaneez Bibi gave brickbat blow hitting on right cheek of the complainant; Khadim Hussain gave sota blow hitting on belly of the complainant. Upon hearing hue & cry, Muhammad Mujahid, Muhammad Habib Ahmad and others came at the spot and due to their intervention, accused persons left the spot along with weapons. Motive, as described in Exh:PH, was that the accused persons were forbidden to park coat before the shops and exchange of hot words took place and due to this grievance they with their common intention caused injuries to the complainant side.

3. Muhammad Anwar ASI (PW-2), the posted as ASI at Police Station Saddar, Multan, having received information of the occurrence, said to have reached at Nishtar Hospital, Multan and inspected the injured persons and prepared injury statements of Muhammad Usman, Farooq, Suleman, Shahab-ud-Din and Siddique Exh.PA, Exh.PB, Exh.PC, Exh.PD and Exh.PE. The investigation was then entrusted to Muhammad Hanif SI (PW-11), who claimed to have reached at the place of occurrence; interrogated Muhammad Siddique, Muhammad Mujahid and Habib Ahmad; inspected place of occurrence and took blood stained cotton through recovery memo. Exh.PM; recorded statement of witness namely Habib Ahmad; prepared rough site-plan of place of occurrence Exh.PN; endorsed cross-version application submitted by Khadim Hussain and sent the same to police station for incorporation of Rapt; on 07.09.2018 recorded statements of witnesses namely Muhammad Mujahid, Habib Ahmad Muhammad Anwar ASI, Muhammad Jaffar 1689/C

and Mudassar Zia Control Room Incharge 1122; took into possession clothes of injured persons namely Farooq (*i.e* Shalwar P/3), Suleman (*i.e* Shalwar P/4), Usman (*i.e* Shalwar P/5), Shahab-ud-Din (*i.e* Shalwar P/6) and Siddique (*i.e* Shalwar P/7) *vide* recovery memo. Exh.PO, Exh.PP, Exh.PQ and Exh.PR, respectively; on 08.09.2019, after receiving information regarding the death of Muhammad Farooq, added Section 302 of PPC ana handed over the file of the case to Incharge HIU Circle Saddar, Multan. The investigation was then entrusted to Zahid Hussain SI (PW-16) who claimed to have visited Nishtar Hospital, Multan; inspected dead body of Farooq, prepared injury statement Exh.PT and inquest report Exh.PU; handed over the documents along with the dead body to Mobeen Yousaf 3440/C for post-mortem examination; visited place of occurrence and recorded version of Asad Ikram, Mehboob, Sajjad, Saqib Nawaz, Abid, Junaid, Bilal, Irfan and Amir inspected place of occurrence and prepared rough site-plan Exh.PAA; recommended cancellation of cress-version being false; took into possession last worn clothes of the deceased *i.e* Shalwar P/1 and secured the same through recovery memo. Exh.PF; after making proceedings at Nishtar Hospital, Multan returned to police station and handed over parcel to Moharrar made notes with red ink on the scaled site-plan Exh.PZ, Exh.PZ/1 and Exh.PZ/2; on 25.09.2018, Mubeen Yousaf, 3440/C handed over to him photographs of deceased which he took into possession through recovery memo. Exh.PG; on 27.09.2018, arrested Muhammad Imran and Muhammad Sohail; on 28.09.2018 obtained physical remand of Muhammad Imran and Muhammad Sohail; on 03.10.2018, on disclosure of Muhammad Sohail recovered sota P/9 lying under the cot in the drawing room of his house and took the same into possession through recovery memo. Exh.PV besides preparing site-plan of place of recovery Exh.PV/1; on disclosure of Muhammad Imran recovered weapon of offence Rifle 7-MM P/10 from Almirah of the room of his house and took the same into possession *vide* recovery nemo. Exh.PW besides preparing site-plan of place of recovery Exh.PW/1; on 10.11.2018 on disclosure of Khadim recovered sota lying underneath the Iron Petti and took the same into possession *vide* recovery memo. Exh.PX besides preparing site-plan of place of recovery Exh.PX/1; on 11.11.2018 on disclosure of Shoaib recovered Sariya P/12 from his house and took the same into possession *vide* recovery

memo. Exh.PY besides preparing site-plan of place of recovery Exh.PY/1; on 13.11.2018 sent the file to SHO for preparation of report under Section 173 of Cr.PC and the same was duly prepared by SHO concerned on 05.12.2018 by placing the names of four accused persons namely Muhammad Imran, Muhammaa Sohail, Muhammad Shoaib and Khadim Hussain in Column No. 3 of report under Section 173, Cr.P.C. Appellants were indicted on 25.03.2019. They did not plead guilty and the trial commenced.

4. Muhammad Jaffar (PW-1) stated to have got conducted medical examinations of injured persons at Nishtar Hospital, Multan and handed over MLCs of injured persons to Moharrar of Police Station, Muhammad Anwar ASI (PW-2) claimed to have prepared injury statements of injured persons namely Muhammad Usman, Farooq, Suleman, Shahab-ud-Din and Saddique Exh.PA, Exh.PB, Exh.PC, Exh.PD and Exh. PE respectively and handed over the same to Muhammad Jaffar 1689/C for getting conducted medical examination of above said injured persons. Mobeen Yousaf (PW-3) claimed to have handed over last worn clothes of the deceased *i.e* Shalwar light pink colour P/1 along with police papers and post-mortem report to Zahid Hussain SI/I.O. after receiving the same from doctor which were taken into possession by the I.O. *vide* recovery memo. Exh.PF attested by him; handed over photographs of deceased Muhammad Farooq P2/1-4 to I.O. which were taken into possession by the 1.O. *vide* recovery memo. Exh.PG. Arshad Ali 1119/HC (PW-4) claimed to have attested recovery memo. Exh.PG. Muhammad Siddique (PW-5) is the complainant of the case and has attempted to substantiate the version taken in his application Exh:PH. Muhammad Usman (PW-6) is an injured witness and has deposed accordingly by narrating certain events which took place at the place of occurrence. Muhammad Salman (PW-7) is also injured witness of the case. Dr. Mahmood Ahmad Admin Registrar (PW-8) having received a letter from Incharge, Homicide Investigation Unit Circle Saddar, Multan Exh.PJ prepared ward report Exh.PJ/1 observing as under:

> *"The said patient was admitted through emergency on 03.09.2018 with head injury. His GCS was 12/15. He was diagnosed as a case of left pariental and right parietal extradural hematoma with fracture of right*

parietal bone of skull. He was operated on 04.09.2018. He was expired on 03.09.2018.

Dr. Saleem Akhtar Khan has also been shown to have appeared as PW-8 and he in fact appeared as secondary witness on behalf of Dr. Mahmood Ahmad and claimed to have been well acquainted with the handwriting of Dr. Mahmood Ahmad whose examination-in-chief was already recorded as PW-8. He claimed to have identified the handwriting of Dr. Mahmood Ahmad on documents Exh.PJ/1 to Exh.PJ/17. Muhammad Mudassar, Control Room Incharge (PW-9) claimed to have prepared incident report Exh.PK. Shafqat Nabi 469/HC claimed to have chalked out formal FIR Exh.PL; kept the sealed parcel said to contain blood stained cotton in Maalkhana for safe custody; on 03.09.2018, Muhammad Hanif ASI handed over to him five sealed parcels of clothes of injured persons for keeping in police *Maalkhana* for safe custody and on 8.9.2018 Zahid Hussain SI/I.O. handed over to him last worn clothes of deceased Farooq for keeping in safe custody; Muhammad Hanif SI (PW-11) claimed to have endorsed the application Exh.PH and sent the name to police station through Muhammad Afzal 3885/C for registration of formal FIR. Dr. Mukhtar Ahmad, Senior Demonstrator (PW-12) claimed to have conducted post-mortem examination on dead body of Muhammad Farooq and observed following injuries:

Injuries:

1) A stitched wound, having four stitches 3.5cm in length with irregular margins on (L) frontal area of head 6cm above (L) eyebrow;

2) A stitched wound having three stitches with irregular margin 3cm in length on left back of head 3cm postero superior to (L) ear.

An operative stitched wound with 29 stretches on lop and (L) side of head U shaped. No ligature mark seen around neck. Hyoid bone intact.

He opined that both the injuries were ante-mortem and caused by blunt weapon. Injury No. 2 Individually and Injuries No. 2 and 1 collectively were likely to cause death in ordinary course of nature. Injury No. 2 was injury to vital organ *i.e.* Brain. Probable time between injury and death was 04 to 05 days and probable time between death and post-mortem was 02 to 04 hours.

Dr. Nasir Javaid (PW-13) claimed to have examined Muhammad Farooq on 03.09.2018 in injured condition and observed following injuries on his person:

1) A lacerated wound of 3½ x 1 cm on left side of front of head, 06cm above left eyebrow, scalp-deep (adv: X-ray).

2) A lacerated wound of 03 x 01cm on left back of head, 03cm behind left ear, underlying bone exposed, (adv. X-ray).

Injury No. 1 was declared as Shajja Mudihah and Injury No. 2 was declared as Shajjah Kafifa. Probable duration of injuries was 06-hours.

Both injuries were inflicted with blunt weapon.

On the same day he also examined Muhammad Usman injured and observed following injuries:

1) A lacerated wound of 3-1/2 on right side of head, 08cm from right car 16cm from right eyebrow, scalp-deep.

2) A contused swelling of 15 x 10cm at middle of left forearm with deformity of left forearm. On clinical X-ray fracture of radius and Ulna with displacement.

3) An abrasion of 2 x 1 cm on front of left lower leg, 18cm below left knee joint.

Injury No. 1 was declared as Shajja Khafifa and Injury No. 2 was declared as Jurrah Ghair Jaifa Munaqlah while Injury No. 3 was declared as Jurrah Ghair Jaifa Damiah.

Probable duration of injuries was 06-hours. All injuries inflicted with blunt weapon.

On the same day he also examined Muhammad Siddique and observed following injuries on his person:

1) A lacerated wound of 03 x 1-1/2 cm on right back top of head, 12cm from right ear, 13cm from right eyebrow, underlying bone was exposed (adv: X-ray),

2) A lacerated wound of 07 x 01cm on left side of head, 09 cm, from left ear, 11 cm from left eyebgrow, scalp-deep (adv: X-ray).

3) A lacerated wound of 1-1/4 x 1/3 cm on right cheek prominence with swelling of 03 x 02cm around the wound, skin deep.

4) Multiple contusions and abrasions on left scapular region. Injury No. 1 was declared as Shajja Mudihah, Injuries No. 2 & 3 were declared as Shajjah Kafifa, Injury No. 4 was declared as Jurrah Ghair Damiah.

Probable duration of injuries was 06-hours. All injuries were inflicted with blunt weapon.

On the same day he also examined injured Shahab-ud-Din and observed following injuries on his person:

1) A lacerated wound of 04 x 01 on left front of head, 05cm above left eyebrow, underlying bone exposed, (adv: X-ray).

2) A contused swelling of 03 x 02 cm on left cheek prominence.

Injury No. 1 was declared as Shajja Mudihah, Injury No. 2 was declared as Shajjah Kafifa.

Probable duration of injuries was 06-hours. All injuries inflicted with blunt weapon.

On the same day he also examined injured Muhammad Suleman and observed following injuries on his person:

1) A lacerated wound of 03 x 01 cm on left back top of head, 10cm from left ear, underlying bone exposed, (adv: X-ray).

2) A contused swelling of 05 x 04 cm on right of forehead, above right eyebrow.

3) A lacerated wound of 1 x 1/3 cm on right back of head, 10cm below the right ear, scalp-deep.

4) An abraded area 6 x 4cm on front and inner aspect of left fore-arm, 12cm above left wrist.

5) Multiple contusion with overlying abrasions over area converting almost whole back of chest.

Injury No. 1 was declared as Shajja Mudihah, Injuries No. 2 & 3 were declared as Shajjah Kafifa and Injury No. 4 & 5 were declared as Jurrah Ghair Jaifa Damiah.

Probable duration of injuries was 06-hours. All injuries inflicted with blunt weapon.

Muhammad Mujahid (**PW-14**) is injured witness and he deposed accordingly. Raja Usman Yousaf (PW-15) claimed to have prepared scaled site-plan Exh.PZ, Exh.PZ/1 and Exh.PZ/2. Zahid Hussain SI (PW-16) is also Investigator of the case.

5. PWs namely Umer Farooq 2085/C, Habib and Shahab-ud-Din were given up by the prosecution being unnecessary. Learned DDPP by tendering in evidence Forensic DNA and Serology Analysis Reports as Exh.PAB and Exh.PAC closed the prosecution evidence.

6. Statements of accused persons under Section 342, Cr.P.C. were recorded. All of them professed their innocence. None of them except Muhammad Imran opted to appear as their own witness under Section 340(2), Cr.P.C. All of them, however, opted to produce defence evidence and by tendering in defence evidence documents Exh.DA to Mark-DM, closed their defence evidence.

7. Learned counsel for appellants argued that prosecution hopelessly failed to prove its case against appellants beyond shadow of reasonable doubt. To explain the same, it has been argued that evidence of ocular account is replete with contradictions and dishonest improvements and for that reason two accused persons facing trial earned acquittal and in view of dicta laid down in cases *"Shaban Akhtar v. The State"* (2021 SCMR 395), *"Liaqat Ali v. The State"* (2021 SCMR 455) and *"Muhammad Idrees v. The State"* (2021 SCMR 612) remaining accused persons were also entitled to be treated in the same way. Learned counsel concluded that even a single circumstance creating doubt in prosecution case was sufficient for acquittal of accused but learned

trial Court has proceeded to convict the appellants merely on the basis of presumptions and surmises.

8. As against that, learned Law Officer duly assisted by learned counsel for the complainant argued that prosecution successfully proved its case against appellants at trial. Added that learned trial Court by following the principle of sifting the grain from the chaff, awarded conviction and sentence to appellants on the basis of positive evidence of ocular account that was duly supported by medical evidence. It was further argued that mere relationship of PWs inter se was not sufficient to discard their evidence most particularly where all witnesses of the ocular account themselves sustained injuries in the same incident, as such their presence at the spot cannot be doubted in any manner. It has further been argued that ocular account was also supported by recoveries of weapons of crime from the appellants It was, therefore concluded by learned counsel for complainant that since prosecution case was proved through straightforward and reliable evidence' and there existed no circumstances for awarding lesser sentence, be accepting revision petition filed by complainant, sentence of appellants be enhanced to the maximum.

9. I have heard learned counsel for the parties and learned Additional prosecutor General and have gone through the record with their able assistance.

10. Venue of occurrence as per Exh.PH was shop of Farooq deceased. As per contents of Exh.PH complainant was present along with Salman and Usman on his general store whereas his brother Farooq was sitting in his shop when Khadim Hussain Sohail Ahmad. Muhammad Imran, Shoaib, Abid Hussain and Kaneez Bibi launched attack after arriving at the shop of Farooq and thereafter complainant started giving the details of the injuries caused by each of the accused with their respective weapons not only on the person of Farooq but also injured PWs including himself. When Muhammad Siddique complainant appeared as PW-5, he narrated almost the same story as given in his written complaint Exh.PH Complainant as per his own showing, was present at his shop along with Salman and Usman whereas Farooq was shown to be sitting in his shop when he was attacked by the accused persons. Complainant has not stated at all that how and when he along with Salman and

Usman left his shop and rushed to the shop of his brother Farooq where he was shown to be present and was attacked by the assailants. In the face of this deposition of complainant, the venue of occurrence precisely was the shop of Farooq deceased where he was shown to be present. This deposition is in conflict with the scaled and un-scaled site-plans of the place of occurrence. As per un-scaled site-plan Exh.PN prepared by Muhammad Hanif SI on 06.09.2018 occurrence took place near Chowk Siddique-e-Akbar (Point No. 1) on a road and strangely enough, no shop of complainant has been shown in Exh.PN where he along with Usman and Salman was present. Presence of complainant and PWs has been shown at Point No. 2, which again is road near and around Chowk Siddique-e-Akbar and strangely enough, names of PWs have also not been mentioned in Exh.PN and similarly the names of all accused persons and the injured persons have not been mentioned in Exh.PN. Another un-scaled site-plan Exh.PZ was prepared by Zahid Hussain SI on 08.09.2018 and as per its contents again venue of occurrence is not the shop of Farooq deceased rather same has been shown in front of Ansari General Store on road near Chowk Siddique-e-Akbar Usmania Bazaar Shuraj Miani. It has not all been mentioned in both un-sclaed site-plans Exh. PN and Exh. PZ that in fact Farooq deceased was sitting in his shop and was attacked as per the story given in Exh.PH. Another glaring aspect of the matter that needs to be hinted here is that Exh.PN was shown to be prepared on 6.09.2018 by Muhammad Hanif ASI and till that date Section 302 of PPC was not added but said section finds mention in Exn.PN, suggesting that Exh.PN was in fact prepared after the addition of Section 302 of PPC on 08.09.2018. Similar is the situation that has been depicted in scaled site-plan Exh.PZ/1, according to which place of occurrence at least is not the shop of Farooq deceased rather it is a thoroughfare near Chowk Siddique-e-Akbar Usmania Bazaar Suraj Miani. Venue of occurrence as per the contents of Exh.PH and even examination-in-chief of complainant and Muhammad Usman is utterly in contradiction with the contents of scaled and un-scaled site-plans. Occurrence as per prosecution case took place on 03.09.2018 at 01:00 PM whereas application Exh.PH was produced before Muhammad Hanif ASI on 06.09.2018 and no explanation, what to speak of any plausible explanation, was forthcoming to justify belated reporting of the matter to police. Belated lodging of FIR would give rise to

strong presumption that Exh.PH was drafted after due consultations and deliberations by assigning specific roles to the six accused persons including a woman accused with some ulterior motives and design. Reliance in this regard may safely be placed on case *"The State through P.G Sindh and others v. Ahmad Omar Sheikh and others"* (2021 SCMR 873). Since a photographic narration of occurrence as given by the complainant in the instant matter was highly improbable rather in ordinary course of nature it was beyond the feat of human intellect to narrate each and minute detail of the occurrence with a level of exactitude, it could conveniently be resolved that-FIR was lodged after due deliberations after medico legal reports; Guidance in this regard has been sought from case *"Irfan Ali v. The State"* (2015 SCMR 840). It may not be out of place to mention here that as per the contents of Exh.PA, Exh.PB, Exh.PC, Exh.PD and Exh.PE the version of injured persons before Muhammad Anwar ASI was that they were inured by Khadim Hussain, Sohail, Shoaib, Abid, Shafiq and three/four unknown persons, whereas as per the contents of application Exh.PH neither Shafiq nor three/four unknown persons were hinted as accused. This fact also reflects that Exh.PH was in fact prepared after deliberations with some ulterior motives.

11. Adverting to the appraisal of evidence of ocular account, it may be seen that Muhammad Siddique appeared as PW-5 and in examination in chief he deposed the facts as hinted in Exh.PH. This PW again gave photograph; narration of the injuries said to have been caused by each accused and the same in ordinary course of nature was not possible particularly when this PW was also under attack and even claimed to have received two successive blows inflicted by Khadim Hussain one hitting on his head and another on his face besides receiving the injuries from accused Shoaib ana Kaneez. Possibility of narration of sequence of the incident given by complainant PW-5 being tutored, cannot be ruled out. When this PW was put to cross-examination, he showed lack of knowledge about the facts that Imran and Shahab-ud-Din were arrested in the proceedings under Section 107 and 151 of Cr.PC *vide* rapat No. 39 dated 03.08.2018. He, however stated that Muhammad Shafiq was complainant of case FIR No. 343/18 dated 06.09.2018 in which he, his brother Usman, Mujahid, Ahsan and one unknown person

were shown as accused persons for an occurrence which took place on 03.09.2018 at about 07:00/07:30 AM. However, he against showed his lack of knowledge that Muhammad Imran appellant and Danish were cited as PWs in the said FIR. According to him (PW-5), he alongwith Salman were discharged from the Hospital On 03.09.2018. He further admitted it correct that he did not move any application for registration of case prior to submission of Exh.PH and he did not approach police station Saddar even on 04.09.2018 for registration of criminal case. He (PW-5) further admitted it correct that police officials, did not visit the place of occurrence from 03.09.2018 to 05.09.2018. As per PW-5, police officials visited place of occurrence after some days of death of Farooq. When whole of the deposition of this PW is seen in its entirety, it can safely be concluded that he did not at one hand come up with any justifiable reason for belated lodging of FIR and on the other, was also not telling the truth *qua* the other happenings which took place on 03.09.2018 in the result of which FIR No. 343/18 was lodged in which Muhammad Imran appellant was cited as a witness. Evidence of this PW thus cannot safely be relied upon for conviction on the capital charge. Second PW of ocular account is Muhammad Usman PW-6. He too has given a comprehensive account of the occurrence by giving minute details. However, when put to the ordeal of cross-examination, PW-6 too attempted to deny the fact that Muhammad Imran was cited as a witness in case FIR No. 343/18. He also showed his lack of knowledge about MLC No. 1910 of Muhammad Shafiq but in the same breath counted it as fake. He denied the certain suggestions put to him in the result of which one Muhammad Shafiq was injured by Siddique and Ahmad and even the injuries caused to Shoaib. PW-6 aiso denied the suggestion that he was introduced as an injured PW on 08.09.2018 after the death of his brother Muhammad Farooq. Another witness of ocular account is Muhammad Salman who appeared as PW-7. He in his examination in chief also deposed that on 03.09.2018 at about 01:00 PM he alongwith brothers namely Usman and Siddique was present on their general store and in adjacent shop of crockery his brother Farooq was present when accused persons launched attack on his brother Farooq. PW-7 too has not given any explanation that how, where and when he left his shop along with his brothers and went to the shop of his brother Farooq who allegedly was under attack by the accused persons.

Evidence of all three witnesses of ocular account on this aspect of the matter is sketchy. Where PW-7 was cross-examined, he stated that his statement was recorded by police on 03.09.2018 at Nishtar Hospital, Multan and police inquired from him regarding the occurrence. He did not state whether his other statement was subsequently recorded by the police. According to this PW, he was discharged from the hospital on 03.09.2018 and he remained at his home till 08.09.2018. He showed lack of knowledge about the injuries on the persons of Khadim Hussain, Abid and Shoaib which were caused to them on 03.09.2018 and they were also medically examined. He also showed lack of knowledge about the registration of criminal case FIR No. 343/18 dated 06.09.2018. He, however, denied the suggestion that he and his brothers attacked Khadim Hussain and his sons in their house on 03.09.2018 in the result of which Khadim Kussain, Abid and Shoaib were injured. PW-7 denied that Muhammad Imran and Shahab-ud-Din were arrested in proceedings under Section 107 and 151 of Cr.PC. All the three witnesses of ocular account seem to have concealed the facts and happenings which took place, on 03.09.2018 as certain facts were brought on the record during the course of cross-examination of Muhammad Hanif SI PW-11. According to him (PW-11), an application for registration of criminal case was presented by Khadim Hussain by appending MLC of himself and that of injured persons namely Shoaib and Abid which were issued on 03.09.2018. PW-11 further admitted it correct that cross-version was recorded through Rapat No. 84 dated 06.09.2018. He also admitted it correct that FIR No. 343/18 was also lodged on the statement of Muhammad Shafiq in which Muhammad Imran appellant was cited as PW and he also investigated that case and challaned accused Mujahid. According to PW-11, he did not record statements of Shoaib and Abid injured persons. According to him, the injured prosecution witnesses namely Salman, Usman and Shahab-ud-Din did not appear before him for recording their statements. He also admitted it correct that occurrence took place in front of Farooq crockery store. Evidence of PW-11 who was I.O. of the case, would clearly suggest that the complainant and his PWs did not come up with the whole truth and they attempted to suppress certain happenings and events that took place on 03.09.2018. In this view of the matter, evidence of

witnesses of ocular account cannot be considered as trustworthy and confidence inspiring.

12. Evidence of ocular account also does not find complete corroboration from the medical evidence. Statement of PW-8 Dr. Saleem Akhtar was recorded as secondary evidence on behalf of Dr. Muhammad Ahmad who being seriously ill and paralyzed was unable to appear before the Court. PW-8 during the course of his cross-examination stated that according to the Emergency Ward Report dated 30.09.2018 Exh.PJ/7, the details of injuries were found as under:

> *i) Wound No. 1: Wound with sharp edges on scalp about 07cm superior to Glabella (place between two eyebrows on the forehead, just above the nose) going muscle deep but bone not exposed.*
>
> *ii) Wound No. 2: A 3cm wound with sharp edges on the scalp about 3cm supera posterior to left ear going muscle deep and bone is exposed.*

As per the contents of Exh.PJ/7 one injury was shown to be present on the forehead of Farooq and second was on the posterior to the left ear. Both these injuries were having sharp edges excluding the possibility of being caused by blunt weapon, whereas according to MLC Exh.PA both these injuries were shown to be caused by blunt weapon. This glaring contradiction in between Exh.PA and Exh.PJ/7, at one hand creates some doubt about the nature of injuries present on the person of deceased and on the other, evidence of ocular account is in sharp contradiction with the contents of Exh.PJ/7. Injury No. 1 as per witnesses of ocular account was ascribed to appellant Imran in the way that he gave rifle butt blow hitting on the left side of head breaking the head but admittedly no such injury existed on the left side of head of deceased and as per medical evidence Injury No. 1 was between eyebrows on the forehead just above the nose of Farooq deceased. Even as per post mertem report, Injury No. 1 was found on the frontal area of the head above left eyebrow. This injury in fact was not assigned to any of the assailants including Muhammad Imran despite the fact that FIR was lodged after delay of three days. This conflict in-

between evidence of ocular account and medical evidence in fact has caused a serious dent to the prosecution case.

13. It may be seen that as per FIR, co-accused Abid hit a brick on left cheek of Shahab-ud-Din and Kaneez Bibi hit brick on his forehead on right side. Abid has also been attributed role of hitting brickbat on backside of head of Salman and Kaneez Bibi has also been assigned role of hitting brickbat on right cheek of the complainant. Both the said co-accused however, were acquitted of the charge by learned trial Court *vide* impugned judgment. Both the acquitted co-accused were attributed specific roles in the occurrence and evidence against them was same but learned trial Court proceeded to acquit them. It is well-settled proposition that when a witness of ocular account was disbelieved to the extent of co-accused persons attributed effective role such eye witness could not be relied upon for the purpose of convicting another accused without independent corroboration. Reliance in this regard may safely be placed on cases *"Akhtar Ali and others v. The State"* (2008 SCMR 6), *"Mst. Sughra Begum and another v. Qaiser Pervez and others"* (2015 SCMR 1142) and *"Mst. Mir Zalai v. Ghazi Khan and others"* (2020 SCMR 319).

14. Having seen and assessed the entire prosecution evidence it can conveniently be observed that complainant and his PWs did not bring the truth on the record resulting into the death of Farooq and the injuries on the persons of PWs. They willfully suppressed and concealed the facts *qua* real cause and the mode of occurrence. Only the fact that Muhammad Farooq lost his life stood proved but how, where and by whom he received injuries on his person were the facts that remained mystery throughout. It is a settled proposition that mere injury present on the person of a witness cannot make him a truthful witness. Guidance in this regard has been sought from the case *"Amin Ali and another v. The State"* (2011 SCMR 323).

15. Motive, as described in application Exh:PH, was that the accused persons were forbidden to park cart before the shops and exchange of hot words took place and due to this grievance they with their common intention caused injuries to the complainant side. Prosecution's evidence *qua* motive part has already been disbelieved by learned trial Court in the impugned

judgment and findings recorded by learned trial Court in this respect are supported from the evidence available on record.

16. So far as recoveries are concerned, it may be shown that when main stay of prosecution *i.e.* ocular account as discussed in preceding paragraphs is not worthy of credit, reliance cannot be placed on recoveries which are only corroborative in nature. Reliance in this regard may safely be placed on case reported as *"Zafar v. The State and others "* (2018 SCMR 326).

17. Both the parties particularly complainant side seemed to have concealed and suppressed the real facts leading to the occurrence and did not find it appropriate to come before the Court with the real facts and the happenings. Even if it is believed that real murderers still may be amongst the appellants, it becomes hard in view of the evidence available on the record, to identity the real culprits. If the witnesses, even though the injured witnesses, did not come out with the whole truth, their evidence could not be used for convicting some of the accused keeping in view the principle as enshrined in *maxim 'falsus in uno falsus in omnibus'*, particularly where truth in the case was mixed very heavily with something which was untrue and both the parties did not disclose true and real facts. In these circumstances, it would become almost impossible to separate the truth from the heap of falsehood, leaving the Court with no other option out to acquit the remaining accused persons by extending them benefit of doubt. Reliance in this regard may safely be placed on case *"Rajmeer Khan and, another vs. Noor-ul-Haq and others"* (2019 SCMR 1549). It may not be out of context co observe here that as per saying of the Holy Prophet, (ﷺ) the mistake in releasing a criminal is better than punishing an innocent person. Same principle was also followed by the Hon'ble Supreme Court or Pakistan in the case of *"Ayub Masih v. The State"* (PLD 2002 SC 1048), wherein Apex Court was pleased to observe that prosecution was obligated to prove its case against accused and if prosecution fails then accused was entitled to get benefit of doubt as a right and Apex Court quoted the saying of Holy Prophet that **'mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing in innocent',** and making reference to the maxim of relating jurisprudence, that ***'it is better that ten guilty persons be acquitted rather than one innocent person be convicted.'***

Keeping in view the golden rule of benefit of doubt which finds support even from the Islamic jurisprudence, accused has only to show existence of a reasonable doubt in prosecution case for getting benefit thereof inasmuch as giving of benefit of doubt to an accused is much more than mere a rule of law and it is not necessary that there should be so many circumstances rather if a single circumstance that creates reasonable doubt in the mind of a prudent person, accused would be entitled to get the benefit thereof not as a matter of grace but as a matter of right. Prosecution case from its inception to end remained replete with doubts and its benefit must be given to appellant not as a matter of grace but as a matter of right. Reliance in this respect may safely be placed on case *"Muhammad Akram v. The State"* (2009 SCMR 230).

18. On re-appraisal of evidence, I have come to conclusion that prosecution has failed to prove charge against appellants. Findings of conviction recorded by learned trial Court in the impugned judgment are not sustainable. Therefore, both the appeals are allowed and appellants Muhammad Imran, Muhammad Sohail, Khadim Hussain and Muhammad Shoaib are acquitted of the charge extending benefit of doubt to them. Appellants Muhammad Imran and Muhammad Sohail are in jail. They are directed to be released forthwith if not required in any other case. Appellants Khadim Hussain and Muhammad Shoaib are on bail. Their bail bonds are cancelled and sureties stand discharged.

19. As the convicts have been acquitted of the charge, therefore, Criminal Revision No. 479 of 2019 has become infructuous and is filed as such.

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

PLJ 2022 Cr.C. 1123

[Lahore High Court, Multan Bench]

***Present*: SHAKIL AHMAD, J.**

UMAR HAYYAT--Appellant

versus

STATE--Respondent

Crl. A. 1103-J of 2019, heard on 17.1.2022.

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

----Ss. 376 & 83--Rape--Nothing offence done by a child--Appellant/ convict is a child and in order to determine his age, a district standing medical board, was opinion is 10 to 12 years old--He was capable of performing sexual act but Medical Officer failed to give any specific opinion qua capability of appellant/convict to perform sexual intercourse--There is no evidence, available on the record to establish the fact that appellant/convict being a minor had attained sufficient maturity of understanding to judge the nature of offence--Prosecution has failed to prove its case against appellant beyond the shadow of a reasonable doubt--Appellant is acquitted of the charge. [Pp. 1126 &1127] A, B, C, D & E

2019 SCMR 129 *ref.*

Rana Muhammad Javed Iqbal, Advocate for Appellant.

Malik Ghulam Muhammad Langrial, Advocate for Complainant.

Mr. Ansar Yaseen, Deputy Prosecutor General for State.

Date of hearing 17.1.2022.

JUDGMENT

Umar Hayyat (hereinafter referred to as appellant) has preferred instant Criminal Appeal No. 1103 of 2019 through jail authorities against his conviction and sentence. Appellant was tried by learned Additional Sessions

Judge, Muzaffargarh in connection with case FIR No. 157/2019 dated 15.04.2019 offence under Section 376 (i), PPC registered at Police Station City Muzaffargarh. Upon conclusion of trial appellant was convicted under Section 376(i), PPC and was sentenced to undergo R.I. for 10-years with a fine of Rs. 50,000/- in default of payment thereof, he shall suffer S.I for six months. Benefit of Section 382-B was also given to the appellant.

2. Muhammad Jameel complainant reported the matter through written application Exh.PA before Station House Officer, Police Station City Muzaffargarh by stating therein that his wife *Mst.* lrshad Bibi sent his daughter *Mst.* Kausar Fatima, aged 8/9 years, to purchase vegetable from a nearby street but she did not return and when she came back home, her daughter was out of sorts and there were stains of blood on her Shalwar and upon inquiry, her daughter told that when she reached at shop to purchase vegetable, same was closed and Umar Hayyat (appellant) asked her to accompany him by offering toffees and then took her to a vacant plot where there were two ditches and took her in one ditch, removed her Shalwar and then did something on her vagina, resulting in the bleeding therefrom and Umar Hayyat (appellant) managed to his scape good after wearing his Shalwar. According to complainant, they raised their concern with the parents of Umar Hayyat (appellant) and then reported the matter to police.

3. Syed Khizar Abbas ASI (PW-7) after receiving Exh.PA, got lodged formal FIR Exh:PD. Investigation of the case was entrusted to Muhammad Bilal ASI (PW-5) who said to have visited District Headquarter Hospital Muzaffargarh, recorded statements of PWs and arrested appellant on 19.04.2019. Upon conclusion of investigation he prepared report under Section 173 Cr.PC by placing the name of appellant Umar Hayyat in Column No. 3 of the said report. Copies as envisaged under Section 265-C of, Cr.P.C. were supplied to the appellant on 28.05.2019 and he was formally indicted on 22.06.2019, who pleaded not guilty and the trial commenced.

4. In report under Section 173, Cr.P.C., the prosecution has cited as many as 12 witnesses, out of them, 11-witnesses were examined, however, prosecution has given up PW Muhammad Ismail being unnecessary. *Mst.* Kausar Fatima (victim) appeared as PW-1 and narrated the occurrence in the result of which she was raped by appellant Umar Hayyat. Muhammad Jameel complainant appeared as PW-2 and deposed in line with his application (Exh:PA). Muhammad Javed Iqbal (PW-3) is a witness who said to have heard the story told by the victim in presence of her parents. The remaining witnesses except Dr. Hassan Muhai-ud-Din M.O (PW-9) are formal in nature. Dr. Hassan Muhai-ud-Din M.O (PW-9) deposed as under:-

> "On 21.04.2019, I was posed as M.O at DHQ Hospital Muzaffargarh. On the same day, Umar Hayyat S/O Muhammad Latif along with police docket Exh.PF appeared before me for potency test. I examined the said Umar Hayyat and on his examination found Cremasteric reflex positive and pubic exiliary hair not developed. My report Exh:PF/1 is available on record which is in my hand and bear my signature?"

During trial, an application under Section 540, Cr.P.C. summoning of Abdul Qayyam, who alleged to see the victim in the company of appellant while plyaing in the vacant plot, which application was accepted and evidence of Abdul Qayyam as PW-11 was also recorded. The learned ADPP, *vide* his statement dated 24.09.2019, closed the prosecution evidence.

5. Statement of appellant/convict under Section 342, Cr.PC was recorded on 26.09.2019. He denied the charges and mainly professed his innocence. The appellant/convict, while replying to questions that "why the complainant got registered this case against you" and "why the PWs deposed against you", he precisely took the stance that he was innocent and did not commit any crime and he has been involved in this case for the reason that complainant wanted to take Rishta of his sister for his brother and upon refusal, the complainant and his sister Shahnaz Bibi quarreled with his parents and thereafter registered this false case against him. The appellant did not opt to

appear as his own witnesses under Section 340(2), Cr.PC, however, he opted to produce some documentary evidence and by placing on record Mark-DA to Mark-DC, closed his defence evidence.

6. Learned trial Court upon conclusion of the trial found appellant guilty, convicted and sentenced the appellant. Hence, this Jail Appeal.

7. Learned counsel for the complainant did not raise any objection on acceptance of this appeal by stating that the complainant is no more interested for conviction of the appellant and even if the appeal is accepted, the complainant would have no objection.

8. Heard. Record perused.

9. In order to prove the case of rape/sexual assault, opinion of the Medical Officer that an accused is medically capable of Peno-Vaginal intercourse particularly where accused is a child below the age of 12 years, was essentially required. In the instant case, appellant/ convict is a child and in order to determine his age, a District Standing Medical Board (DSMB) on 24.04.2019 was constituted, who was of the opinion *vide* report Exh:PE that appellant/convict was 10 to 12 years old. During investigation, appellant/convict was subjected to medical/ potency test by Dr. Hassan Muhai-ud-Din M.O (PW-9) so as to establish the fact that he was capable of performing sexual act but Medical Officer (PW-9) failed to give any specific opinion qua capability of appellant/convict to perform sexual intercourse. During cross-examination, Dr. Hassan Muhai-ud-Din (PW-9), deposed that at the time of examination of appellant/convict, there was no erection of penis of appellant. In the instant case, the Medical Officer failed to specifically depose qua capability of appellant/convict to perform sexual act, which would indeed create a dent in a prosecution case and benefit of the same would indeed go to appellant/convict. No evidence whatsoever was adduced by the prosecution to establish the fact beyond shadow of doubt that appellant/convict, who was a minor below the age of 12 years, was capable of committing the alleged crime. Moreover, there is no evidence, available on the record to establish the fact

that appellant/convict being a minor had attained sufficient maturity of understanding to judge the nature of offence and consequence of his conduct. Under the provisions of Section 83 of PPC, nothing is an offence which is done by a child above ten years of age and under fourteen, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct. When whole prosecution evidence is seen in the backdrop of above discussed fact, it can very conveniently be resolved that the prosecution failed to prove its case against the appellant/convict beyond any shadow of reasonable doubt and whenever a single dent is created in the prosecution case, the accused becomes entitled to acquittal.

10. In the sequel of above discussion, it can very safely be concluded that prosecution has failed to prove its case against appellant beyond the shadow of a reasonable doubt. It is settled law that prosecution is duty bound to prove its case beyond any reasonable doubt and if any single and slightest doubt is created, benefit of the same will go to the accused. It is by now settled principle of criminal justice that there is no, need of so many doubts in the prosecution case, rather a single doubt arising out of the prosecution case is sufficient for acquittal of the accused. In the case of *Abdul Jabbar and another v. The State* (2019 SCMR 129), Hon'ble Supreme Court of Pakistan has held as under:

> *"--It is the settled principle of law that once a single loophole is observed in a case presented by the prosecution much less glaring conflict in the ocular account and medical evidence or for that matter where presence of eye-witnesses is not free from doubt, the benefit of such loophole/lacuna in the prosecution case automatically goes in favour of an accused--"*

11. Upshot of above discussion is that prosecution hopelessly failed to prove its case against appellant. Findings of conviction recorded against appellant by learned Additional Sessions Judge, Muzaffargarh in the impugned judgment are not sustainable, which are hereby set aside allowing

this criminal appeal. Consequently, appellant **Umar Hayyat is acquitted of the charge** by extending benefit of doubt to him. Appellant is in jail. He be released forthwith if not required in any other case.

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

PLJ 2022 Cr.C. 1308

[Lahore High Court, Multan Bench]

Present: **SHAKIL AHMAD, J.**

ZAHID RASHEED--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 2811-B of 2022, decided on 1.6.2022.

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

---S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 302/324/337-D/337-F(ii)/ 337-F(i)/ 337-A(i)/109/34-- Post arrest bail, dismissal of--Plea of Alibi--Finding of investigating officer-- Petitioner is named in FIR--Specific role of made repeated dagger blows on the one injured PW on the different parts of his body as well as on the fingers of the other injured PW--Plea of Alibi raised by the accused, denotes presence of an accused person elsewhere when occurrence took place--Plea of Alibi has not been set up at the earliest stage--Petitioner did not at all take the plea of Alibi what to speak of giving the details as to place and time where he was present at the time of occurrence--Material available on record sufficiently connects the accused/petitioner with commission of the alleged crime--No case for grant of post arrest bail is made out--Post arrest bail petition is dismissed. [Pp. 1309 & 1310] A, B, C, D, E & F

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

----S. 497--Plea of Alibi--It is essential for the proof of an Alibi that it should cover an account for whole of the time of the transaction in question or at least for so much of it as it render it impossible that an accused could have committed the alleged crime. [P. 1309] B

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

----S. 497--Plea of alibi--Credibility of plea of alibi is properly considered if it has been set up by the accused person at the moment when the accusation is raised against him and has been maintained consistently throughout the remaining proceedings.

[P. 1310] C

Khawaja Qaisar Butt, Advocate for Petitioner.

Malik Mudassar Ali, Deputy Prosecutor General for State.

Ch. Saeed Ahmad Farrukh, Advocate for Complainant.

Date of hearing: 1.6.2022.

ORDER

Instant petition has been filed under Section 497, Cr.P.C. by Zahid Rasheed petitioner seeking post arrest bail in case FIR No. 100 of 2022 dated 11.02.2022 registered at Police Station Saddar Mianchannu, District Khanewal for the offences under Sections 302, 324, 337-D, 337-F(ii), 337-F(i), 337-A(i), 109, 34, PPC. Earlier application of the petitioner for the same relief was dismissed by learned Additional Sessions Judge, Mianchannu, *vide* order dated 18.04.2022.

2. Precisely, as per FIR, accused/petitioner while armed with dagger along with co-accused, launched a murderous assault on complainant party, in result of which, Nouman lost his life whereas complainant Muhammad Haroon Mukhtar, Rameez, Rizwan, Suleman and Israr Ahmad received injuries. Specific role ascribed to accused/ petitioner is that he made repeated dagger blows on the person of Rizwan injured on different parts of his body as well as on the fingers of right hand of Israr Ahmad.

3. Having heard learned counsel for the parties and learned Deputy District Public Prosecutor and upon tentative assessment of the material

available on record, it has been noticed straightway that accused/petitioner is named in FIR with specific role, who actively participated in the occurrence being member of the unlawful assembly in result of which one person lost his life and five persons received injuries. Specific role of inflicting repeated dagger blows on the person of injured Rizwan hitting on right side of his chest, left flank and on different parts of his body has been attributed to him. He also gave dagger blow hitting on fingers of right hands of injured Israr Ahmad. In their statements recorded under Section 161, Cr.P.C, the prosecution witnesses have fully implicated the petitioner. Injuries caused accused/petitioner and co-accused, *ex-facie* are supported by medical evidence. So far as plea of Alibi raised by accused/petitioner is concerned, it may be observed that an Alibi denotes presence of an accused person elsewhere when occurrence took place. It is equally essential for the proof of an Alibi that it should cover an account for whole of the time of the transaction in question or at least for so much of it as it render it impossible that an accused could have committed the alleged crime. The credibility of an Alibi in above backdrop is properly considered if it has been set up by the accused person at the moment when the accusation is raised against him and has been maintained consistently throughout the remaining proceedings. In case plea of Alibi has not been set up at the earliest stage, it would indeed react adversely to its genuineness. In the instant case, accused/petitioner firstly moved his pre-arrest bail before learned Additional Sessions Judge, Mian Channu on 16.02.2022. Bare perusal of the contents of that application would reveal that accused/petitioner did not at all take the plea of Alibi what to speak of giving the details as to place and time where he was present at the time of occurrence. Accused/petitioner, however, belatedly raised the said plea that too was vague as to time, place and person where and with whom he was present inasmuch as the said facts were not disclosed by the accused/ petitioner in specific terms. At the moment, material available on record sufficiently connects the accused/petitioner with commission of alleged

crime which entails the punishment falling within the ambit of prohibitory clause of Section 497 of Cr.P.C.

4. For the reasons recorded above, no case for grant of post arrest bail is made out. Petition in hand is dismissed. It is however made clear that any observation qua plea of Alibi made hereinabove is tentative in nature only for the decision of instant bail application and the same would not influence the learned trial Court in any manner whatsoever while deciding the main case and the same would be considered and decided by learned trial Court in the light of evidence led by prosecution and defence as well.

(M.A.B.) **Bail dismissed.**

PLJ 2022 Cr.C. 1543 (DB)

[Lahore High Court, Multan Bench]

***Present*: SARDAR MUHAMMAD SARFRAZ DOGAR AND SHAKIL AHMAD, JJ.**

TALIB HUSSAIN and another--Appellants

versus

STATE and another--Respondents

Crl. A. No. 181 of 2022, Crl. Misc. No. 1 of 2022, decided on 5.7.2022.

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

----S. 426--Pakistan Penal Code, (XVL of 1860), Ss. 53/334/337-F(vi)/ 337-A(i) & 337-N(2)--Short sentence--The intention of legislature to have included cases relating to hurt entailing punishment of Daman in non-obstante clause as contained in s, 337-N(2) PPC--**Held:** When an accused is held guilty by a court of competent jurisdiction on basis of evidence so led at trial, initial presumption of innocence simply stands vanished--Sentence awarded to him is short one and there is no likelihood of decision of main appeal in near future--The pendency of his appeal, there is very possibility that, before decision of his appeal, he would have undergone his entire sentence--Petition partially allowed.

[Pp. 1548 &1549] A, B & C

2019 SCMR 516; 2007 SCMR 246 *ref.*

Ch. Shakir Ali, Advocate for Appellants.

Mr. Muhammad Ali Shahab, Deputy Prosecutor General State.

Rana Muhammad Nadeem Kanjoo, Advocate for Complainant.

Date of hearing: 5.7.2022.

ORDER

Crl. Misc. No. 01 of 2022

This is a petition filed under Section 426 of Cr.PC by Talib Hussain and Muhammad Hussain petitioners/convicts seeking suspension of execution of sentence awarded to them by learned Additional Sessions Judge, Kabirwala through judgment dated 17.02.2022, whereby they were convicted and sentenced as under:-

TALIB HUSSAIN:-

- *"Convicted under Section 337F(vi) of PPC and sentenced to undergo seven years R.I as ta'zir and to pay daman amounting to Rs. 50,000/-.*

MUHAMMAD HUSSAIN:-

- *"Convicted under Section 337A(i) of PPC and sentenced to undergo two years R.I as ta'zir and to pay daman amounting to Rs. 25,000/- on two counts.*

  Sentences awarded to the petitioners were ordered to be run concurrently.

2. Learned counsel for petitioners/convicts submits that sentence awarded to petitioner Muhammad Hussain is short one and there is no likelihood of the fixation of main appeal, in near future, therefore, he is entitled to be released on bail by suspending his sentence. Learned counsel for the petitioners while arguing his case *qua* petitioner Talib Hussain contended that as per the provisions of Section 337-N(2) of PPC only the sentence of 'arsh' could have been awarded by learned trial Court and petitioner Talib Hussain could have been awarded the sentence of imprisonment as ta'zir only if he was found to be previous convict, habitual, hardened, desperate or dangerous criminal and the offence committed by him was either in the name or on the pretext of honour. According to learned counsel for petitioners, nothing was available on the record to show that case of petitioner Talib Hussain fell within the category of offenders as hinted in subsection (2) to Section 337-N of PPC. It was, therefore, concluded that since sentence of imprisonment awarded to

petitioner Talib Hussain was illegal, he is entitled to be released on bail by suspending his sentence.

3. On the other hand, learned Deputy Prosecutor General duly assisted by learned counsel for the complainant has opposed the contention of the learned counsel for petitioners and argued that provisions of Section 337-N(2) of PPC are only applicable where sentence of 'arsh' was provided under the provisions of various sections of Chapter XVI of PPC. According to learned DPG, petitioner Talib Hussain was convicted and sentenced under Section 337F(vi) of PPC that entails punishment of 'daman' and imprisonment of either description for a term which may extend to seven years as ta'zir. According to learned DPG, since provisions of Section 337F(vi) of PPC do not provide punishment of 'arsh', the provisions of Section 337-N(2) of PPC are not applicable and learned trial Court, in its discretion, rightly sentenced the petitioner Talib Hussain to undergo imprisonment of seven years as provided under section 337 F(vi) of PPC. It has further been argued that sentence awarded to Talib Hussain cannot be counted as short sentence, therefore, he is not entitled to grant of relief claimed.

4. Heard learned counsel for the parties, learned Deputy Prosecutor General and perused the record with their able assistance.

5. Before taking up the legal proposition so argued by learned counsel for petitioners and the counter argument of learned DPG, relevant statutory provisions clinching the moot point are required to be reproduced in the first place.

> ***"Section 53 of PPC. Punishments.--****The punishment to which offenders are liable under the provisions of this Code are:*
>
> | | | | |
> |---|---|---|---|
> | *Firstly,* | *Qisas;* | *Eightly,* | *Imprisonment which is of two descriptions namely:--* |
> | *Secondly* | *Diyat;* | | |
> | *Thirdly,* | *Arsh;* | | |
> | *Fourthly,* | *Daman;* | | |

Fifthly,	*Ta'zir;*		*(i) Rigorous i.e., with hard labour;* *(ii) Simple*
Sixthly,	*Death;*	*Ninthly*	*Forfeiture of property.*
Sevently	*Imprisonment for life*	*Tenthly*	*Fine"*

"Section 299 of P.P.C*. Definitions. In this Chapter, unless there is anything repugnant in the subject or context,*

(a)……..

(b) "arsh" (ارش) means the compensation specified in this Chapter to be paid to the victim or his heirs under this Chapter;

(c)……..

(d) "daman " (ضمان) means the compensation determined by the Court to be paid by the offender to the victim for causing hurt not liable to arsh;

(e)……"

"Section 337-F of P.P.C. Punishment of Ghayr-jaifah.-*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--*

(i)……..

(ii)…….

(iii)……

(iv)……

(v)…….

(vi) munaqqillah to any person, shall be liable to daman and may also be punished with imprisonment of either description for a term which may extend to seven years ast a 'zir ."

"Section 337-N of P.P.C. Cases in which qisas for hurt shall not be enforced.

(1)……..

(2) Notwithstanding anything contained in this Chapter in all cases of hurt, the Court may, having regard to the kind of hurt caused by him in addition to payment of arsh , award ta'zir zir to an offender who 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 the honour."

"Section 337-Y of P.P.C. 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 final judgment;

(2) Where a convict fails to pay daman or any part thereof within the period specified in sub-section (1a), the convict may be kept in jail and dealt in the same manner as if sentenced to simple imprisonment until daman is paid in full or may be released on bail if he furnished security of 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."

(Emphasis supplied)

From bare perusal of above hinted provisions of law, we are constrained to observe and resolve that separate and distinct punishment of 'daman' has been provided under Section 53 of PPC and that has been defined as compensation determined by Court to be paid by the offender to the victim for causing a hurt not liable to 'arsh'. The definition contained in Section 299(b) of PPC clearly draws a distinction between two punishments viz., 'arsh' and 'daman'. Undeniably, the provisions of Section 337-F(vi) of PPC provide the

punishment in shape of payment of daman besides imprisonment of either description for a term which may extend to seven years as ta'zir. The use of word "shall" before the punishment 'daman' reflects that a person convicted under Section 337-F(vi) of PPC would be punished by awarding the principal punishment of daman and discretion has been left with the Court to also award the punishment of imprisonment that may extend to seven years as ta'zir. Non-obstante of clause as contained in subSection 2 to Section 337-N of PPC contemplates that Courts in all hurt cases may pass sentence for imprisonment as ta'zir while awarding principal sentence of *arsh* provided that offender was found to be previous convict, habitual, hardened, desperate or dangerous criminal or had committed offence in the name or on the pretext of honour. Undeniably, as per the provisions of Section 337-F(vi) of PPC, no punishment of *arsh* has been provided and principal sentence as contemplated under Section 337-F(vi) of PPC is 'daman', therefore, provisions of Section 337-N(2) of PPC would not be applicable and learned trial Court was competent to award sentence of imprisonment which may extend to seven years as ta'zir. As per the provisions of section 337-N (2) of PPC in all cases of hurt under Chapter XVI of PPC, Courts besides awarding the punishment of *arsh* can only award ta'zir to an offender who 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 the honour, however, in cases of hurt where punishment of *arsh* has not been provided, it would be discretion of Court to have awarded punishment of imprisonment as prescribed by the section of law falling in Chapter XVI of PPC. There is no cavil with the proposition that Chapter XVI of PPC relating to hurts provides punishments of diyat, *arsh* or daman in addition to punishment of ta'zir by providing certain sentences of imprisonment *qua* different kinds of hurts. The non-obstante clause of sub-section (2) to Section 337-N of PPC would not be applicable *qua* kinds of hurt where no punishment of *arsh* has been provided and the offenders who are tried for an offence not entailing the sentence of *arsh* can be dealt with in accordance with the relevant provisions of substantive law. Had it been

the intention of legislature to have included the cases relating to hurt entailing punishment of daman in non-obstante clause as contained in subSection 2 to Section 337-N of PPC, it could have conveniently been added after the word 'arsh' as hinted in subSection 2 to Section 337-N of PPC. Admittedly, it has not been done so and merely word 'arsh' has been mentioned in the said section of law by excluding the offences under which punishment of daman has been provided from the rigours of Section 337-N(2) of PPC. No illegality, thus, has been committed by learned trial Court while awarding the sentence of imprisonment under Section 337-F(vi) of PPC. The case law *"Abdul Wahab and others v. The State and others"* (2019 SCMR 516) so relied upon by learned counsel for petitioners is clearly distinguishable from the facts & circumstances of the instant case. In that case accused were convicted and sentenced under the provisions of Section 334 of PPC and were sentenced to rigorous imprisonment for five years besides payment of *arsh* equal to diyat in equal shares to the victim. Section 334 of PPC provides punishment for itlaf-i-udw and the principal sentence as per the provisions of Section 334 of PPC is 'arsh' and an offender may be punished with imprisonment of either description for a term which may extend to ten years as ta'zir. Since Section 334 of PPC provides sentence of *arsh*, provisions of Section 337-N(2) of PPC would be fully applicable. Hence, the case law so relied upon by learned counsel for petitioners has to proceed on its own peculiar facts and same has no bearing on the facts and circumstances of instant case. Petitioner/convict Talib Hussain was specifically named in the FIR as well as in the private complaint and upon conclusion of investigation he was found involved in the commission of alleged crime. Learned trial Court after recording prosecution evidence held petitioner Talib Hussain guilty and proceeded to convict and sentence him accordingly. It is by now a settled principle of law that when an accused is held guilty by a Court of competent jurisdiction on the basis of evidence so led at trial, initial presumption of innocence simply stands vanished. Reliance in this regard may safely be placed upon the case *"Makhdoom Javed Hashmi vs. the State"* (2007 SCMR 246). Learned counsel

for the petitioner failed to point out even an obvious legal infirmity or perversity in the impugned judgment, reasonably suggesting its reversal as final outcome of main appeal at the end of day. No case of suspension of sentence to the extent of petitioner Talib Hussain is made out.

6. Taking up the case of petitioner Muhammad Hussain, we are to observe in the first place that sentence awarded to him is short one and there is no likelihood of decision of the main appeal in near future. In case, the petitioner Muhammad Hussain is not released on bail during the pendency of his appeal, there is every possibility that, before the decision of his appeal, he would have undergone his entire sentence. Furthermore, it would certainly be impossible to compensate the petitioner for his detention in jail if ultimately he is acquitted after having served out his entire sentence. In these circumstances, coupled with the principle of safe administration of justice, it seems appropriate to order the release of petitioner Muhammad Hussain by way of suspension of his sentence.

7. The upshot of above discussion is that, instant petition to the extent of petitioner Muhammad Hussain is allowed, in consequence whereof, sentence awarded to him by learned trial Court is suspended and he is directed to be released on bail subject to his furnishing bail bonds in the sum of Rs. 50,000/-(rupees fifty thousand only) with one surety in the like amount to the satisfaction of the Deputy Registrar (Judicial) of this Bench. Instant petition to the extent of petitioner namely Talib Hussain stands dismissed. Petitioner Muhammad Hussain is directed to appear before this Court on each and every date of hearing in the main appeal.

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

PLJ 2022 Cr.C. (Note) 97

[Lahore High Court, Multan Bench]

***Present*: SHAKIL AHMED, J.**

MUHAMMAD SARFRAZ--Petitioner

versus

STATE and another--Respondents

Crl. Rev. No. 130 of 2018, decided on 1.6.2022.

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

----Ss. 336/337-X--Criminal Procedure Code, 1898, Ss. 435/439--Arsh--Reduction is sentence--Appeal filed by petitioner, however, was dismissed and revision petition filed by Respondent No.2 was allowed and sentence of imprisonment for six years was enhanced to seven years R.I--Requests that sentence of imprisonment awarded to petitioner may be reduced to the period already undergone--Petitioner has already served out imprisonment for 06 years & 14 days (including remissions)--Conviction of the petitioner under section 336 of PPC is maintained, however, sentence of seven years imprisonment awarded to petitioner by Appellate Court is hereby reduce to the period already undergone--Revision dismissed.

[Para 2, 3, 5 & 6] A, B & C

Malik Muhammad Saleem, Advocate for Petitioner.

Mr. Javed Aslam Ansari, Advocate for Complainant.

Malik Mudassar Ali, Deputy Prosecutor General.

Date of hearing: 1.6.2022.

ORDER

Instant Criminal Revision has been directed against the judgments dated 14.12.2017 and 24.02.2018 passed by learned Magistrate Section-30, Chichawatni and learned Additional Sessions Judge, Chichawatni, respectively.

2. Facts, in brief, leading to the filing of instant revision petition are that vide judgment dated 14.12.2017, learned Magistrate Section-30, Chichawatni convicted Muhammad Sarfraz (petitioner herein) under Section 336 of PPC and sentenced him to imprisonment for six years (R.I) besides payment of Rs.2,00,000/- as 'Arsh' to be paid to victim and also directed to pay compensation Rs.2,00,000/- under Section 544 A of Cr.P.C.. Petitioner preferred an appeal challenging his conviction and sentence, whereas Aman Ullah complainant (Respondent No. 2 herein) filed Criminal Revision seeking, enhancement of petitioner's sentence. Appeal filed by petitioner, however, was dismissed and revision petition filed by Respondent No. 2 was allowed and sentence of imprisonment for six years was enhanced to seven years (R.I) and amount of 'Arsh' was fixed as Rs. 19,35,594/-. Compensation amount to the tune of Rs. 2,00,000/-under Section 544-A of Cr.P.C. as awarded by learned trial Court, however, was upheld.

3. Having argued the case at some length, learned counsel for the petitioner submits that he does not press the instant petition to the extent of conviction passed by Courts below, however, he requests that sentence of imprisonment awarded to petitioner may be reduced to the period already undergone by him. This request of learned counsel for the petitioner has readily been accepted by learned counsel for complainant and for that very reason, learned Law Officer also has not opposed the suggestion. Learned counsel for the parties have also agreed to the payment of 'Arsh' amount to the tune of Rs. 19,35,594/-within a period of five years in ten equal installments each to be paid biannually. Learned counsel for the petitioner has also

requested that petitioner may be released on bail subject to his furnishing of surety bonds equivalent to the 'Arsh' amount. This request has also not been opposed by learned counsel for the complainant.

4. As per the provisions of Section 337-X of Pakistan Penal Code, 1860, payment of 'Arsh' amount can be made in installments spreading over a period of five years from the date of final judgment. The said provision reads as under:

> *"**Payment of Arsh.--**(1) The arsh may be 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 arsh or any part thereof within the period specified in sub-section (1), the convict may be kept in jail and dealt with in the same manner as if sentenced to simple imprisonment until arsh is paid in full or may be released on bail if he furnishes security [or surety] equal to the amount of arsh to the satisfaction of the Court [or may be released on parole as may be prescribed in the rules].*
>
> *(3) Where a convict dies before the payment of arsh or any part thereof it shall be recovered from his estate.*
>
> *(emphasis supplied)*

5. As per report of Superintendent, Central Jail, Sahiwal, petitioner has already served out imprisonment for 06 years and 14 days (including remissions) and that remaining portion of his imprisonment is 11 months and 16 days.

6. In view of concurrence of learned counsel for the parties, conviction of the petitioner under Section 336 of, PPC is maintained, however, sentence of seven years imprisonment awarded to petitioner by learned Appellate Court

is hereby reduced to the period already undergone. Remaining punishment of payment of 'Arsh' amounting to Rs. 19,35,594/- passed by learned Appellate Court and order passed by the Courts below qua compensation of Rs. 2,00,000/- under Section 544-A of Cr.P.C. are maintained with amount of Arsh in lump sum. Amount of compensation of Rs. 2,00,000/- shall be recovered from petitioner as per the terms of Section 544-A(2) of Cr.P.C..

7. With the above mentidned Observations/modification in term of imprisonment, the revision petition is dismissed.

(K.Q.B.) **Revision dismissed.**

PLJ 2022 Cr.C. (Note) 136

[Lahore High Court, Multan Bench]

Present: **SHAKIL AHMAD, J.**

Mst. **KHANSA TABASSUM--Appellant**

versus

STATE and 2 others--Respondents

Crl. Rev. No. 201 of 2021, decided on 9.2.2022.

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

----Ss. 204, 435 & 439--Petitioner filed private complaint--Dismissed--Revision petition--There is no cavil with proposition that no limitation is of provided for filing of criminal complaint but it is equally correct that delay in approaching Court would cast doubt on veracity of allegations leveled in same for reason longer a complaint is delayed less becomes chances for believing in its contents, more particularly when same is merely based on words of mouth of complainant--Unnecessary delay in filing of complaint may be a good ground for refusing to proceed with complaint for issuance of process for summoning of respondents--Filing of complaint by complainant was manifestly tainted with *mala fide*--Trial Court while taking stock of whole material available on record rightly declined to issue process by dismissing complaint--Bare perusal of provisions of Section 203 of Cr.P.C. would show that proper safeguard has been provided by legislature so that frivolous, baseless and vexatious complaints must be buried at their inception-Revision dismissed.

[Para 4] A & B

2010 SCMR 105 & 2000 SCMR 1904.

Sayyed Zia Haider Zaidi, Advocate for Petitioner.

Mr. Ansar Yasin, Deputy Prosecutor General for State.

Mr. Qasim Ali Butt, Advocate for Respondents No. 2 & 3.

Date of hearing: 9.2.2022.

ORDER

This revision petition has been filed to assail order dated 31.07.2021 passed by learned Additional Sessions Judge, Khanewal, whereby private complaint filed by petitioner titled "Mst. Khansa Tabassum vs Muhammad Aamir & another" under Sections 302, 109, PPC was dismissed.

2. facts necessary for the decision of instant petition, precisely are that petitioner filed private complaint stating therein that on 17.09.2020 at about 09:00 A.M. she along with her sisters Tooba Tabassum, Hifsa Tabassum and brother Muhammad Arbaz-ul-Islam was present whereas her maternal uncle Muhammad Amir also came in her house on previous night and was quarrelling with her brother Muhammad Arbaz-ul-Islam by saying him not to visit his house at Multan and that conversation was heard by petitioner (complainant) along with her sisters while sitting in front of them. As per contents of private complaint, petitioner was refraining her maternal uncle when in the meanwhile Muhammad Aamir stood up and picked a Churri and tried to stab complainant's brother Arbaz-ul-Islam who in order to stop *Churri* blow, put forward his left hand, however received *Churri* injury on his left arm resulting in cutting of vein of his left arm. According to contents of complaint, petitioner and her sisters snatched *Churri* from Muhammad Aamir whereafter Muhammad Aamir caught hold of Arbaz-ul-Islam and forcibly put him on bricks and taking a foot of cot (چارپائی کا پاوا) inflicted its several blows hitting on the backside of head, left leg, back and on different parts of body of Arbaz-ul-Islam and same was again snatched by complainant and her sisters, however, due to successive bleeding Arbaz-ul-Islam succumbed to the injuries at the spot and Muhammad Aamir managed his escape good. Motive was stated to be that Arbaz-ul-Islam had been visiting the house of Muhammad Aamir who had a suspicion of illicit liaison of his wife with Arbaz-ul-Islam and due to that suspicion he killed Arbaz-ul-Islam. Learned Additional

Sessions Judge, Khanewal, having received complaint sent the same to learned Judicial Magistrate, Khanewal for holding) inquiry, who after recording statements of witnesses submitted his report and learned Additional Sessions Judge after going through the record dismissed the complaint *vide* order dated 31.07.2021, hence this petition.

3. Heard learned counsel for the parties. Record perused.

4. There is no denial to the fact that an FIR No. 487 of 2020 dated 18.09.2020 under Sections 302, 109, 34, PPC was got lodged by one Abdul Manan at Police Station Saddar, Khanewal by raising specific allegations against Aamir, Tooba Tabassum and present petitioner Kliansa Tabassum and after usual investigation, report under Section 173, Cr.P.C. was submitted in the Court of competent jurisdiction. Petitioner who is one of the accused of aforesaid FIR, filed private complaint on 24.02.2021 with delay of five months without any plausible explanation. There is no cavil with the proposition that no limitation is of provided for filing of criminal complaint but it is equally correct that delay in approaching the Court would cast doubt on the veracity of allegations levelled in the same for the reason longer a complaint is delayed the less becomes the chances for believing in its contents, more particularly when same is merely based on words of mouth of the complainant. Unnecessary delay in filing of complaint may be a good ground for refusing to proceed with the complaint for issuance of process for summoning of respondents. Reliance in this regard may safely be placed on case law titled *"Muhammad Fiaz Khan vs. Ajmer Khan"* (2010 SCMR 105). It may further be shown that while issuing process under the provisions of Section 204 of Cr.P.C., Court must be fully conscious of the material available before it particularly where complainant party was facing the charge for the same crime in FIR case pending before the Court of competent jurisdiction. In the instant case, when contents of Paragraph No. 2 of the complaint are seen, the same on the face of it, appear to be sketchy and lacking coherence. It was highly improbable that a real brother was being subjected to torture by the accused and his real sisters despite snatching *Churri* from his hands would have

allowed the accused to cause further multiple injuries by wooden foot of the cot and the same was also allegedly snatched by the petitioner and her sisters and still accused managed his escape good from the spot. The allegations made in the complaint, on the face of it, are so absurd and inherently improbable as no prudent person could reach to the conclusion that the same were sufficient for proceeding against the respondents. Sequence of events as described in Paragraph No. 3 when are taken at their face value, it depicts that occurrence might have taken place in the night when Muhammad Aamir was shown to be quarreling with Arbaz-ul-Islam but not in the way detailed in the complaint. Filing of complaint by the complainant was manifestly tainted with *mala fide*. Learned trial Court while taking stock of the whole material available on record rightly declined to issue the process by dismissing the complaint. Bare perusal of provisions of Section 203 of Cr.P.C. would show that proper safeguard has been provided by the legislature so that frivolous, baseless and vexatious complaints must be buried at their inception. Reliance in this regard may safely be placed on case law titled *"Abdul Wahab Khan vs. Muhammad Nawaz"* (2000 SCMR 1904).

5. The upshot of the above discussion is that no case of taking any exception to the impugned order at all is made out. Petition in hand is devoid of any force, the same is hereby **dismissed.**

(A.A.K.) **Revision dismissed.**

PLJ 2022 Cr.C. (Note) 145

[Lahore High Court, Multan Bench]

Present: **SHAKIL AHMED, J.**

MUHAMMAD IBRAHEEM--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 1138-B of 2022, decided on 15.3.2022.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 409, 420, 468 & 471--Prevention of Corruption Act, (II of 1947), S. 5(2)--Bail after arrest, grant of--Further inquiry--Allegation of--Corruption/ financial embezzlement in purchase of medicines etc.--Charge against petitioner- of negligence, counsel for petitioner has pointed out that petitioner twice brought into notice of M.S. through written applications *qua* need for repair of CCTV system prior to registration of FIR, which fact reflects his bona fides--Assertion of counsel for petitioner *qua* moving of applications by petitioner *qua* CCTV repair could not be controverted by Law Officer on factual side--All these circumstances indeed make case of petitioner one of further inquiry as contemplated under provisions of Section 497(1) of Cr.P.C and in turn entitling him to grant of relief claimed not as a matter of grace but as a matter of right--Bail allowed. [Para 3] A

Syed Jaffar Tayyar Bukhari, Advocate for Petitioner.

Mr. Ansar Yaseen, Deputy Prosecutor General with Shahid Nazir Warraich, Circle Officer, ACE Lodhran for Respondents.

Date of hearing: 15.3.2022.

ORDER

Instant petition has been filed under Section 497, Cr.P.C. by Muhammad Ibraheem petitioner seeking post arrest bail in case FIR No. 15 of 2020 dated 29.12.2020 registered at Police Station ACE, Lodhran for the offences under Sections 409, 420, 468, 471, PPC read with Section 5(2) of Prevention of Corruption Act, 1947. Earlier application of the petitioner for the same relief was dismissed by learned Special Judge Anti-Corruption Court, Multan *vide* order dated 25.10.2021.

2. Fleard and perused the record.

3. One Shakil Kamran moved an application before Chief Executive Officer (Health), Lodhran, whereby he pointed out corruption/financial, embezzlement in purchase of medicines, etc committed mainly by Dr. Iftikhar Ahmad, Medical Superintendent THQ Hospital, Kehror Pacca in connivance with co-accused Muhammad Wajid Purchase Officer, Muhammad Zulqarnain Budget and Finance Officer, Ejaz Hussain Junior Clerk, Zain-ul-Haq of Al-Haq Medical Store and Kashif Nawaz Ward Servant. On said application, inquiry was conducted and matter was also forwarded to Anti-Corruption Establishment and ultimately FIR was registered. Petitioner was implicated in this case on the charge that he played active role in financial embezzlement being member of purchase committee and also committed negligence by not keeping in order CCTV system. It may not be out of context to mention here that role of financial embezzlement as per the complaint initially filed by Shakil Kamran, was mainly of Doctor Iftikhar Ahmad, Medical Superintendent and five others. Petitioner's name was not amongst said five co-accused initially named in the complaint. Learned Law Officer has failed to controvert that inquiry in this case was conducted by Director Health Services, Bahawalpur Division, who *vide* report/ letter No. DHS/CC/86/No. 252 BWP dated 27.01.2021 exonerated the petitioner from the charges. As regards charge against petitioner of negligence, learned counsel for petitioner has pointed out that petitioner twice brought into notice of M.S. through written applications *qua* need for repair of CCTV system prior to registration of FIR, which fact reflects his bona fides. Assertion of learned counsel for petitioner *qua* moving of applications by petitioner *qua* CCTV repair could not be controverted by learned Law Officer on factual side. All these circumstances indeed make the case of petitioner one of further inquiry as contemplated under the provisions of Section 497(1) of Cr.P.C and in turn entitling him to grant of relief claimed not as a matter of grace but as a matter of right.

4. For the reasons recorded above, petition in hand is allowed and petitioner is admitted to post arrest bail subject to his furnishing of bail bonds in the sum of Rs. 2,00,000/- with one surety in the like amount to the satisfaction of learned trial Court.

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

PLJ 2022 Cr.C. (Note) 174
[Lahore High Court Multan Bench]

***Present*: SHAKIL AHMAD, J.**

***Mst.* SAMINA BIBI--Petitioner**

versus

STATE and another--Respondents

Crl. Misc. No. 1832-B of 2021, decided on 10.5.2022.

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

----S. 498--Pakistan Penal Code, (XLV of 1860), Ss. 324 & 109--Pre-arrest bail, grant of--Allegation of--Attempt to murder--Supplementary statement--Extra-judicial confession--Accused/petitioner was not at all named in FIR with any sort of allegation and she seemed to have been implicated firstly on supplementary statement of PW recorded--Law Officer frankly conceded to proposition that said supplementary statement of PW wherein an extra judicial confession has been shown to be made by accused/petitioner hardly qualifies to be a valid confession admissible under law--No other evidence whatsoever is available on record connecting accused/petitioner with commission of crime falling within purview of Section 109, PPC--According to learned Law Officer, petitioner remained in contact with co-accused prior to occurrence--This fact alone again is not sufficient to saddle accused/petitioner with crime of abetment--In absence of any legal and admissible evidence, insistence of Investigating Officer to apprehend accused/petitioner reflects malice on his part and in turn entitles accused/ petitioner to grant of relief claimed--Bail accepted.

[Para 3] A

Mr. Muhammad Faisal Bashir Chaudhary, Advocate with Petitioner.

Malik Mudassar Ali, Deputy Prosecutor General for State.

Mr. Bashir Ahmad Khan, Advocate for Complainant.

Date of hearing: 10.5.2022.

ORDER

This is a petition filed under Section 498, Cr.P.C. by *Mst.* Samina Bibi, petitioner, seeking pre-arrest bail in case FIR No. 142 of 2021 dated 15.08.2021, registered at Police Station Peer Jaggi, District Layyah, for the offences under Section 324, 109, PPC. Earlier application of the petitioner for the same relief was dismissed by learned Additional Sessions Judge Layyah, *vide* order dated 16.03.2022.

2. Facts, in brief, as disclosed in the FIR are that on 15.08.2021 at about 4:00 a.m., an unknown person made a fire shot hitting on the forehead of Muhammad Bilal (brother of complainant) who became injured.

3. Having heard learned counsel for the parties, learned Deputy Prosecutor General and upon tentative assessment of the record, it has been noticed that accused/petitioner was not at all named in FIR with any sort of allegation and she seemed to have been implicated firstly on the supplementary statement of PW Rehmat Ullah recorded on 28.10.2021. The learned Law Officer frankly conceded to the proposition that the said supplementary statement of Rehmat Ullah wherein an extra judicial confession has been shown to be made by the accused/petitioner hardly qualifies to be a valid confession admissible under the law. No other evidence whatsoever is available on the record connecting accused/petitioner with the commission of crime falling within the purview of Section 109, PPC. According to learned Law Officer, petitioner remained in contact with co-accused Waqas Nadeem prior to the occurrence. This fact alone again is not sufficient to saddle accused/petitioner with the crime of abetment. In absence of any legal and admissible evidence, insistence of Investigating Officer to apprehend accused/petitioner reflects malice on his part and in turn entitles accused/ petitioner to the grant of relief claimed.

4. The upshot of above discussion is that, petition in hand is **accepted** and ad-interim pre-arrest bail already granted to accused/ petitioner by this Court *vide* order dated 24.03.2022 is confirmed subject to her furnishing of fresh bail bonds in the sum of Rs. 100,000/- (Rupees one hundred thousand only) with one twenty in the like amount to the satisfaction of learned trial Court.

(A.A.K.) **Bail accepted.**

2022 Y L R Note 94

[Lahore (Bahawalpur Bench)]

Before Shakil Ahmad, J

MUHAMMAD RAMZAN---Petitioner

Versus

The STATE---Respondent

Criminal Miscellaneous No.1892-M of 2021 in Criminal Appeal No. 483 of 2017, decided on 2nd July, 2021.

Criminal Procedure Code (V of 1898)---

----S. 426---Penal Code (XLV of 1860), Ss. 302(b) & 377--- Qatl-i-amd, un-natural offence---Suspension of sentence--- Scope--- Petitioner was convicted under S.302(b), P.P.C. and sentenced to life imprisonment had sought suspension of his sentence---Validity---Record showed that petitioner was convicted by the Trial Court vide judgment dated 26.09. 2017 and the present appeal was lodged on 29.09.2017 before High Court, which was still pending adjudication--- In routine petitioner would be entitled to bail on the ground that more than two years had gone by and there was no likelihood of hearing of his appeal in the near future---Nothing was on the record to show that the petitioner was a previous convict or a hardened, desperate or dangerous criminal or was accused of an act of terrorism punishable with death or imprisonment for life---More than three years had gone but the appeal had not been disposed of---Delay in hearing of the appeal had not been caused by the petitioner or any person acting on his behalf---Petition was allowed and the sentence of the petitioner was suspended and he was directed to be released on bail, in circumstances.

Prince Rehan Iftikhar Sheikh for Petitioner.

Ch. Ghulam Mujtaba Gujjar for the Complainant.

Rao Muhammad Riaz Khan, Deputy District Public Prosecutor with Ali A.S.I. for the State.

ORDER

SHAKIL AHMAD, J.---Through this petition under section 426 of Cr.P.C., the petitioner Muhammad Ramzan son of Muhammad Hanif seeks suspension of his sentence awarded to him by the learned Additional Sessions Judge, Dunyapur vide judgment dated 26.09.2017. The petitioner was convicted and sentenced after trial in case FIR No. 217 of 2016, dated 06.10.2016 registered at Police Station Jalla Arain (Dunyapur), District Lodhran in respect of offences under sections 302, 377, P.P.C. The petitioner was convicted and sentenced as under

(i) Imprisonment for life under section 302(b), P.P.C. and directed to pay compensation of Rs.100,000/- to the legal heirs of the deceased under section 544-A, Code of Criminal Procedure, 1898 and in default thereof to further undergo simple imprisonment for six months.

(ii) Simple imprisonment for 10 years under section 377, P.P.C. with fine of Rs.25,000/- and in default of payment of fine, directed to farther undergo simple imprison-ment for six months.

The benefit of section 382-B of Cr.P.C. was extended to the petitioner. Instant petition has been filed by the petitioner under section 426 of Cr.P.C. on the ground of statutory delay in the disposal of the main appeal. The main appeal is still pending adjudication, hence, this petition.

2. Learned counsel for the petitioner has submitted that petitioner is behind the bars since 08.10.2016 and was convicted by the trial court vide judgment dated 26.09.2017 and that the petitioner moved the jail appeal on

29.09.2017 before this Court, which is still pending and the delay in disposal of the appeal has not been occasioned by the petitioner or any person acting on his behalf, hence the sentences of the petitioner may be suspended.

3. The learned counsel for the complainant and learned Deputy District Public Prosecutor while opposing the petition, submits that the petitioner has been convicted by the trial court on the basis of a well-reasoned judgment as such petitioner is not entitled for the relief claimed by way of suspension of sentence.

4. Arguments heard. Record perused with the able assistance of the learned counsel for the parties.

5. The petitioner was convicted by the trial court vide judgment dated 26.09.2017 and the instant appeal was lodged on 29.09.2017 before this court, which is still pending adjudication. In routine petitioner would be entitled to bail on the ground that more than two years have gone by and there is no likelihood of hearing of the appeal filed by the petitioner in the near future. There is nothing on the record to show that the petitioner is a previous convict or a hardened, desperate or dangerous criminal or is accused of an act of terrorism punishable with death or imprisonment for life. The criminal appeal was filed on 29.09.2017 and more than three years have gone but the appeal has not been disposed of. The delay in hearing of the appeal has not been caused by the petitioner or any person acting on his behalf.

6. For the foregoing reasons, this petition is allowed and the sentences of the petitioner is suspended and he is directed to be released on bail subject to his furnishing bail bonds in the sum of Rs.200,000/- (rupees two hundred thousand only) with two sureties each in the like amount to the

satisfaction of the Deputy Registrar (Judicial) of this Court. The petitioner is directed to appear before this Court on each and every date of hearing in the main Criminal Appeal No. 483-J of 2017.

AA/M-225/L **Petition allowed.**

2023 C L D 165

[Lahore (Multan Bench)]

Before Ahmad Nadeem Arshad and Shakil Ahmad, JJ

ZARAI TARQIATI BANK LIMITED through Manager---Appellant

Versus

AFZAL SHAH---Respondent

R.F.A. No. 119 of 2017, heard on 7th September, 2022.

Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

----Ss. 9 & 22---Limitation Act (IX of 1908), Ss. 19 & 20---Suit for recovery of Bank loan---Limitation---Debt, non-acknowledgement of---Fresh period of limitation---Principle---Suit filed by appellant/Bank was dismissed ex-parte by Trial Court---Validity---In order to invoke provision of S. 19 of Limitation Act, 1908, condition precedent was that such acknowledgement had to be made within the period of limitation prescribed for claims sought to be enforced and the same was to be fulfilled in first place---Any credit entry in account constituting an acknowledgment of payment, as per provisions of S. 20 of Limitation Act, 1908, had to be in handwriting or in writing signed by person making the payment so as to bring the case either within the purview of S. 19 or 20 of Limitation Act, 1908, whereby acknowledgment of payment was to be made in handwriting or in a writing signed by the person making the payment within the period of limitation---Fresh period of limitation was to only start when firstly payment/ acknowledgement was made before expiry of period of limitation and secondly, the same was in handwriting and signed by the party against whom and the right was claimed---Appellant/Bank failed to point out or refer any documents showing payment of amount in the handwriting or even signed by respondent/defendant and Trial Court rightly proceeded to non-suit appellant/Bank by holding that suit filed by appellant/Bank was

barred by period of limitation---High Court declined to interfere in judgment and decree passed by Trial Court---Appeal was dismissed in circumstances.

Saddaruddin (since deceased) through LRs v. Sultan Khan (since deceased) through LRs and others 2021 SCMR 642 and Asad Ali and 9 others v. The Bank of Punjab and others PLD 2020 SC 736 ref.

Rao Riasat Ali Khan for Appellant.

Nemo for Respondent.

Date of hearing: 7th September, 2022.

JUDGMENT

SHAKIL AHMAD, J.---This is a regular first appeal filed under section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 to impugn ex parte judgment and decree dated 22.09.2016 passed by learned Judge Banking Court-I, Multan, whereby suit filed by Zarai Taraqiati Bank Ltd. (appellant herein) against Afzal Shah (respondent herein) was dismissed.

2. Necessary facts relevant for the decision of instant appeal, precisely are that appellant filed a suit for recovery of Rs.3,73,462/- along with mark up, cost of funds, costs of suit and other charges till the realization of amount, against respondent, on the ground that respondent requested for grant of agricultural loan amounting to Rs.1,89,240/- for the purchase of pesticides and seeds etc. which was granted under loan case No.101856 and the expiry date of the same was fixed as 07.01.1993. As per contents of the plaint, respondent availed of the facility, however, did not repay the amount of loan along with agreed mark-up in time and an amount to the tune of Rs.3,73,462/- became outstanding against him as on 30.06.2006 and the same was not paid despite repeated demands, hence the suit. Despite service, respondent did not appear before the trial Court and he was proceeded against ex parte on 28.03.2016 and after hearing ex parte

arguments, learned Judge Banking Court-I, Multan dismissed the suit on the ground that suit was filed beyond the period of limitation, hence this appeal.

3. None entered appearance on behalf of respondent despite publication of proclamation in daily Nawa-i-Waqt, therefore, he was proceeded against ex parte vide order dated 11.02.2020.

4. Heard learned counsel for the appellant. Record perused.

5. Learned counsel for the appellant remained unable to controvert the fact that finance facility was availed by respondent as back in the year 1992 that was finally sanctioned under loan case No.101856 and expiry date of the said facility was 07.01.1993, whereas suit was filed on 25.07.2014, as such the same was filed beyond the period of limitation inasmuch under Article 132, Part VIII of the first schedule of the Limitation Act, 1908, suit for the recovery was to be filed within a period of twelve years from the date when outstanding amount became payable on the expiry date of finance facility which as per documents annexed with the plaint was 07.01.1993. Admittedly, loan was obtained by respondent against the mortgage of landed property, therefore, suit to enforce payment of money charged upon immovable property was to be filed within the period of limitation as provided under Article 132, Part VIII of the first schedule of the Limitation Act, 1908. Keeping in view of the contents of plaint, suit was to be instituted by the appellant within a period of twelve years from the date when the amount became due. As per contents of plaint, expiry date of finance facility was 07.01.1993 and suit, therefore, was to be filed till the year 2005 in view of the period of limitation provided under Article 132 ibid, whereas, suit was filed on 28.07.2014. The suit, therefore, was filed beyond the period of limitation. As per provisions of Order VII, Rule 6 of C.P.C., where a suit is instituted after the expiration of the period prescribed by law of limitation, the plaint shall show the ground upon which exemption in view of the grounds as enumerated in Sections 6 to 20

of the Limitation Act, 1908 is claimed. From plain reading of the plaint, it transpires that appellant has not at all narrated the grounds upon which exemption from the period of limitation under section 19 or 20 of the Limitation Act, 1908 could be sought. Where a suit filed by a party apparently is barred by period of limitation and the case is covered under any of the exceptions as contemplated under the provisions of sections 12 to 20 of the Limitation Act, 1908, the party filing suit has to specifically plead the circumstances under which exemption and in turn fresh point of limitation, has been claimed. In case a party fails to specifically mention those facts in the plaint, there is no need for the court to have framed the issue on the point of limitation and to require a party to adduce evidence to establish the same owing to yet another established principle of law that where a party fails to plead a fact in pleadings it cannot be allowed to prove the same through evidence. Reliance in this regard may safely be placed on case reported as "Saddaruddin (since deceased) through LRs v. Sultan Khan (since deceased) through LRs and others" (2021 SCMR 642), wherein it was laid down by Hon'ble Apex Court that parties were required to lead evidence in consonance with their pleadings and no evidence could be laid or looked into in support of plea which had not been taken in the pleadings. Admittedly, in the instant case, even no effort whatsoever, either before the learned trial court or before this Court, has been made by the appellant to seek necessary amendment in the plaint. Where a suit has been filed after the period of limitation prescribed therefor by the first schedule of the Limitation Act, 1908, same is liable to be dismissed under section 3 of the Limitation Act, 1908. As per dictates of section 3 of Limitation Act, 1908, every suit instituted after the period of limitation prescribed therefor by the first schedule, was to be dismissed even if limitation was not set up as defence. Under the provisions of section 3 of the Limitation Act, 1908, trial court is under bounden duty to take notice of question of limitation for the simple reason that the provisions of section 3 are couched in a mandatory form empowering the court before whom suit has been filed, to dismiss the

same if it is found not brought before the court within the time prescribed by the first schedule of the Limitation Act, 1908. It is by now settled principle of law that limitation is not mere technicality and once period of limitation expires, right is accrued in favour of contesting party by operation of law and the same cannot be ignored lightly. Reliance in this regard may safely be placed on case reported as "Asad Ali and 9 others v. The Bank of Punjab and others" (PLD 2020 Supreme Court 736), wherein following dicta was laid down by august Supreme Court of Pakistan:-

> "10. ... It is settled law that limitation is not a mere technicality (or a hyper technicality as it had been termed by the Tribunal). Once limitation expires, a right accrues in favour of the other side by operation of law which cannot lightly be taken away."

Learned trial court, thus, rightly proceeded to dismiss the suit being barred by time.

6. So far as submission of learned counsel for the appellant that period of limitation for filing the suit, in fact was to be computed from a fresh point of limitation when respondent by depositing an amount to the tune of Rs.17,000/- consciously acknowledged his liability in respect of suit amount, is concerned, same as hinted in the preceding paragraph does not find support either from the contents of the plaint or from the documents annexed therewith. It has never been the case of appellant, as per contents of the plaint, that respondent in fact deposited certain amount in the year 2003 by tacitly acknowledging his liability and in turn accruing fresh period of limitation to appellant to file the suit from the date when any amount was shown to be deposited by the respondent under the provisions of sections 19 and 20 of the Limitation Act, 1908. Learned counsel for the appellant upon query by us, remained unable to either refer to or produce any document showing acknowledgment in writing by the respondent in terms of sections 19 and 20 of the Limitation Act, 1908. At one hand, there was no specific stance taken by the appellant in the plaint qua deposit of

any amount by the respondent before the expiry of period of limitation and on the other, no tangible material/document was available on the record to establish acknowledgment of payment by the respondent either in writing, in his handwriting or in the writing signed by him while making any payment against the outstanding amount. Even otherwise, in order to invoke the provisions of section 19 of the Limitation Act, 1908, the condition precedent, that such acknowledgment ought to have been made within the period of limitation prescribed for a claim sought to be enforced, was to be fulfilled in the first place. Similarly, as per provisions of section 20 of the Limitation Act, 1908, any credit entry in the account constituting an acknowledgment of payment must have been in the handwriting or in writing signed by the person making the payment, so as to bring the case either within the purview of section 19 or section 20 of the Limitation Act, 1908, whereby acknowledgment of payment was to be made in the handwriting or in a writing signed by the person making the payment within the period of limitation. Fresh period of limitation would only start when firstly payment/acknowledgment has been made before the expiry of period of limitation and secondly the same is in the handwriting and signed by the party against whom any right is claimed. Learned counsel for the appellant, however, failed to point out or refer any document showing payment of Rs.17,000/- in the handwriting or even signed by respondent. Learned trial court rightly proceeded to non-suit the appellant by holding the suit filed by appellant being barred by the period of limitation. Nothing either tangible or plausible could have been hinted by learned counsel for appellant to convince us to take any exception to the impugned judgment which has been validly passed by learned Judge Banking Court after going through the whole material available on the record.

7. The upshot of the above discussion is that appeal in hand is devoid of any force, therefore, the same is dismissed. No order as to costs.

MH/Z-26/L **Appeal dismissed.**

2023 C L D 1021

[Lahore (Multan Bench)]

Before Muhammad Raza Qureshi and Shakil Ahmad, JJ

Messrs S.M. NISAR AND COMPANY through Managing Partner and others---Appellants

Versus

ASKARI BANK LIMITED, BRANCH HIGH STREET, SAHIWAL---Respondent

R.F.A. No. 73 of 2013, decided on 1st June, 2022.

Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

----Ss. 9, 10 & 22---Suit for recovery of bank loan---Leave to appear and defend the suit---Availing of finance facility was admitted by the clients (appellants) of the bank---Court dismissed the appellants' application to leave to defend and decreed the suit of the bank/respondent---Appellants asserted that the amounts paid by them towards adjustment of finance facility had not been accounted for---Validity---Held, that such assertion had not been substantiated by the appellants in their application for leave to defend through tangible material/details of any amount adjusted and even no specific amount that could have been counted as disputed was mentioned in said application--- When the application for leave to defend did not fulfill the dictates of Ss. 10(3), 10(4) & 10(5) of Financial Institutions (Recovery of Finances) Ordinance, 2001 (' the Ordinance 2001'), then such application was liable to be rejected in terms of S. 10(6) of the Ordinance 2001 and in consequence, allegation of facts as contained in the plaint were deemed to have been admitted as per S. 10(1) of the Ordinance 2001---Appellants also failed to raise any substantial question of law and fact---No illegality or

infirmity was noticed in the impugned judgment and decree passed by the Court below---Appeal was dismissed, in circumstances.

Apollo Textile Mills Ltd. and others v. Soneri Bank Ltd. PLD 2012 SC 268 ref.

Syed Zeeshan Haider Zaidi for Appellants.

Malik Tariq Rajwana, Barrister Kashif Rajwana and Muhammad Ibtasam Ahmad for Respondent.

Date of hearing: 1st June, 2022.

JUDGMENT

SHAKIL AHMAD, J.---This is a regular first appeal filed under section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (hereinafter referred to as the 'FIO, 2001) to impugn judgment and decree dated 23.02.2012 passed by learned Judge Banking Court, Multan, whereby suit filed by Askari Bank Ltd. (hereinafter referred to as the 'respondent Bank') against the appellants was decreed.

2. Precise facts giving rise to the filing of instant appeal are that respondent Bank filed suit for the recovery of Rs.15,678,749.16 against appellants under section 9 of FIO, 2001 on the ground that appellants availed of Running Finance Facility of Rs.3.000 Million and Cash Finance Facility of Rs.20.000 Million and same was sanctioned subject to mortgage of three properties and limit was to be expired on 31.05.2003, however, on the request of appellants the said facility was renewed through sanction advice dated 09.08.2003 for Rs.24.000 Million CF (pledge) and Rs.4.000 Million as RF being sub-limit of CF (pledge) on markup basis that was to be expired on 30.06.2004. In the meanwhile, appellants also requested for Running Finance Facility of Rs.2.500 Million and same was sanctioned vide advice dated 31.07.2003. The said facility was again sanctioned with the reduced limit from Rs.14.000 Million to 10.000 Million. RF limit,

however, was enhanced from Rs.4.000 Million to 14.000 Million and limit that was already sanctioned in the name of Messrs Javed Corporation was discontinued and both the limits were utilized by the appellants and CF limit of Rs.10.00 Million was adjusted upon dissolution of previous partnership.

3. New partnership was executed on 10.06.2009 and at the request of new partnership firm RF for Rs.14.000 Million and CF for Rs.10.000 Million were renewed vide sanction advice dated 30.10.2009 on the basis of already mortgage properties and facilities were to be expired on 30.06.2010. Various charge documents were also executed in favour of respondent. Appellants, however, failed to get adjusted the facilities fully and an amount to the tune of Rs. 15,678,749.16 became outstanding against them on 30.06.2010.

4. Appellants having been served on 24.10.2010, joined the proceedings by moving application for leave to defend the suit on 22.11.2010 by raising therein some preliminary legal objections. According to them, respondent Bank failed to bring the fact qua pendency of suit filed by appellants for damages, rendition of accounts, declaration, permanent and mandatory injunction and recovery of Rs.20,000,000/- on the record and certain amounts those were paid by the appellants have not been adjusted towards Loan account. By taking such a stance appellants thus admitted availing of finance facilities. Learned Judge Banking Court proceeded to dismiss the application for leave to defend and in consequence whereof suit was decreed as prayed for, hence this appeal.

5. Learned counsel for appellants argued that despite raising of substantial question of facts and law in the application filed by appellants seeking leave to defend learned Judge Banking Court wrongly proceeded to dismiss the same in perfunctory manner. It has further been argued that although appellants availed the facilities, however, no amount was ever

disbursed to appellants and owing to that reason entire business of appellants collapsed. Learned counsel further submitted that statement of account tendered by respondent was in clear violation of provisions of section 4 of Bankers Book of Evidence Act, 1891, therefore, respondent could not fulfill the mandatory requirements of section 9(3) of FIO, 2001, hence, in such event appellants were entitled to grant of leave to defend the suit.

6. As against that, learned counsel for respondent Bank argued that appellants did not deny the availing of impugned finance facilities. It was argued that no discrepancy whatsoever could have been pointed out in the statement of account submitted by the respondent Bank. Learned counsel went on arguing that mere pendency of suit for damages/renditions of account creates no bar for the filing of the suit for the recovery of outstanding amounts against the appellants. Lastly, it was argued that appellants failed to comply with the mandatory provisions of section 10 of FIO, 2001. It was therefore concluded that learned trial court rightly rejected the petition and decreed the suit.

7. Arguments heard. Record perused.

8. From the bare perusal of application for leave to defend filed by

appellants under section 10 of FIO, 2001, it transpires that they have not disputed the fact qua availing of Cash Finance and Running Finance facilities. They have also admitted the guarantees so offered along with hypothecation of stock like cotton bales/cotton seed/oil and oil cake. It was, however, the stance of appellants that amounts paid by them towards adjustment of Cash Finance and Running Finance had not been properly accounted for and in fact credit limits were adjusted. Stance taken by appellants in paragraph No.7 under the head of "Points for consideration of leave application" reads;

"That amounts paid towards adjustment of Cash finance and Running finance facilities were not properly accounted for as it was in lacks (sic) of rupees."

These assertions, however, could not be substantiated through any tangible material/evidence and even neither details regarding amount of finance availed by the appellants nor details of any amount adjusted, was tabulated by specifically mentioning the dates of payments were hinted in the application. Even no specific amount that could have been counted as disputed was mentioned in the petition.

9. If is by now a settled principle of law that when application for leave to defend the suit filed by the petitioner did not fulfill the dictates of section 10(3)(4) and (5) of FIO, 2001, such petition was liable to be rejected as per the provisions so contemplated under section 10(6) of FIO, 2001 and in consequence whereof, allegation of facts so contained in the plaint were deemed to have been admitted as per the provisions of section 10(1) of FIO, 2001. Reliance in this regard may safely be placed on the case reported as "Apollo Textile Mills Ltd. and others v. Soneri Bank Ltd." (PLD 20212 SC 268). Learned Judge Banking Court thus rightly observed that appellants failed to raise any substantial question of law and fact besides non - compliance of the mandatory provisions of section 10(3)(4) and (5) of FIO, 2001. Learned counsel for appellants remained unable to point out even a single instance of any irregularity in the impugned judgment. Nothing plausible could have been hinted by learned counsel for appellants to convince us to take any exception to the impugned judgment which has been validly passed by learned Judge Banking Court after going through the whole material available on the record.

10. It would also not be out of place to mention here that during the pendency of instant appeal, appellants moved C.M No.890-C of 2017 for issuance of direction to respondent Bank for return of the mortgage

documents on account of the fact that all amounts have been paid to respondent Bank showing satisfaction of the decree so assailed through instant appeal. Where appellant themselves satisfied the decree by paying remaining amount apart from the appropriation of amounts of the proceeds of auction proceedings carried out by respondent Bark in terms of section 19 of FIO, 2001, they would deem to have accepted the decree so passed against them.

11. The upshot of above discussion is that appeal in hand has no merits and is dismissed accordingly. No order as to costs.

MQ/S-87/L **Appeal dismissed.**

2023 M L D 483

[Lahore]

Before Shakil Ahmad, J

IRFAN JAVED and 2 others---Petitioners

Versus

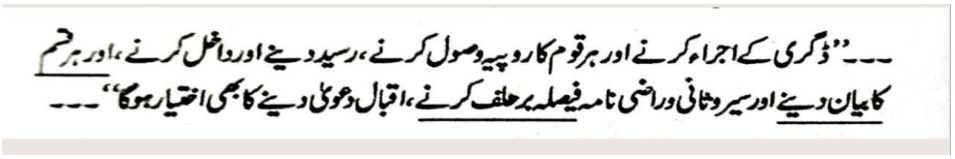
ADDITIONAL DISTRICT JUDGE, TOBA TEK SINGH and 2 others---Respondents

Writ Petition No. 52389 of 2019, heard on 25th April, 2022.

(a) Oaths Act (X of 1873)---

----Ss. 8, 9, 10 & 11---Family Courts Act (XXXV of 1964), S. 17(2)---Power of Attorney Act (VII of 1882), S. 2---Dowry articles, recovery of---Special oath---Suit for recovery was consolidated with two other matters (for recovery of maintenance allowance and custody of minors) pending adjudication before Family Court and in consequences additional issues were framed---During cross-examination, an offer was made by petitioner's counsel qua decision of the matter through special oath on the Holy Quran by petitioner; which offer was not accepted by respondent/wife---Respondent/wife, instead, signified her willingness to state on oath by putting her hands on the Holy Quran and on the heads of her children that her dowry articles were lying at defendant's house, which proposal was accepted by the petitioner's counsel---On the adjourned date petitioner moved an application that he did not instruct his counsel to make offer to respondent/wife for taking her special oath and that such offer was under misconception---Petitioner's application was dismissed and the statement of respondent/wife was recorded under special oath and her suit for recovery of dowry articles was consequently decreed---Petitioner contended that no specific direction was given by him to his counsel for resolution of the controversy qua dowry articles through special oath; that

his counsel was not authorized either to make any offer to other side or to accept any such offer; that whole proceedings regarding offer and so-called acceptance by his counsel took place in his absence; and that procedure adopted by learned trial court for taking special oath was against the law---Held, that document of the power of attorney contained the phrase:


---"ڈگری کے اجراء کرنے اور ہر قوم کا روپیہ وصول کرنے، رسید دینے اور داخل کرنے، اور ہر قسم کا بیان دینے اور سیر و ثانی و راضی نامہ فیصلہ بر حلف کرنے، اقبال دعویٰ دینے کا بھی اختیار ہوگا"---

---Such vernacular expression beyond an iota of ambiguity evinced the intention of petitioner conferring the power to his counsel for making statement qua decision of matter on oath---Petitioner was bound by an act/undertaking of his counsel for the simple reason that his counsel was holding a valid authority to act on his behalf on the basis of contents of power of attorney executed by him in favour of his counsel---Proceedings carried out by the Judge Family Court were in accordance with the provisions of Ss. 8 to 11 of the Oaths Act, 1873---Any act required/authorized to be done by a party to a suit could be done by his recognized agent provided the act would fall generally within the scope of the latter's authority---Statement of respondent/wife was recorded on special oath in pursuance of an offer that was agreed by counsel for the petitioner which offer when accepted, would become agreement in the nature of contract the nature of contract which was binding on both the parties---Constitutional petition was dismissed accordingly.

Hata v. Samail AIR 1932 Lahore 414; Muhammad Ali v. Major Muhammad Aslam and others PLD 1990 SC 841 and Ahmad Khan and others v. Jewan PLD 2002 SC 655 rel.

Mst. Khairan Bibi v. Mst. Hajran Bibi 2012 YLR 2054 distinguished.

(b) Power of Attorney Act (VII of 1882)---

----S. 2---Contract Act (IX of 1872), Ss. 182 & 238---Contract between an advocate and his client is essentially governed by the general rules of contract as embodied under the various provisions of Contract Act, 1872---Power of attorney should be construed strictly and be interpreted to give only such authority as it confers expressly or by necessary implication.

Sh. Muhammad Fazil v. Abdul Qadir and 7 others 1997 CLC 243 rel.

(c) Family Courts Act (XXXV of 1964)---

----Preamble & S.17(2)---Decision of the matter through special oath---Scope---Wisdom behind enactment of Family Courts Act, 1964 is a swift/expeditious settlement of family disputes for the simple reason that a family dispute was not limited to the four walls of home between two persons viz., husband and wife, rather it had impact on the souls/minds of all near and dear to the contesting parties and it may disrupt not only the mental fabric of both the parties but also of those who were not even party to it, directly particularly the children and the parents of the parties.

(d) Oaths Act (X of 1873)---

----S. 8---Word "party"---Advocate included under the meaning of "party"---Scope---Word 'party' as hinted in Ss. 8 & 9 of Oaths Act, 1873, included an Advocate of the party and the offer to abide by the special oath under S. 9 may be accepted not by party personally but by a party through an agent.

Haji Dilbar Khan Mahaar, A.A.G. Mewo and another v. Mst. Lal Khatoon PLD 1962 Kar. 162 rel.

(e) Constitution of Pakistan---

----Art. 199--- Constitutional jurisdiction---Nature and scope---Extraordinary constitutional jurisdiction under the provisions of Art. 199

of the Constitution, 1973, was discretionary/equitable and same could not be extended to a party who did not come before the Court with clean hands---High Court, in exercise of constitutional jurisdiction, had only to see whether the court acted without jurisdiction or had violated the statute/law laid down by the superior courts.

West Pakistan Tanks Terminal (Pvt.) Ltd. v. Collector (Appraisement) 2007 SCMR 1318; Muhammad Sharif and another v. Muhammad Afzal Sohail and others PLD 1981 SC 246 and Aamir Latif v. Member (Colony), Board of Revenue, Lahore and 2 others 2005 YLR 1913 rel.

Hafiz Muhammad Ishfaq Gondal for Petitioners.

Malik Muhammad Nadeem for Respondent No. 3.

Date of hearing: 25th April, 2022.

JUDGMENT

SHAKIL AHMAD, J.---Instant is a petition that has been filed by Irfan Javed and two others under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 to assail order and decree dated 27.02.2019 and judgment and decree dated 21.08.2019, passed by learned Senior Civil Judge (Family Division), Toba Tek Singh and learned Additional District Judge, Toba Tek Singh, respectively, whereby suit filed by Mst. Rubab Shahid (respondent No.3) against Irfan Javed and two others for recovery of dowry articles was decreed by learned Senior Civil Judge (Family Division) Toba Tek Singh as a consequence of special oath taken by Mst. Rubab Shahid and the decree was maintained in appeal by learned Additional District Judge, Toba Tek Singh.

2. Facts, in brief, giving rise to the filing of instant petition are that Mst. Rubab Shahid instituted a suit on 11.09.2018 for recovery of dowry articles

against Irfan Javed and two others narrating therein that her marriage was solemnized with Irfan Javed on 22.08.2013 and she was given dowry articles not only by her parents but also by her enatic and patrilineal sides. As per contents of plaint, behaviour of Irfan Javed towards Mst. Rubab Shahid went bad to worse and he drove her out of the house at the instigation of his sisters and finally pronounced divorce on her on 01.07.2017. As per contents of plaint, dowry articles of Mst. Rubab Shahid valuing Rs.20,12,056/- as per list annexed with the plaint were lying at the house of Irfan Javed and despite persistent demands, he refused to return the dowry articles. Suit was contested by Irfan Javed and remaining defendants by filing their respective written statements and after framing the issues, case was fixed for recording of evidence. On 13.10.2018 the said suit was ordered to be consolidated with two other matters pending adjudication before the learned Judge Family Court, one for recovery of maintenance allowance and the other for custody of minors and in consequences whereof additional issue qua recovery of dowry articles was framed. It was on 31.01.2019 when Mst. Rubab Shahid appeared as PW-1 and submitted her affidavit Ex.P-1 as her examination-in-chief and she subsequently entered in the witness box for cross-examination on 14.02.2019. During the course of her cross-examination, an offer was made by learned counsel for Irfan Javed qua decision of the matter through special oath on Holy Quran by Irfan Javed, however, this offer was not accepted by Mst. Rubab Shahid and instead she signified her willingness to state on oath on Holy Quran and also by putting her hands on the heads of her children that her dowry articles were lying at defendant's house. Learned counsel for Irfan Javed by agreeing to this proposal, requested learned trial court for taking oath of Mst. Rubab Shahid qua dowry articles on Holy Quran and by putting her hands on the heads of her children. Matter

was adjourned on the joint request for taking special oath and Mst. Rubab Shahid was directed to appear in person along with her children on 15.02.2019. An application, however, was moved on the adjourned date by Irfan Javed with the prayer that his oath may be taken in the court. As per contents of that application, Irfan Javed did not instruct his counsel to make offer to Mst. Rubab Shahid for taking her special oath. It was further averred that the offer made by his counsel qua taking oath from Mst. Rubab Shahid was under misconception. Said application, however, was dismissed by learned trial court and statement of Mst. Rubab Shahid was recorded under special oath as agreed and in consequence whereof her suit for recovery of dowry articles was decreed vide order and decree dated 27.02.2019. Said order and decree were assailed by petitioners by filing an appeal, the same was dismissed vide judgment and decree dated 21.08.2019, hence this petition.

3. Learned counsel for petitioners mainly argued that no specific direction was given by Irfan Javed to his counsel for resolution of the controversy qua dowry articles through special oath and thus his counsel was not at all authorized either to make any offer to other side or to accept any such offer. Added that learned Judge Family Court committed illegality by deciding the matter on special oath and learned Appellate Court also committed the same error by maintaining the decree passed by learned Judge Family Court. It was further argued that whole proceedings regarding offer and so-called acceptance by learned counsel for Irfan Javed took place in absence of petitioners and having come to know about that, application was immediately filed by Irfan Javed, which was wrongly dismissed by learned trial court. According to learned counsel, authority given to learned counsel for Irfan Javed through power of attorney simply pertained to routine matters which in no case include authorization for deciding the case

on the basis of special oath. Learned counsel went on arguing that procedure adopted by learned trial court for taking special oath was against the law. For his arguments, learned counsel relied on case "Mst. Khairan Bibi v. Mst. Hajran Bibi" (2012 YLR 2054).

4. As against that, learned counsel for respondent No.3 contended that both the courts below rightly decided the matter and impugned decrees cannot be taken to any exception in exercise of constitutional jurisdiction of this Court.

5. Heard learned counsel for the parties. Record so annexed with the petition and that of summoned from the learned trial court perused.

6. Bare perusal of proceedings dated 14.02.2019 before learned trial court would vividly reveal that a simple, clear and straightforward offer was made by Mst. Rubab Shahid and the same was unambiguously acceded to by learned counsel for Irfan Javed. Thereafter, learned Judge Family Court stopped further cross-examination and on the joint request, matter was adjourned for taking special oath by Mst. Rubab Shahid. The moot point to be resolved in view of submissions made by learned counsel for petitioners is that:-

Whether learned counsel for Irfan Javed was authorized to make statement for decision of case on the basis of special oath by accepting the offer made by Mst. Rubab Shahid?

Before entering upon to resolve the moot point hinted supra, it seems essential to first of all deal with and examine the nature, scope and extent of contract between a counsel and his client with reference to relevant provisions of law. Section 2 of the Power of Attorney Act, 1882 deals with execution under power of attorney. This section applies to the power of attorney created by an instrument. Similarly, provisions of sections 182 to

238 of the Contract Act, 1872 deal with the appointment and authority of agents. Words "Agent" and "Principal" have been defined in section 182 as under:-

> "182. "Agent" and "principal" defined.---An "agent" is a person employed to do any act for another or represent another in dealing with third persons. The person for whom such act is done, or who is so represented, is called the "principal".

A counsel who is appointed to represent his client proceeds to act on behalf of principal as per the powers so conferred on him under the ordinary rules governing the relationship of principal and agent as determined by the terms of power of attorney. Powers so conferred on a counsel would indeed create mutual obligations inter se the parties and an attorney would fall within the definition of agent as contemplated under section 182 of the Contract Act, 1872. The contract between an advocate and his client is essentially governed by the general rules of contract as embodied under the various provisions of Contract Act. In case "Sh. Muhammad Fazil v. Abdul Qadir and 7 others" (1997 CLC 243 [Lahore]), scope and object of powers given through power of attorney to a counsel was eloquently and extensively dealt with in following manner:-

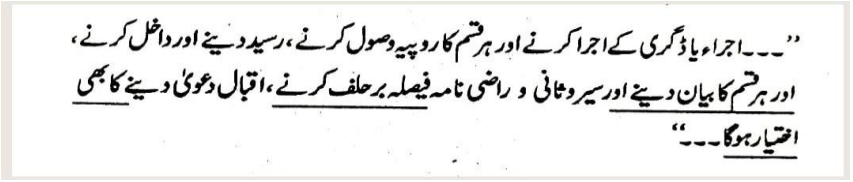
> "Speaking for the law as to construction of powers of attorney it is well understood that different clauses thereof are scrutinized so as to understand the scope and object of various powers granted thereby and it is too well-known that the clauses contained therein are all too important to understand the same. Over the period of years the rule as to construction of power of attorney have been interpreted to mean that the powers which have not been incorporated in the power of attorney should not be imported therein nor the general power as

is usually incorporated at the end of the document of power of attorney should be constructed to include all the powers of the principal. Needless to add that the general powers as included in the power of attorney have always been read in conjunction with the specific powers incorporated in the general power of attorney and not beyond and that it has also been insisted that for every and any power which an attorney is supposed or purported to exercise, there must be a specific clause thereby authorizing him to exercise such a power".

(Emphasis supplied)

It is almost an established principle of law that power of attorney should be construed strictly and be interpreted to give only such authority as it confers expressly or by necessary implication.

7. In the backdrop of above, now reverting to the query as to whether learned counsel for Irfan Javed was competent to make statement on his behalf for deciding the matter on special oath, answer can conveniently be found from the contents of power of attorney executed by Irfan Javed in favour of his counsel namely Ch. Suleman Razzaq, Advocate. Relevant portion of power of attorney is reproduced hereunder for the facility of ready reference:-



"۔۔۔اجراء یا ڈگری کے اجرا کرنے اور ہر قسم کا روپیہ وصول کرنے، رسید دینے اور داخل کرنے، اور ہر قسم کا بیان دینے اور سپرد ثالثی و راضی نامہ فیصلہ بر حلف کرنے، اقبال دعویٰ دینے کا بھی اختیار ہوگا۔۔۔"

(Emphasis supplied)

Above referred vernacular expression beyond an iota of ambiguity evinces the intention of principal i.e. Irfan Javed conferring the power to his counsel

for making statement qua decision of matter on oath. It can, therefore, very conveniently be resolved that learned counsel for Irfan Javed was fully authorized to give any statement qua decision of the case on special oath. Irfan Javed, therefore, was bound by an act or undertaking of his counsel for the simple reason that his counsel was holding a valid authority to act on his behalf on the basis of contents of power of attorney executed by him in favour of his counsel.

8. There is no cavil with the proposition that by dint of section 17(2) of Family Courts Act, 1964, provisions of sections 8 to 11 of Oaths Act, 1873 are made applicable to the proceedings before Family Courts. The underlying wisdom of above hinted provision of Family Courts Act, 1964 is swift and expeditious settlement of Family disputes for the simple reason that a Family dispute is not limited to the four walls of home between two persons viz., man and wife, rather it has impact on the souls and minds of all near and dear to the contesting parties and it may disrupt not only the mental fabric of both the parties but also of those who are not even party to it directly particularly the children and the parents of the parties. As regards submission of learned counsel for petitioners that procedure adopted by learned Judge Family Court for taking special oath was against the law, it may be seen that same also is devoid of any force. Proceedings carried out by learned Judge Family Court were in accordance with the provisions of sections 8 to 11 of the Oaths Act, 1873. Undeniably, an offer was made by Mst. Rubab Shahid and that was agreed upon by learned counsel for Irfan Javed and in consequence whereof Mst. Rubab Shahid took special oath in the terms as agreed upon and learned Judge Family Court proceeded to decree the suit as per the dictates of section 11 of the Oaths Act, 1873. It is also settled principle of law that the word 'party' as hinted in sections 8 and 9 ibid includes an Advocate of the party also and the offer to abide by the

special oath under section 9 may be accepted not by party personally but by a party through an agent. Reliance in this regard may safely be placed on "Haji Dilbar Khan Mahaar, A.A.G. Mewo and another v. Mst. Lal Khatoon" (PLD 1962 Kar. 162), wherein it was held that an Advocate empowered by a party to enter into a compromise etc., was fully competent to make an offer to abide by the special oath and in doing so he must be deemed to have been instructed by his client. In "Hata v. Samail" (AIR 1932 Lahore 414) it was held that any act required or authorized to be done by a party to a suit can be done by his recognized agent provided the act falls generally within the scope of the latter's authority. It cannot be held that an offer to be bound by the oath of the other party must be made by the party personally and not by his duly authorized agent. Therefore, an Advocate empowered as such by a party can make statement for the decision of the case on special oath particularly where the contents of power of attorney specifically authorize a counsel to get his statement recorded for decision of the case on oath. In view of above discussion, argument of learned counsel for petitioners that authority given to learned counsel for Irfan Javed through power of attorney simply pertained to routine matters which in no case include authorization for deciding the case on the basis of special oath, carries no solid rational.

9. It may further be seen that no particular form or procedure for recording offer and acceptance qua decision of the cases on oath has been prescribed in the provisions of Oaths Act, 1873. Guidance has been sought from case "Muhammad Ali v. Major Muhammad Aslam and others" (PLD 1990 Supreme Court 841) wherein it has been observed by Apex Court as under:-

"- - - -The need for recording separate statements of the parties in respect of the offer and acceptance made in such cases deserves to be over-emphasized, for such a procedure would give parties some short time to think over the matter and extricate themselves from hasty decisions, before appending their signatures to their statements. We do not wish to go down on the record as suggesting that this procedure must invariably be observed, for there is no such legal compulsion, not do we want to suggest that certain safeguards suggested here should be treated as rules of prudence to be observed in such cases, because sections 9 to 11 of the Oaths Act do not admit of such intrusions, but we would say that all this may be treated as a note of caution, for a Court is as much bound to ensure the solemnity of these proceedings, as the parties are bound to respect them".

In another celebrated judgment titled "Ahmad Khan and others v. Jewan" (PLD 2002 Supreme Court 655) it was observed by the Apex Court that there were no hard and fast rules for accepting or rejecting the statement of a person given on oath provided departure from it was made on the basis of cogent grounds and depending upon case to case. In the instant case, statement of Mst. Rubab Shahid was recorded on special oath in pursuance of an offer that was agreed by learned counsel for Irfan Javed. Such an offer when was accepted, it became agreement in the nature of contract the nature of which was binding on both the parties.

10. So far as case law "Mst. Khairan Bibi v. Mst. Hajran Bibi" (2012 YLR 2054) relied upon by learned counsel for petitioners is concerned, the same has to proceed on the peculiar facts of that case and has no relevance whatsoever to the facts and circumstances of the instant case. Power of

attorney in that case did not bear a clause authorizing the counsel for decision of matter on the basis of special oath whereas in the instant case learned counsel for Irfan Javed petitioner as hinted earlier, was fully authorized to make statement for decision of matter on oath and even the statement of Mst. Rubab Shahid was recorded as per the dictates of sections 9 and 10 of Oaths Act, 1873.

11. Looking the matter from an altogether different angle, it may be shown that petitioners while filing this constitutional petition were required to have annexed all documents necessary for resolution of the matter. However, they failed to annex copies of certain necessary documents particularly evidence of the parties, cross-examination on respondent No.3 (PW-1) whereby offer made by her was accepted by learned counsel for Irfan Javed. Similarly, statement of Mst. Rubab Shahid on oath was also not annexed with the petition and last but not the least, attested copy of power of attorney of learned counsel for Irfan Javed before learned trial court was not annexed with the instant petition. Non-annexing of all these documents, in particular copy of power of attorney which contained the fact that learned counsel for Irfan Javed was authorized to make statement for resolution of matter on oath, reacts against the bona fides of petitioners. It rather appears that these documents were not annexed with the instant petition by a design. Petitioners seemed to have willfully omitted to annex necessary and essential documents with the petition. Therefore, they did not come to the Court with clean hands. There is no cavil with the proposition that extraordinary constitutional jurisdiction under the provisions of Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 is discretionary and equitable and same cannot be extended to a party who did not come before the Court with clean hands. Reliance in

this regard may safely be placed on case reported as "West Pakistan Tanks Terminal (Pvt.) Ltd. v. Collector (Appraisement)" (2007 SCMR 1318).

12. The concurrent findings of both the courts below are in accordance with law and the same in no way suffer from any jurisdictional defect or error and the same cannot be taken to any exception by invoking the extra-ordinary constitutional jurisdiction of this Court. It is well established principle of law that this Court in exercise of constitutional jurisdiction has only to see whether the court acted without jurisdiction or had violated the statute or law laid down by the superior courts. This Court while exercising power under the provisions of Article 199 of Constitution of Islamic Republic of Pakistan, 1973 is not required to decide the matter in the same manner as regular appeals are heard and decided. Reliance in this regard may safely be placed on cases reported as "Muhammad Sharif and another v. Muhammad Afzal Sohail and others" (PLD 1981 Supreme Court 246) and "Aamir Latif v. Member (Colony), Board of Revenue, Lahore and 2 others" (2005 YLR 1913).

13. Natural corollary to the above discussion is that petition in hand merits dismissal by looking from any angle and the same therefore dismissed as such.

ZH/I-117/L **Petition dismissed.**

2023 Y L R 222

[Lahore (Multan Bench)]

Before Shakil Ahmad and Muhammad Raza Qureshi, JJ

Mst. LALARUKH SAQLAIN and 3 others---Appellants

Versus

PUNJAB HEALTH DEPARTMENT through Secretary and 4 others---Respondents

Regular First Appeal No. 184 of 2013, heard on 10th May, 2022.

Land Acquisition Act (I of 1894)---

----Ss. 4, 18 & 54---Constitution of Pakistan, Art. 24---Acquisition of land---Compensation--- Potential value---Determination--- Appellants/landowners were aggrieved of compensation determined by Referee Court---Validity---Acquisition process employed to deprive someone of his property, was an exception that was visualized by the Constitution---Process must be in consonance with conditions, parameters and manner as laid down in Art. 24(2) & (3) of the Constitution---Even if property of any person was taken over for a public purpose, the person being deprived of his property had to be given adequate, fair, just and due compensation---Provisions of Land Acquisition Act, 1894 had Constitutional backing as the same was covered under the Exception as contained in Art. 24(2) of the Constitution---Acquired land was located on main road, in the vicinity of major bypass road crossing and was situated near various residential colonies---Land in question possessed potential significance in future---Referee Court while determining/enhancing award amount from Rs.7,500/- to Rs.12,000/-, observed that appellants/land owners failed to place on record any valuation table existing at the time of publication of notification under S.4 of Land Acquisition Act, 1894 and provision of S.23(1) of Land Acquisition Act, 1894 had provided that in

determining amount of compensation to be awarded of the land value of the land at the date of publication of notification under S. 4(1) of Land Acquisition Act, 1894 was to be considered---High Court modified judgment of Referee Court by enhancing compensation amount of acquired land of appellants/landowners from Rs.12,000/- per Marla to Rs.40,000/----Appeal was allowed accordingly.

Collector, Land Acquisition, Mardan and others v. Nawabzada M. Ayub Khan and others 2000 SCMR 1322; Province of Punjab through Collector, Attock v. Engr. Jamil Ahmad Malik and others 2000 SCMR 870; Government of Pakistan through Military Estate Officer, Abbottabad and another v. Ghulam Murtaza and others 2016 SCMR 1141; Air Weapon Complex through DG v. Muhammad Aslam and others 2018 SCMR 779; Federal Government Employees Housing Foundation (FGEHF), Islamabad and others v. Malik Ghulam Mustafa and others 2021 SCMR 201; Land Acquisition Collector and others v. Mst. Iqbal Begum and others PLD 2010 SC 719; Pakistan Burmah Shell Ltd. v. Province of N.W.F.P and 3 others 1993 SCMR 1700; Haji Muhammad Yaqoob and another v. Collector, Land Acquisition/Additional Deputy Commissioner, Peshawar 1997 SCMR 1670; Sarhad Development Authority N.W.F.P (Now KPK) through COO/CEO (Officio) and others v. Nawab Ali Khan and others 2020 SCMR 265; Iffat Jabeen v. District Education Officer (M.E.E.), Lahore and another 2011 SCMR 437; Ghulam Rasool through L.Rs. and others v. Muhammad Hussain and others PLD 2011 SC 119; Province of Punjab through Land Acquisition Collector and another v. Begum Aziza 2014 SCMR 75; Province of Sindh through Collector of District Dadu and others v. Ramzan and others PLD 2004 SC 512 and Abdul Majeed and 6 others v. Muhammad Subhan and 2 others 1999 SCMR 1245 rel.

Syed Muhammad Ali Gilani for Appellants.

Malik Altaf Hussain Raan, Assistant Advocate General for Respondents.

Date of hearing: 10th May, 2022.

JUDGMENT

SHAKIL AHMAD, J.---This is an appeal that has been filed by Mst. Lalarukh Saqlain and 3 others (hereinafter referred to as 'appellants') under section 54 of the Land Acquisition Act, 1894 (hereinafter referred to as the 'Act, 1894'), to impugn judgment dated 05.06.2013 passed by learned Senior Civil Judge, Multan (hereinafter referred to as ' learned Referee Court').

2. Essential facts giving rise to the filing of instant appeal, in brief, are that Notification No.161/DO(R)/LAC dated 02.06.2005 was issued by District Officer (Revenue)/District Collector, Multan for acquiring land measuring 433-Kanal and 14-Marla in Mouza Dera Muhammadi and Samurana, Tehsil and District Multan for the construction/up-gradation of Civil Hospital, Multan. Total land falling within Mouza Dera Muhammadi was 252-Kanal and 09-Marla. Above hinted notification was published in Punjab Government Gazette on 24.08.2005, whereafter Notification No.441/EDO(R)/ LAC dated 26.12.2006 was issued and published in Punjab Government Gazette on Wednesday 21st February, 2007, whereby total acquired land was reduced to 401-Kanal and 14-Marla, however, the measurement of land falling in Mouza Dera Muhammadi remained intact. Appellants' land measuring 17-Kanal, 10-Marla and 15-Yards, falling in Khewat Nos.342 and 335 and Khatooni Nos.511 and 516 situated in Mouza Dera Muhammadi, was included in the acquired land falling within Mouza Dera Muhammadi. As per minutes of the meeting of District Price Assessment Committee held on 21.12.2005, average sale price of residential property falling in Mouza Dera Muhammadi was fixed at the rate of Rs.7,672.67/- per Marla, whereas average sale price of agricultural property was fixed at the rate of Rs.2,195/- per Marla. However, Award dated 05.11.2007 was finally issued by DDO(R)/LAC (City) Multan,

whereby value of residential land in Mauza Dera Muhammadi was fixed @ Rs.7500/- per marla, which according to appellants, was lesser than actual prevailing price in the area. Appellants being aggrieved, moved reference under section 18 of the Act, 1894 before Deputy District Officer (Revenue)/Land Acquisition Collector, Multan on 13.12.2007 against the Award dated 05.11.2007 by stating therein that the grievance of appellants' was not heard by the Revenue authorities regarding less price of their own land and they proceeded to receive award amount under protest. Reference was sent to learned Referee Court. Having received the reference on 24.09.2008, process was issued for summoning of respondents. Respondents opted to file separate written replies by raising some preliminary legal objections besides taking the stance that acquisition process was completed in accordance with law and after observing all legal formalities. According to them, the price of land was assessed by competent forum keeping in view prevailing market rate. Learned Referee Court, in view of pleadings of the parties, proceeded to frame following issues:-

ISSUES:-

"1. Whether the reference petitioners have no cause of action and locus standi to bring this reference? OPR

2. Whether the reference petitioners have not come to the Court with clean hands? OPR

3. Whether the petitioners are estopped to file this reference on account of their words and conduct? OPR

4. Whether the reference is time barred? OPR

5. Whether the reference is not maintainable in its present form? OPR

5-A Whether the petitioners have received compensation/amount of Award without any protest. If so its effect? OPR-1 and 3

5-B Whether the reference is bad for non-joinder of necessary party? OPR-1 and 3

6. Whether the reference petitioners have already received the consideration? If so upto what extent in terms of money? OPR

7. Whether the reference petitioners have not been adequately compensated through impugned Award? OPA

8. If above issue is proved in affirmative, what should be the actual extent of compensation to be paid to the reference petitioners? OPA

9. Relief."

Appellants produced total three witnesses namely Ghulam Muhammad (PW-1), Muhammad Aslam Javed (AW-1) and Mushtaq Ahmad (AW-2) and in their documentary evidence by placing on the record attested copy of Notification as Exh.A-3, attested copy of mutation No.12651 of Mauza Dera Muhammadi as Exh.A-4, attested copy of Aks Shajra as Exh.A-5, attested copy of letter regarding acquisition of land dated 12.09.2005 as Exh.A-6, attested copy of minutes of meeting dated 21.12.2005 as Exh.A-7, attested copy of Award dated 05.11.2007 as Exh.A-8, attested copy of notification dated 26.12.2006 as Exh.A-9, attested copy of letter dated 05.03.2007 as Exh.A-10, original valuation table as Exh.A-11, attested copy of registered sale deed No.6129 dated 12.02.2007 as Exh.A-12, attested copy of registered sale deed No.3334 dated 06.05.2005 as Exh.A-13, attested copy of sale deed No.5973 dated 09.07.2007 as Exh.A-14, original copy of form as Exh.A-15, report of LAC Multan as Exh.A-15/1, photocopy of valuation table dated 28.10.2010 as Mark-A, photocopy of register of record of rights for the year 2002-03 (four in number) as Mark-B, Mark-B/1 to Mark-B/3, photocopy of notice dated 21.12.2007 (four in number) as Mark-C, Mark-C/1 to Mark-C/3, photocopy of Aks Shajra as Mark-D, photocopy of letter dated 05.07.2007 as Mark-E, copy of payment of compensation under protest dated 05.11.2007 (four in number) as Mark-

F, registered power of attorney No.150 dated 05.06.1997 as Exh.P-1 and general power of attorney No.1275 dated 04.06.1997 as Exh.P-2, closed their evidence. Respondents produced two witnesses namely Khalil Ahmad and Muhammad Javaid Ashraf as RW-1 and RW-2, respectively and by tendering in documentary evidence copy of Notification No.161 as Exh.R-1, copy of Notification No.441 as Exh.R-2, copy of report of Field Revenue Staff as Exh.R-3, copy of 'Roznamcha Waqiyati" as Exh.R-4, copy of average sale price of Mauza Dera Muhammadi as Exh.R-5, copy of average sale price of disputed property as Exh.R-6, copy of average sale price of agricultural land as Exh.R-7, copy of detailed report of Mauza Dera Muhammadi as Exh.R-8, copy of minutes of meeting of DPAC as Exh.R-9, copy of letter No.726 dated 10.07.2007 as Exh.R-10, copy of order of MBR as Exh.R-11, copy of Award dated 05.11.2007 as Exh.R-12, copies of mutations Nos. 9232, 9257, 9271, 9272, 9318, 9440, 9969, 9492, 9525, 9565, 9592, 9639, 9687, 9774, 9713, 9854, 9882, 9897, 9880, 10017, 10018, 10028, 10035 as Exh.R-13 to Exh.R-36, attested copy of register regarding compensation received by the appellants as Exh.R-37, office order dated 08.11.2007 as Exh.R-38, voucher regarding payment of amount of Award No.47/4919 in favour of appellants as Exh.R-39, certified copy of register pertaining to Award amount received by Ghazala Saleem as Exh.R-40 and certified copy of register pertaining to Award amount received by Muhammad Ameen Shahid as Exh.R-41, closed their evidence. After hearing learned counsel for the parties, learned Referee Court proceeded to accept the reference and fix the compensation at the rate of Rs.12,000/- per marla also holding the appellants entitled to 15% compulsory acquisition charges and compound interest at the rate of 8% per annum from the date of taking possession of disputed property from appellants. Being dis-satisfied, appellants filed instant appeal with the following prayer:-

" the appeal may be accepted the judgement and decree of the referee court dated 05.06.2013 may be amended and compensation awarded to the appellants may be enhanced to compensate them for depriving from their valuable property and price may be granted at the rate of Rs.60,000/- per Marla.

It is further prayed that all other costs, compensations and benefits may be enhanced and awarded to the appellants which are provided by law and also recommended and approved by the superior courts."

3. Learned counsel for appellants while opening his arguments, contended that Land Acquisition Collector and learned Referee Court failed to determine the price of land as per the evidence produced by appellants. It was argued that the principle of willing purchaser and willing seller was not applied by Land Acquisition Collector and learned Referee Court. Added that, while assessing the price authoritative pronouncements of Superior Courts were also ignored by Land Acquisition Collector as well as learned Referee Court. Learned counsel went on arguing that Land Acquisition Collector and learned Referee Court also failed to take note of the fact that land in question was situated on the bypass road of Multan and same was also surrounded by industrial concerns, commercial centers and residential colonies. Learned counsel argued that as per evidence produced by appellants, market price of the land was not less than Rs.60,000/- per marla. It was further argued that while determining the market price of the land, Land Acquisition Collector and learned Referee Court failed to consider the increase of price of land during the acquisition period and also failed to assess the potential value of the acquired land in view of future utility of the acquired land. For his arguments, learned counsel placed reliance on cases reported as "Collector, Land Acquisition, Mardan and others v. Nawabzada M. Ayub Khan and others" (2000 SCMR 1322), "Province of Punjab through Collector, Attock v. Engr. Jamil Ahmad Malik

and others" (2000 SCMR 870), "Government of Pakistan through Military Estate Officer, Abbottabad and another v. Ghulam Murtaza and others" (2016 SCMR 1141). "Air Weapon Complex through DG v. Muhammad Aslam and others" (2018 SCMR 779).

4. As against that, learned Law Officer supported the impugned judgment by arguing that value of the land was correctly assessed by Land Acquisition Collector and even learned Referee Court rightly enhanced the said amount. Added that as per evidence available on the record, price of land was not more than the amount awarded by Land Acquisition Collector and even by the learned Referee Court. It was further submitted that appellants after receiving the compensation as back in the year 2007, were not supposed, by their act and conduct, to file the reference as they practically accepted the price fixed by the Land Acquisition Collector. Learned law officer went on arguing that price of the land was assessed as per the parameters provided under the provisions of section 23 of the Act, 1894, as such there exists no ground for the acceptance of this Appeal. Learned Law Officer prayed for dismissal of this appeal with cost.

5. Arguments heard. Record perused.

6. Before going into the merits of the instant case, we find it apt to have a glance over relevant provisions of the Constitution of Islamic Republic of Pakistan, 1973 (hereinafter referred to as the 'Constitution') and law dealing with the rights of a citizen to acquire, possess and dispose of property. Article 23 of the Constitution enjoins that citizens have been vested with a fundamental right to hold, acquire and dispose of property in any part of Pakistan, subject to the constitution and any reasonable restriction imposed by law in the public interest. Provisions of Article 24 of the Constitution provide that no person shall be deprived of his property save in accordance with law. It has further been contemplated in the said provisions that no property shall be compulsorily acquired or taken

possession of except for a public purpose and save by the authority of law which provides for compensation therefor and either fixes the amount of compensation or specifies the principles on the basis of which compensation has to be determined and given.

7. Acquisition process employed to deprive someone of his property, therefore, is an exception that has been visualized by the Constitution. The process must be in consonance with conditions, parameters and the manner as laid down in Article 24(2) & (3) of the Constitution. Even if property of any person is taken over for a public purpose, the person being deprived of his property has to be given adequate, fair, just and due compensation. The provisions of Act, 1894 had constitutional backing as the same have been covered under the exception as contained in Article 24 (2) of the Constitution. It may further be observed that the provisions of Act, 1894 are self-contained for acquisition of land besides payment of compensation. Raison d'etre of the provisions of the Act, 1894 is twofold. Firstly, to fulfill the needs of the Governments and Companies for land required by them for their projects and secondly, to determine and pay compensation to those persons whose land is to be acquired. The main intention and object of the legislature is to provide an indemnity to the owner that no property can be acquired without proper and adequate compensation. An exhaustive and inbuilt modus operandi, for the redress of grievances of the persons from whom land is compulsorily acquired, has been provided in the Act, 1894. The provisions of section 23 of Act, 1894 contemplate in detail the matters that have to be considered while determining compensation. Guidance has been sought from the cases reported as "Federal Government Employees Housing Foundation (FGEHF), Islamabad and others v. Malik Ghulam Mustafa and others" (2021 SCMR 201) and "Land Acquisition Collector and others v. Mst. Iqbal Begum and others" (PLD 2010 SC 719).

8. Acquiring authority and even the courts while determining the compensation indeed have to firstly adhere to the provisions of section 23 of the Act, 1894 and secondly are also bound to follow the dicta laid down by the apex court for determining the market value of the property so acquired. In case reported as "Pakistan Burmah Shell Ltd. v. Province of N.W.F.P and 3 others" (1993 SCMR 1700), it was observed by the apex Court that in assessing the market value of land, its location, potentiality and the price, evidenced by the transactions of similar land at the time of notification were the factors to be kept in view. It was further observed that one year's average of the sales taking place before the publication of the notification under section 4 of the similar land was merely one of the modes for ascertaining the market value and was not an absolute yardstick for the assessment.

9. In another case reported as "Haji Muhammad Yaqoob and another v. Collector, Land Acquisition/Additional Deputy Commissioner, Peshawar" (1997 SCMR 1670), it was observed by the apex Court that one year average sale price of the land in the vicinity preceding the date of notification under section 4 of the Act, 1894 was only one of the relevant factors for consideration in determining the market value of the land but it alone could not be adopted as a basis for the assessment of market value, if there is other evidence available on the record to establish the potential value of acquired land at a higher rate. In another case reported as "Province of Punjab through Collector, Attock v. Engr. Jamil Ahmad Malik and others" (2000 SCMR 870), while approving the dicta laid down in Pakistan Burmah Shell Ltd. and Haji Muhammad Yaqoob's cases referred supra, apex Court inter alia observed as under:-

"18 .

The following matters are to be taken into consideration in determining the amount of compensation:-

(i) The data from which the market value of the land can be estimated is given in Rule 13 of the North-West Frontier Province Circular No.54 issued presumably under section 55 of the Act.

(ii) The best method to work out the market value is the practical method of a prudent man laid down in Article 2, Qanun-e-Shahadat 1984 to examine and analyze all the material and evidence available on the point and to determine the price which a willing purchaser would pay to willing seller of the acquired land.

(iii) Subsection (1) of section 23 of the Land Acquisition Act provides that in determining the amount of compensation the Court shall take into consideration the market value, loss by reason of severing such land from his other land, acquisition injuriously affecting his other property or his earning in consequence of change of residence or place of business and damage, if any, resulting from diminution of the profits of the land between the time of the publication of the declaration under section 6 and the time of the Collector's taking possession of the land. This, however, is not exhaustive of other injuries or loss which may be suffered by an owner on account of compulsory acquisition.

(iv) The best method of determination of the market price of the plots of land under the acquisition is to rely on instances of sale of it near about the date of notification under section 4(1) of the Land Acquisition Act. The next best method is to take into consideration, the instances of sale of the adjacent lands made shortly before and after the notification. When the market value is to be determined on the basis of the instances of sale of land in the neighboring locality, the potential value of the land need not be separately awarded because such sales cover the potential value.

(v) The law provides determi-nation of compensation not with reference to classification or nature of land but its market value at the relevant, time. No doubt, for determining the market value, classification p; the nature of land may be taken as relevant consideration but that is not the whole truth. An area may be Banjar Qadeem or Barani but its market value maybe tremendously high because of its location, neighborhood, potentiality or other benefits.

(vi) While determining the value of the compensation the market value of the land at the time of requisition/acquisition and its potentiality have to be kept in consideration.

(vii) Consideration should be had to all the potential uses to which the land can be put as well as all the advantages, present or future which the land possesses in the hands of the owners.

(viii) In determining the quantum of fair compensation the main criterion is the price which a buyer would pay to a seller for the property if they voluntarily entered into the transaction.

(ix) The measure of fair compensation is the value of the property in open market which a seller voluntarily entering into a transaction of sale can reasonably demand from a purchaser this means that Court has to determine the value of the land in the open market at the relevant time on the assumption that the notification of acquisition did not exist.

(x) While determining the value of the land acquired by the Government and the price which a willing purchaser would give to the willing seller, only the "past sales" should not be taken into account but the value of the land with all its potentialities may also be determined by examining (if necessary as Court-witness) local property dealers or other persons who are likely to know the price that the property in question is likely to fetch in the open market. In appropriate cases

there should be no compunction even relying upon the oral testimony with respect to market value of the property intended to be acquired; because even while deciding cases involving question of life and death, the Courts rely on oral testimony alone and do not insist on the production of documentary evidence. The credibility of such witnesses would, however, have to be kept in mind that it would be for the Court in each case to determine the weight to be attached to their testimony. It would be useful and even necessary, to examine such witnesses while determining the market prices of the land in question, because of the prevalent tendency that in order to save money on the purchases of stamp papers and to avoid the imposition of heavy gain tax levies on sale of property, people declare or show a much smaller amount as the price of the land purchased by them than the price actually paid. The "previous sales" of the land, cannot, therefore, be always taken to be an accurate measure for the determining the price of land intended to be acquired.,

(xi) The sale-deed and mutation entries do serve as an aid to the prevailing market value.

(xii) In cases of compulsory acquisition effort has to be made to find out what the market value of the acquired land was or could be on the material date. While so venturing the most important factor to be kept in mind would be the complexion and character of the acquired land on the material date. The potentialities it possessed on that date are also to be kept in view in determining a fair compensation to be awarded to the owner who is' deprived of his land as a result of compulsory acquisition under the Act.

(xiii) The value of the land of the adjoining area which wad simultaneously acquired and for which different formula of compensation has been adopted should be taken into consideration.

(xiv) The phrase `market value of the land' as used in section 23(1) of the Act means `value to the owner' and, therefore, such value must be the basis for determination of compensation. The standard must be not a subjective standard but an objective one. Ordinarily, the objective standard would be the price that owner willing and not obliged to sell might reasonably expect to obtain from a willing purchaser. The property must be valued not only with reference to its condition at the time of the determination but its potential value must be taken into consideration."

10. In case reported as "Government of Pakistan through Military Estate Officer, Abbottabad and another v. Ghulam Murtaza and others" (2016 SCMR 1141), it was observed as under:-

"Numerous judgments and dictas given and laid down by this court with binding and laying guiding principles on the subject issue have unfortunately been conveniently ignored by the Collector as he remained stuck to the one year average without taking care of present and future potentiality of the land acquired. It has been repeatedly laid down that being a compulsory acquisition of land for public purposes, the owners of the land are deprived of its utility while at the same time the Collectors Acquisition simply impose their own opinion ordinarily based on one year average which is not a correct approach to the matter, as has been laid down by this court."

In another case reported as "Air Weapon Complex through DG v. Muhammad Aslam and others" (2018 SCMR 779), it was observed as under:-

"7. It is settled law that in assessing compensation of acquired land, the following factors are to be taken into consideration:

(a) its market value at the prevalent time and its potential;

(b) one year average of sale taken place before publication of notification under section 4 of the Act of the similar land;

(c) its likelihood of development and improvement;

(d) a willing purchaser would pay to a willing buyer in an open market arms length transaction entered into without any compulsion;

(e) loss or injury occurred by severing of acquired land from other property of the land owner;

(f) loss or injury by change of residence or place of business and loss of profit;

(g) delay in the consummation of acquisition proceedings and;

(h) peculiar facts and circum-stances of each case."

11. In case reported as "Sarhad Development Authority N.W.F.P (Now KPK) through COO/CEO (Officio) and others v. Nawab Ali Khan and others" (2020 SCMR 265), it was observed by the apex Court that precedents reflect a constant trend to also consider the purposes of determining the market value of the property to be acquired, its potential value or essentially the future use to which the said property can be put to. It was further observed as under:-

"13 ..And in doing so, there is judicial consensus in considering sale transactions of similar nature of immovable property in the adjoining khasras or even mauzas taking place even after the date of publication of the Notification under section 4(1) of the Act for adjudging the "market value", and in doing so to finally fix the

amount of compensation to be awarded to the landowners for the property acquired."

While answering the first proposition as formulated in Paragraph No.7 of Sarhad Development Authority's case referred supra, it was observed by the apex Court as under:-

"17. Thus, in view of the above, it would be safe to state that not only in Khyber Pakhtunkhwa, but even in other three provinces, where section 23(1) of the Act has not been amended, it is noted that: firstly, the value of similar land in the adjoining khasras and mauzas to the acquired land was taken into consideration for determining the amount of compensation to be awarded to owners of the acquired property; and secondly, the escalation of price of land during the acquisition period till its culmination in issuance of the award could be taken into consideration; and thirdly, for assessing the "potential value" of the acquired land, the most critical factor, which is to be kept in mind is the future utility of the proposed acquired land, keeping in view the availability of facilities for its said utilization; and finally, there can be no mathematical formula set for the determination of the compensa-tion due to the landowners for the compulsory acquisition of their property. And thus, various factors depending on the circumstances of each case would cumulatively form the basis for determining the "market value" of the acquired land within the contemplation of section 23(1) of the Act."

12. In view of the dicta laid down by apex Court, it can very safely be concluded that while determining the compensation, Land Acquisition Collector and the courts ought to have considered the evidence/material so brought on the file as per the provisions of section 23 of the Act, 1894 besides taking note of the potentiality and the future perspective of the land beyond the date of publication of the notification under section 4 (1) of the

Act, 1894. There is no cavil to the proposition that decision of the august Supreme Court of Pakistan in terms of Article 189 of the Constitution amounts to law declared and has binding effect on all fora within the country and judgment of august Supreme Court of Pakistan to the extent that it decides question of law or is based upon or enunciates a principle of law, is binding on each and every organ of the State. Guidance has been sought from the case reported as "Iffat Jabeen v. District Education Officer (M.E.E.), Lahore and another" (2011 SCMR 437).

13. In the backdrop of above discussion we now proceed to examine the claim of appellants in view of the pleadings and evidence so adduced by the parties before learned Referee Court. Version of appellants in their reference made under section 18 of Act, 1894 was that the price of their land was not less than Rs.60,000/- per marla and they received the award amount under protest. Respondents in their written statements nowhere denied in specific terms the fact of receiving of award amount under protest. Where a fact pleaded in the plaint is not specifically denied, the same shall be deemed to be accepted as correct in view of the provisions of Order VIII, Rule 5 of C.P.C., according to which an evasive denial would be construed as admission. Reliance in this regard may safely be placed on "Ghulam Rasool through L.Rs. and others v. Muhammad Hussain and others" (PLD 2011 SC 119). Even otherwise, as per document Mark-F (copy of payment of compensation under protest dated 05.11.2007) that was produced at trial, award amount was shown to be received under objection. Similarly, in reply to ground No.2 of paragraph No.4 of the reference, stance of respondents was that market price of acquired land was assessed in accordance with law/ rules. In order to substantiate and prove their version, appellants produced Ghulam Muhammad as PW-1 who in his examination-in-chief stated that price of land was Rs.80,000/- per marla (on 10.06.2010 when this PW was deposing before the court). Muhammad Aslam Javaid (AW-1) is General Attorney of appellants and according to

him price of acquired land was fixed on low rates. According to him, acquired property was adjacent to the road which was being used for commercial purposes and award amount had wrongly been determined. Mushtaq Ahmad (AW-2) stated that the acquired property was on the road and same was being used for commercial and residential purposes and various towns had been established near and around the acquired property and value of property was Rs.80,000/- per marla. During the course of cross-examination of the witnesses produced by appellants, it further came on the record that Mouza Dera Muhammadi was situated at Sher Shah Bypass on Bahawalpur Road and same was in the front of various residential colonies. Strangely enough, main suggestion put to these witnesses was that acquired land belonging to appellants was not residential one rather the same was agricultural land, however, these suggestions were answered in negative rather it was asserted that the acquired land was used for residential and commercial purposes.

14. It has never been the case of respondents, as per their pleadings, that acquired land in fact was agricultural land. Even as per the minutes of District Price Assessment Committee meeting (Exh.A7) that was also brought on the record by respondents as Exh.R9, the acquired land was situated on Muzaffargarh road nearest to Chowk Bahawalpur Bypass and price of the land at the rate of Rs.7,500/- per Marla was assessed being residential keeping in view its location, nature and potential value. Needless to add here that in their examination-in-chief both witnesses of the respondents did not depose at all that acquired land was in fact agricultural land. From the material/evidence brought on the record, it can conveniently be resolved that acquired land was located on Muzaffargarh Road, in the vicinity of Chowk Bahawalpur Bypass and was situated near various residential colonies, therefore, the same possessed potentiality qua its significance in future. It may further be seen that learned Referee Court while determining/enhancing the award amount from Rs.7,500/- to

Rs.12,000/-, observed that appellants failed to place on the record any valuation table existing at the time of publication of notification under section 4 of the Act, 1894. Learned Referee Court further observed that section 23(1) of the Act, 1894 provides that in determining the amount of compensation to be awarded of the land under the said Act, the court shall take into consideration the value of the land at the date of publication of notification under section 4(1) of the Act, 1894. This observation made by learned Referee Court is in vivid conflict with the dicta laid down in case "Province of Punjab through Land Acquisition Collector and another v. Begum Aziza" (2014 SCMR 75) wherein it has been observed as under:-

> "8 .Thus it took four years for appellants to complete the acquisition proceedings. The prices may have escalated during this period and this escalation has to be kept in view while assessing the potential value of the land."
>
> (emphasis supplied)

In the instant case, Notification No.161/DO(R)/LAC for acquiring land was issued on 02.06.2005 and the same was got published in Punjab Government Gazette on 24.08.2005 and final award was announced on 05.11.2007, therefore, it took around two years for respondents to complete the acquisition proceedings and during that period price/value of the acquired land was increased as evinced from the contents of sale deed (Exh.A-12) whereby value of one marla land in the year 2007 was escalated to the tune of Rs.1,00,000/-. Learned Referee Court, however, ignored this evidence merely on the wrong notion that the court had to take into consideration value of the land at the date of publication of notification under section 4(1) of the Act, 1894, whereas apex Court in the case referred supra held it unambiguously that escalation in the price till the completion of acquisition proceedings was to be kept in view while assessing the potential value of the land. Guidance has further been sought from the cases

reported as "Province of Punjab through Land Acquisition Collector and another v. Begum Aziza" (2014 SCMR 75), "Province of Sindh through Collector of District Dadu and others v. Ramzan and others" (PLD 2004 SC 512) and "Abdul Majeed and 6 others v. Muhammad Subhan and 2 others" (1999 SCMR 1245).

15. This now brings to us the assessment/determination of the price of acquired land of the appellants. As per the material/evidence available on the record, as discussed in the preceding lines, equitable value/price of acquired land belonging to appellants from the years 2005 to 2007 when finally award was published, comes to Rs.40,000/- per Marla and appellants are held entitled to the same.

16. Sequel of the above discussion is that, instant appeal is partly allowed, impugned judgment dated 05.06.2013 passed by learned Referee Court is modified by enhancing compensation amount of the acquired property of appellants from Rs.12,000/- per marla to Rs.40,000/- per marla by maintaining remaining findings qua awarding of 15% compulsory acquisition charges and compound interest at the rate of 8% per annum since the date of taking possession of the disputed property from appellants. No order as to costs.

MH/L-3/L **Order accordingly.**

2023 Y L R 2164

[Lahore]

Before Sardar Ahmed Naeem and Shakil Ahmad, JJ

YASIR PARVEZ and others---Appellants

Versus

The STATE and others---Respondents

Criminal Appeals Nos. 53173-J, 53156-J of 2017, Criminal Revision No. 183857 of 2018 and Murder Reference No. 253 of 2017, heard on 28th April, 2022.

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

----Ss. 302(b), 396 & 412---Qatl-i-amd, dacoity with murder, dishonestly receiving property stolen in the commission of dacoity---Appreciation of evidence---Benefit of doubt---Accused were charged for committing murder of the brother of complainant and injuring the complainant during dacoity---Record showed that complainant failed to specifically mention in complaint that whether accused persons named in complaint were in fact previously known to him---During the course of cross-examination both of the witnesses of ocular account stated that accused persons were previously known to them---Complainant had also failed to mention specific seat of injuries said to have been caused by accused persons on the head of deceased---Even complainant failed to specifically mention the part of his body where he received butt blows given by the unknown accused person---Complainant had also not stated anything in complaint as to whether any of the accused demanded or asked either him or the deceased to hand over cash---Complainant failed to specifically mention in complaint as to who was carrying cash which was claimed to have been drawn from the bank and it was also not specifically mentioned that from whom the accused persons forcibly snatched the money----It had not been mentioned in complaint that which of the accused persons snatched the cash---Not

essential for the complainant to give each and every detail of the occurrence in the complaint on the basis of which FIR is lodged, however, at the same time it is equally correct that certain necessary and essential details leading to the occurrence are always required to be mentioned in the application on the basis of which FIR is lodged---Circumstances established that the prosecution failed to prove its case against accused persons beyond reasonable shadow of doubt---Appeal against the conviction was allowed accordingly.

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

----Ss. 302(b), 396 & 412---Qatl-i-amd, dacoity with murder, dishonestly receiving property stolen in the commission of dacoity---Appreciation of evidence---Benefit of doubt---Unnatural conduct of the complainant---Accused were charged for committing murder of the brother of complainant and injured the complainant during dacoity---Bare reading of the story as narrated in the complaint reflected that complainant and his brother were going back to their home after taking cash from a bank, and were vividly alert enough to notice being chased by accused persons---During the course of cross-examination, complainant stated that the whole area from the bank towards their home was a populated one and police office was on the way---Despite that, as per own showing of complainant during cross-examination, they did not make any attempt to report the matter to police---Even no attempt was shown to have been made by complainant and his brother to avoid being chased by accused persons by taking shelter at any safe place on the way---Such conduct shown by complainant was against natural human behavior---Circumstances established that the prosecution failed to prove its case against accused persons beyond reasonable shadow of doubt---Appeal against the conviction was allowed accordingly.

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

----Ss. 302(b), 396 & 412---Qatl-i-amd, dacoity with murder, dishonestly receiving property stolen in the commission of dacoity---Appreciation of

evidence---Benefit of doubt---Dishonest improvements made by the complainant---Accused were charged for committing murder of the brother of complainant and injuring the complainant during dacoity---Complainant, who besides giving the narration as mentioned in complaint, deposed that accused persons after forcibly getting them down from motorcycle asked them to handover the amount which they had brought from a bank---It was further deposed by complainant that accused snatched Rs.100,000/- from the deceased forcibly at gunpoint and left the place of occurrence whereafter they shifted deceased in injured condition at THQ Hospital and he moved application before the police---Complainant further deposed that his brother was referred to DHQ Hospital, and was further referred to other Hospital where he expired---Complainant cautiously made improvements in his examination-in-chief by introducing the fact that accused persons asked them to hand over the amount that they had got from the bank and that accused snatched Rs.100,000/- from the deceased---Both the said facts although were not confronted during the course of cross-examination, however, a judicial notice could be taken as both the improvements, on the face of it, were dishonest and deliberate, therefore, same could not be ignored lightly---Circumstances established that the prosecution failed to prove its case against accused persons beyond reasonable shadow of doubt---Appeal against the conviction was allowed accordingly.

(d) Criminal trial---

----Dishonest improvements made by witness---Scope---If improvements are found to be deliberate and dishonest, same would cast doubt qua the veracity of the testimony of such witness of ocular account and no reliance can be placed on such testimony for conviction on a charge entailing death penalty for the simple reason that when a witness makes dishonest improvement while deposing before the court, he simply exposes himself to his own dishonesty that ipso facto is sufficient to discard his evidence by counting him a dishonest person.

Fida Hussain and another v. The State and another 2021 PCr.LJ 174 rel.

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

----Ss. 302(b), 396 & 412---Qatl-i-amd, dacoity with murder, dishonestly receiving property stolen in the commission of dacoity---Appreciation of evidence---Benefit of doubt--- No justification for the presence of witnesses at the time and place of occurrence---Chance witnesses---Accused were charged for committing murder of the brother of complainant and injury the complainant during dacoity---Record showed that complainant admittedly was posted as Patwari Irrigation Department, as such on the day of occurrence, he was supposed to be present at his office whereas in complaint, he was shown to be accompanying deceased and also witnessed the occurrence---Claim of complainant qua his presence at the spot made him a chance witness particularly when it had never been the stance of complainant in his written application that on the fateful date he in fact was on leave---Eye-witness should reasonably explain his presence at the spot and narration of incident as given by such witnesses should also inspire confidence---Both the said essential elements simply were lacking in the instant case inasmuch as neither presence of complainant had plausibly been explained and even narration of incident given by said witness hardly inspired confidence---Eye-witness, in his examination-in-chief attempted to support the stance of complainant but he skipped to state the improved stance of complainant that accused persons demanded them to hand over the cash---Said witness instead came up with the assertion in his examination-in-chief that accused tried to snatch amount from deceased and on his resistance, accused fired shot with his pistol---Said witness, who was nephew of complainant, admittedly was posted at Police Post which was at a distance of 2- kilometers from city, and he was supposed to be present at the place of his duty---No plausible explanation at all had been put forth by eye-witness justifying his presence at the spot during the hours when he was supposed to have been present at Police Post---Said witness too would conveniently be counted as a chance witness---Circumstances

established that the prosecution failed to prove its case against accused persons beyond reasonable shadow of doubt---Appeal against the conviction was allowed accordingly.

(f) Criminal trial---

----Witness---Chance witness---Scope---Chance witness is a witness who claims that he was present at the crime spot at the fateful event notwithstanding, his presence there was per sheer chance as in the ordinary course of events he was supposed to be present at same other place---Testimony of chance witness in such context is ordinarily not accepted unless justifiable reasons are shown to establish his presence at the spot at relevant time---In normal course of events presumption under the law that would operate would be that such witness was not present at the crime spot.

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

----Ss. 302(b), 396 & 412---Qatl-i-amd, dacoity with murder, dishonestly receiving property stolen in the commission of dacoity---Appreciation of evidence---Benefit of doubt---Contradictions in the statements of witnesses---Accused were charged for committing murder of the brother of complainant and injuring the complainant during dacoity---According to contents of FIR, on hearing the report of a fire shot as well as hue and cry made by complainant and his deceased brother, witness, since given up, and eye-witness were attracted to the spot along with many other person---Such narration given in the FIR suggested that the witnesses attracted to the spot after fire shot had been made could not be considered to have seen the assailants who made fire shot---Moreover, it had never been the case of complainant that two witnesses were already present in the street before their arrival---However, during cross-examination, complainant volunteered that said witnesses were already present in the street at the time of occurrence---Eye-witness in his cross-examination also stated that he was present in the street where occurrence took place---Such claim of complainant and eye-witness was in utter contradiction with the contents

of FIR where witnesses were shown to have been attracted to the spot after hearing report of fire shot---In the scaled site plan which was prepared by draftsman on the pointing out of witnesses, distance between point No.1 where deceased sustained firearm injury at the hands of accused, from point No.3 wherefrom the fire shot was made by said accused, was three feet---However, during the course of cross-examination, complainant stated that he could not say with certainty that from which side fire was shot at deceased because they were grappling with each other---Said assertion of complainant implied that fire shot was made on the deceased when he was grappling with the accused---As for distance of deceased from the accused when fire shot landed on the abdomen of deceased, two versions in prosecution case emerged at trial---According to first version, fire shot was made by accused on the deceased from a distance of three feet as shown in scaled site plan whereas according to second version fire shot was made by accused on the deceased when they were grappling with each other, as stated by complainant---Both the versions were in clear contrast with each other considering the statement of complainant that he could not say with certainty that from which side fire was shot because they were grappling with each other---It could very conveniently be inferred that complainant did not see the fire shot made on the deceased---In both the eventualities, fire would be considered to have been made within a range of not more than three feet, as such, presence of burning around the entry wound is quite natural in view of principles of medical jurisprudence but strangely enough, there was no blackening around the wound as stated by Medical Officer during the course of his cross-examination---Circumstances established that the prosecution failed to prove its case against accused persons beyond reasonable shadow of doubt---Appeal against the conviction was allowed accordingly.

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

----Ss. 302(b), 396 & 412---Qatl-i-amd, dacoity with murder, dishonestly receiving property stolen in the commission of dacoity---Appreciation of

evidence---Benefit of doubt---Ocular account and medical evidence---Contradictions---Accused were charged for committing murder of the brother of complainant and injuring the complainant during dacoity---Both the witnesses of ocular account had mentioned the time of occurrence as 12:00 noon but said deposition was not at all supported by the medical evidence---According to Medical Officer, injured, then deceased was brought at THQ Hospital at 11:15 am through his brother---Said deposition simply knocked the bottom out of whole prosecution story provided by the witnesses of ocular account as per whom occurrence took place at 12:00 noon---Had occurrence in this case taken place at 12:00 noon as claimed by the witnesses of ocular account, there could have been no question that injured was brought before Medical Officer at 11:15 a.m., i.e., 45 minutes prior to occurrence---Medical Officer was indeed an independent witness and the stance taken by him could not be doubted particularly when he was under oath---Even if a wrong fact was deposed by said witness, same could have been corrected and rectified either through re-examination or even getting said witness declared as hostile to that extent but nothing of that sort was done at trial---According to Investigating Officer, complainant appeared before him at Police Station and produced application and after lodging formal FIR, he prepared injury statement of injured, then deceased, and deputed a Police Constable for getting him medically examined---If injury statement was prepared after registration of FIR at 12:50 p.m., presence of injured at THQ Hospital even at 11:55 a.m. was beyond one's comprehension and reacted against the truthfulness of contents of complaint and even the evidence of witnesses of ocular account qua the time of occurrence---As per the contents of complaint, deceased also sustained injuries on various parts of his head, claimed to have been caused by accused persons with butts of pistol, however, no injury whatsoever on head of deceased was noticed by Investigating Officer in injury statement---Similarly, as per complaint, complainant also sustained pistol butt blows on various parts of his body but no Medico-Legal Certificate was obtained

to show the injuries---Circumstances established that the prosecution failed to prove its case against accused persons beyond reasonable shadow of doubt---Appeal against the conviction was allowed accordingly.

Barkat Ali's case 2007 SCMR 1812 and Abdul Subhan's case PLD 1994 SC 178 rel.

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

----Ss. 302(b), 396 & 412---Qatl-i-amd, dacoity with murder, dishonestly receiving property stolen in the commission of dacoity---Appreciation of evidence---Benefit of doubt---Defective investigation---Accused were charged for committing murder of the brother of complainant and injuring the complainant during dacoity---Investigating Officer during the course of his cross-examination admitted that he did not mention the name of any of accused persons on injury statement, and recovery memos. regarding blood stained earth and empty of 30-bore---Said omission was reflective of the fact that till the preparation of said documents, the names of the assailants were not known to Investigating Officer and application and FIR was belatedly drafted after due deliberation and consultation---No record was either produced by the complainant or collected by the Investigating Officer during the course of investigation to establish the fact that on the date of occurrence amount to the tune of Rs. 100,000/- was actually drawn from the bank as mentioned in complaint---Complainant during the course of his cross-examination stated that he did not produce any receipt before the Investigating Officer about the withdrawal of money from the bank---Investigating Officer also admitted during the course of his cross-examination that he did not take any record from the concerned bank regarding withdrawal of the amount by the deceased---Investigating Officer did not record the statement of any bank official in that regard---Deceased was claimed to have been brought at THQ Hospital in injured condition but Investigating Officer never made any attempt to record statement of injured while preparing injury statement---Record showed that

injured was further referred to another Hospital but Investigating Officer did not visit said Hospital for a period of around ten days in order to record statement of the injured till he succumbed to the injuries---Non-recording of statement of injured for about ten long days simply shattered the whole prosecution story given in complaint particularly where it had not been plausibly explained at trial that what refrained the Investigator from recording statement of injured---All the said facts clearly suggested that FIR in the instant case was lodged after due deliberation and consultation between complainant and police without recording statement of injured who was in his senses when he was firstly medically examined at THQ Hospital---Circumstances established that the prosecution failed to prove its case against accused persons beyond reasonable shadow of doubt---Appeal against the conviction was allowed accordingly.

(j) Criminal trial---

----Benefit of doubt---Principle---Conviction could only be based on evidence of unimpeachable character leading to certainty of the guilt of the accused---Even a single doubt arising in the prosecution case must be resolved in favour of the accused.

(k) Criminal trial---

----Benefit of doubt---Principle---Once doubt about the genuineness of prosecution story comes into the mind of the judge, proper and permissible course will be to acquit the accused by extending benefit of doubt.

Mst. Nazia Anwar v. The State 2018 SCMR 911 rel.

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

----Ss. 302(b), 396 & 412---Qatl-i-amd, dacoity with murder, dishonestly receiving property stolen in the commission of dacoity---Appreciation of evidence---Benefit of doubt---Recovery of robbed amount from the accused---Reliance---Accused were charged for committing murder of the brother of complainant and injuring the complainant during dacoity---In the

present case, allegedly robbed amount was recovered from the accused---However, the recoveries so effected were clearly in contravention of S. 103, Cr.P.C., therefore no reliance could be place upon the same at all---Even otherwise, no specific denomination of looted amount was mentioned in complaint---Thus, recovery of currency notes from the accused persons hardly lent any support to the prosecution case---Where prosecution case was mainly based on the evidence of ocular account and the moment truthfulness and intrinsic worth of evidence of ocular account had come under the clouds of doubts and was disbelieved, no other evidence even that of a high degree and value would be sufficient for recording conviction for a crime entailing capital punishment---Circumstances established that the prosecution failed to prove its case against accused persons beyond reasonable shadow of doubt---Appeal against the conviction was allowed accordingly.

Zafar v. The State and others 2018 SCMR 326 rel.

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

----Ss. 302(b), 396 & 412---Qatl-i-amd, dacoity with murder, dishonestly receiving property stolen in the commission of dacoity---Appreciation of evidence---Benefit of doubt---Recovery of pistol from accused and empties from the spot---Inconsequential---Accused were charged for committing murder of the brother of complainant and injuring the complainant during dacoity---Record showed that an empty was shown to have been recovered from the spot during first spot inspection by Investigating Officer and during investigation pistols were also shown to have been recovered on the pointing out of accused persons---However, there was nothing on record to show that either the empty or the pistols were transmitted to the Forensic Science Agency for comparison in order to ascertain as to from which pistol the empty was fired and no report in that regard was available on the record---In absence of any such comparison report, recoveries of pistols shown against the accused persons were simply inconsequential---Circumstances

established that the prosecution failed to prove its case against accused persons beyond reasonable shadow of doubt---Appeal against the conviction was allowed accordingly.

(n) Criminal trial---

----Heinousness of offence--- Mere heinousness of the offence, if not proved to the hilt, is not sufficient to provide a valid basis for conviction of the accused.

Najaf Ali Shah v. The State 2021 SCMR 736 rel.

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

----Ss. 302(b), 396 & 412---Qatl-i-amd, dacoity with murder, dishonestly receiving property stolen in the commission of dacoity---Appreciation of evidence---Benefit of doubt---Presence of witnesses at the spot doubtful---Accused were charged for committing murder of the brother of complainant and injuring the complainant during dacoity---Complainant along with witnesses claimed to have witnessed the occurrence and shifted victim in injured condition to hospital---In doing so, staining of their clothes with blood oozing from the wound of injured was very much natural---No evidence was available on the record to show that blood stained clothes of complainant and witnesses were taken into possession by the Investigating Officer---Had such clothes been taken into possession and dispatched to laboratory for grouping with the blood stained clothes of the deceased, the same would have lent strongest corroboration to the evidence of complainant and eye-witness showing their presence at the spot---Said omission struck at the roots of the case of prosecution---Circumstances established that the prosecution failed to prove its case against accused persons beyond reasonable shadow of doubt---Appeal against the conviction was allowed accordingly.

Azhar Abbas and another v. The State and others 2019 MLD 1808 and Abdul Jabbar v. The State 2019 SCMR 129 rel.

Sikandar Zulqarnain Saleem, for Appellant Yasir Pervaiz.

Muhammad Usman Riaz Gill for Appellant Mukhtar Ahmad.

Muhammad Rasib Khan For Appellant Ansar.

Yasir Javed Malik, Ch. Muhammad Ramzan and Naveed Ahmad Khawaja for the Complainant.

Rao Atif, DDPP for the State.

Date of hearing: 28th April, 2022.

JUDGMENT

SHAKIL AHMAD, J.---By filing Criminal Appeal No.53173-J of 2017, appellants Yasir Parvaiz, Muhammad Imran and Mukhtar Ahmad whereas through Criminal Appeal No.53156-J of 2017 appellant Ansar have challenged their convictions and sentences. They were indicted and tried by learned Additional Sessions Judge, Bhalwal on the charge under Sections 302, 396, 412, P.P.C. in case FIR No.281 of 2013 dated 02.07.2013, registered at Police Station City Bhalwal, District Sargodha. Learned trial court, on conclusion of trial vide judgment dated 13.04.2017 (impugned judgment) convicted the appellants and sentenced them as under:-

Appellant Yasir Parvez

"Convicted under Section 302(b), P.P.C. and sentenced to death with payment of Rs.5,00,000/- as compensation under section 544-A, Cr.P.C. to the legal heirs of deceased. In case of default in payment of compensation, to undergo six months simple imprisonment.

Appellants Ansar, Muhammad Imran and Mukhtar Ahmad

"Each of them convicted under section 302(b), P.P.C. and sentenced to imprisonment for life R.I each with payment of Rs.2,00,000/- each as compen-sation under section 544-A, Cr.P.C. to the legal heirs of

deceased. In case of default in payment of compensation, delinquent convict to undergo six months simple imprisonment".

All the appellants were convicted under section 396, P.P.C. and sentenced to R.I for ten years each.

All the appellants were convicted under section 412, P.P.C. and sentenced to R.I for seven years each.

Benefit of section 382-B of Cr.P.C. was given to all the appellants and sentences awarded to them were ordered to run concurrently.

Murder Reference No.253 of 2017 has been sent by learned trial court under section 374 Cr.P.C. for confirmation of death sentence awarded to appellant Yasir Parvez. Complainant Sadiq Ali has filed Criminal Revision No.183857 of 2018 seeking enhancement of sentence of appellants Ansar, Muhammad Imran and Mukhtar Ahmad. Since all the matters have originated from the impugned judgment dated 13.04.2017, the same are being decided through this single consolidated judgment.

2. Initially, machinery of criminal law was set into motion on written application Ex.P-U moved by Sadiq Ali complainant at Police Station City, Bhalwal on 02.07.2013 at 12:50 P.M, stating therein on the same day at about 12:00 P.M, he along with his brother Hashmat Ali after drawing an amount of Rs.100,000/- from MCB Bank Bhalwal branch, when were on their way to home on a motorcycle, two persons namely Yasir Parvez and Muhammad Ansar chased them on motorcycle Honda-125 bearing Registration No.SGO-1973 and when they reached near Bhaira-Bhalwal Chowk, three companions of above said persons, namely Muhammad Imran, Mukhtar and an unknown on a Honda Motorcycle also started chasing them on the signal given by Yasir Pervaiz and Muhammad Ansar and when they reached in street No.15 Noor Hayat Colony, Bhalwal near their house, Yasir Parvez and Muhammad Ansar came from front side whereas Imran, Mukhtar and an unknown person came from back side and stopped them while taking out their firearms. As per contents of Exh.P-U,

Muhammad Imran and Mukhtar gave repeated blows with butts of their pistols on head of Hashmat Ali and the unknown accused gave pistol butt blows on different parts of body of complainant. It was further averred in Ex.P-U that on resistance, Yasir Parvaiz made a fire with pistol which hit on abdomen of complainant's brother Hashmat, who fell down; hearing report of fire shot as well as hue and cry of complainant and his brother, Shahid Qamar and Sajid Ali residents of Noor Hayat Colony and many other persons attracted the spot, whereupon accused persons after forcibly snatching cash Rs.100,000/- on gun point, fled away.

3. After registration of FIR, investigation was conducted by Muhammad Ashraf S.I (PW-13) who claimed to have registered FIR Exh.PU/1 on the basis of application Exh.PU, prepared injury statement Exh.PM of Hashmat Ali and got himself medically examined by deputing Muhammad Razzaq Constable, proceeded to place of occurrence and inspected the same, secured blood stained earth from place of occurrence through recovery memo Exh.PX, took into possession an empty P-16 from the place of occurrence vide recovery memo Exh.PY, prepared rough site plan of place of occurrence Exh.PZ. On 11.07.2017, PW-13 stated to have arrested Muhammad Ansar and Yasir Parvez and obtained their physical remand. On 12.07.2013, Hashmat Ali succumbed to the injuries at Mayo Hospital, Lahore and receiving this information PW-13 said to have recorded Rapt Exh.PAA in the daily diary register and went to Mayo Hospital, Lahore, wherefrom collected death certificate Exh.PR, received the dead body, prepared injury statement Exh.PS and inquest report Exh.PT an after post-mortem examination, Muhammad Razzaq Constable handed over last worn clothes of deceased and a sealed bottle to PW-13 who took the same into possession vide recovery memos Exh.PM and Exh.PN, respectively. On 13.07.2013, PW-13 stated to have got inspected the place of occurrence by draftsman Muhammad Hafeez and the later after preparing scaled site plan Exh.PF and Exh.PF/1, handed over the same to PW-13. On 19.03.2013, PW-13 claimed to have arrested Muhammad Imran accused and obtained

his physical remand. PW-13 stated to have recovered during investigation a pistol .30-bore P-6 along with two live bullets P-7/1-2 on the pointing out of Yasir Parvez accused and took the same into possession vide recovery memo Exh.PG, recovered cash Rs.25000/- on the pointing out of Yasir Parvez accused and took the same into possession vide recovery memo Exh.PH, prepared rough site plan of place of recoveries Exh.PBB. PW-13 also claimed to have recovered pistol 30-bore P-1 along with three live bullets P-2/1-3 on the pointing out of Muhammad Ansar accused and took the same into possession vide recovery memo Exh.PA, recovered cash Rs.25000/- on the pointing out of Muhammad Ansar accused and took the same into possession vide recovery memo Exh.PB, recovered Honda Motorcycle on pointing out of accused Muhammad Ansar and took the same into possession through recovery memo Exh.PC, prepared rough site plan of place of recoveries Exh.PCC and thereafter he was transferred.

4. Investigation was then entrusted to Ahmad Yar S.I (PW-12) who stated to have recovered a pistol 30-bore P-4 on the pointing out of Muhammad Imran accused and took the same into possession vide recovery memo Exh.PG, recovered cash Rs.25000/- on the pointing out of Muhammad Imran accused and took the same into possession vide recovery memo Exh.PE, prepared rough site plans of places of recoveries Exh.PW and Exh.PV, respectively and thereafter he was transferred

5. Subsequent investigation was conducted by Muhammad Usman S.I (PW-14) who stated to have arrested Mukhtar Ahmad accused and during investigation recovered pistol 32-bore P-9 and two live bullets P-10/1-2 on his pointing out and took the same into possession vide recovery memo Exh.PJ, also recovered cash Rs.15000/- on the pointing out of Mukhtar Ahmad and took the same into possession vide recovery memo Exh.PK, prepared rough site plan of place of recovery Exh.PDD. PW-14 also said to have recovered an amount of Rs.10,000/- from Mukhtar Ahmad accused and took the same into possession vide recovery memo Exh.PL and prepared site plan of place of recovery Exh.PEE. On completion of

investigation, report under section 173, Cr.P.C. was submitted before trial court. Appellants were indicted for the offences under sections 302, 396, 412, P.P.C. They pleaded not guilty and trial commenced.

6. At trial, fifteen PWs were recorded whereas Tasawar Hussain 437/C, Shahid Qamar and Ijaz Mumtaz 1376/C were given up being unnecessary by learned DDPP.

7. Muhammad Jahangir 376/C (PW-1) is attesting witness of recovery memos Exh.PA, Exh.PB, Exh.PC, Exh.PD and Exh.PE. Imtiaz Ahmad 1331/C (PW-2) claimed to have deposited parcel of blood stained earth in the concerned lab. Muhammad Hafeez draftsman (PW-3) claimed to have prepared scaled site plan Exh.PF and Exh.PF/1. Muhammad Yousaf 444/MHC (PW-4) while being posted as Moharrar stated to have received parcel of blood stained earth and handed over to PW-2 for onward transmission. Muhammad Riaz 268/C (PW-5) stated to have executed warrants of arrest and proclamations against Mukhtar Ahmad accused on 23.11.2013 and 11.12.2013, respectively. Muhammad Aslam 716/C (PW-6) is attesting witness of recovery memos Exh.PG and Exh.PH. Zafar Iqbal 1222/C (PW-7) is attesting witness of recovery memos Exh.PJ and Exh.PL. Muhammad Razzaq 484/C (PW-8) stated to have escorted the dead body to mortuary and after autopsy handed over last worn clothes of deceased to the I.O, who took the same into possession vide recovery memo Exh.PM. Ocular account in this case was furnished by Sadiq Ali complainant (PW-10) and Sajid Ali (PW-11). PW-12, PW-13 and PW-14 are the investigators. Nasir Ahmad 1076/C (PW-15) is the attesting witness of recovery memos Exh.PX, Exh.PY, Exh.PA, Exh.PB and Exh.PC. Medical evidence was furnished by Dr. Muhammad Ali (PW-9), who conducted medical examination of Hashmat Ali (the then injured) on 02.07.2013 at 11:15 A.M. and noticed following injuries:-

i. A lacerated wound 3- x 1 cm x bone exposed on left side of head.

ii. A lacerated wound 2- cm x cm x bone not exposed on left side

of head 1.5 cm above injury No.1.

iii. A firearm wound of entry 1.5 x 1 cm x going into abdomen on right side 12 cm above umbilicus (corresponding hole was present on Qameez).

According to PW-9, injuries Nos.1 and 2 were inflicted by blunt weapon whereas injury No.3 was caused by firearm weapon and the injuries were fresh. On 12.07.2013, PW-13 conducted post-mortem examination on the dead body of Hashmat Ali and observed as under:-

1. A fire arm wound of entry on right side of abdomen as already mentioned in MLR No.294/13 dated 02.07.2013.

2.a Fifteen stitched silk stitches found on midline of abdomen.

2.b 02 stitched drain holes on right side of abdomen.

2.c One stitched drain hole on left side of abdomen.

2.d One hole on upper part of right chest.

3. Head injury as mentioned in MLR stated above.

Cause of death, according to PW-9, was injury No.1.

After tendering in evidence report of PFSA Exh.PAA, prosecution evidence was closed by learned DDPP.

8. Statements of appellants were recorded under section 342, Cr.P.C. They controverted and denied the allegations of facts so put to them from the evidence of PWs and professed their innocence. None of the appellants opted to appear in the witness box under section 340(2) Cr.P.C. and also did not chose to produce any evidence in defence except Yasir Parvez appellant but he also did not submit any evidence in his defence. In reply to the question why this case against him and why the PWs had deposed against him, appellant Yasir Pervaiz took the following stance:-

"This is a blind murder. I do not know about the occurrence. The private PWs are close relatives to each other. Officials PWs have deposed

just to show their progress. I was representative of "Soni Dharti" newspaper. I got issued proclamation against PW-11 Sajid Ali and Investigating Officer Muhammad Ashraf S.I due to which I have been involved in this case. I am innocent in this case."

Mukhtar Ahmad appellant while replying the same question, took following stance:-

"I have been involved in the instant case by the complainant due to mala fide and his ulterior motive. The PWs are close relatives inter se and they have deposed falsely. The complainant has involved me in the instant case on the instigation of his maternal cousin Iftikhar son of Lal Muhammad Gondal resident of Chak No.9 M.L who is my opponent in the village."

Muhammad Imran appellant did not take any specific plea and only asserted that it was a false case and PWs had deposed falsely. Stance of Muhammad Ansar appellant is as under: -

"I am the resident of Chak No.9 M.L and one Nazir is the Lumberdar of my Chak who is inimical towards me and the complainant had relations with him. I have been involved in this case on the asking of above said Nazir by the complainant. PWs are interse. I am innocent and I have no concerned whatsoever with the alleged occurrence."

9. On conclusion of trial, appellants were convicted and sentenced as detailed in opening paragraph of this judgment, hence, these matters.

10. We have heard learned counsel for the parties, learned Deputy District Public Prosecutor and gone through the record with their able assistance.

11. Having heard learned counsel for the parties and learned DDPP, we are constrained to observe, at the outset, that Hashmat Ali initially received fire shot injury and subsequently succumbed to the same, are the facts alone

that have been proved by the prosecution at trial and rest of the story qua mode and manner of the occurrence as detailed in application Ex.PU could not at all be proved by the prosecution upto the hilt. As per the contents of Ex.PU, it was on 02.07.2013 at about 12:00 noon when complainant and Hashmat Ali (deceased) were on their way back to home after drawing Rs.100,000/- from MCB Bank Bhalwal Branch and they were initially followed by Yasir and Muhammad Ansar and subsequently by three other persons, two of whom were named as Muhammad Imran and Mukhtar and third one was unknown, whose description was duly given in Ex.PU and when they reached in the street near their house, they were stopped by the said outlaws of whom Muhammad Imran and Mukhtar initially gave butt blows hitting on the various parts of head of Hashmat Ali and unknown person also gave blows with the butt of his pistol hitting on various parts of body of complainant and on resistance Yasir Parvaiz made a fire shot with pistol 30 bore landing on the abdomen of Hashmat Ali who fell down and upon hearing report of fire shot and their uproar, Shahid Qamar, Sajid Ali and many others came at the spot and accused persons after snatching Rs.100,000/- on gunpoint made their escape good. This story, on the face of it, is vague, sketchy and lacking coherence. Complainant failed to specifically mention in Ex.P-U that whether accused persons named in Ex.P-U were in fact previously known to him. During the course of cross-examination both of the witnesses of ocular account stated that accused persons were previously known to them. Impact of their stance taken during the course of cross-examination would be dealt in detail in the later part of this judgment. Complainant has also failed to mention specific seat of injuries said to have been caused by Muhammad Imran and Mukhtar on the head of Hashmat Ali. Even he failed to specifically mention the part of his body where he received butt blows given by the unknown accused person. Complainant has also not stated anything in Ex.PU as to whether any of the accused demanded or asked either from him or from Hashmat Ali for handing over cash amounting to Rs.100,000/-. Complainant failed to

specifically mention in Ex.PU as to who was carrying cash Rs.100,000/- which was claimed to have been drawn from the bank and it was also not specifically mentioned that from whom the accused persons forcibly snatched Rs.100,000/-. Even it has not been mentioned in Ex.PU that who of the accused person snatched Rs.100,000/-. It is correct that it was not essential for the complainant to have given each and every detail of the occurrence in the complaint on the basis of which FIR was lodged, however, at the same time it is equally correct that certain necessary and essential details leading to the occurrence are always required to have been mentioned in the application on the basis of which FIR was going to be lodged. It may further be observed that as per contents of FIR, complainant was accompanying his brother Hashmat Ali when they were going back to their home on a motorcycle after drawing cash Rs.100,000/- from MCB Bhalwal Branch and two persons namely Yasir Parvaiz and Muhammad Ansar chased them on motorcycle and when they reached near Bhaira-Bhalwal Chowk, three companions of above said persons also started chasing the complainant and his brother on pointing out of said two persons and when they (complainant and his brother) reached near their house, accused persons stopped them and committed the occurrence. Bare reading of the story as narrated in the FIR reflects that complainant and his brother when were going back to their home after taking cash from bank, were vividly alert enough that they had even noticed chasing of Yasir Parvaiz and Muhammad Ansar accused and also noticed that said accused persons pointed towards them when they reached near Bhaira-Bhalwal chowk and thereupon three co-accused Muhammad Imran, Mukhtar and an unknown person also started chasing them. During the course of cross-examination complainant PW-10 stated that the whole area from bank towards their home was populated one and SDPO office was on the way, despite that, as per own showing of PW-10 during cross-examination, they did not make any attempt to report the matter to police. Even no attempt was shown to have been made by complainant and his brother to avoid chase of accused

persons by taking shelter at any safe place on the way. Such conduct shown by complainant is against natural human behavior which should be in a situation like reflected in the FIR particularly when fact of chasing of complainant and his brother by the accused was in their knowledge and they were having cash with them said to have been drawn from the bank more particularly where the office of SDPO Bhalwal was situated at a distance of 100 meters from the bank and the presence of traffic police personnel usually at the said chowk was also admitted by Sadiq Ali PW-10. In this backdrop, we now proceed to examine the worth of witnesses of ocular account. Sadiq Ali complainant appeared as PW-10 who besides giving the narration as mentioned in Ex.PU deposed that accused persons after forcibly getting them down from motorcycle asked them to handover the amount which they had brought from the bank. It was further deposed by PW-10 complainant that accused snatched Rs.100,000/- from the deceased forcibly at gunpoint and left the place of occurrence whereafter they shifted Hashmat Ali in injured condition at THQ Hospital Bhalwal and he moved application Ex.PU before the police. He further deposed that his brother Hashmat Ali was referred to DHQ Hospital, Sargodha and was further referred to Mayo Hospital, Lahore where he expired on 12.07.2013. Sadiq Ali PW-10 cautiously made improvements in his examination-in-chief by introducing the fact that accused persons asked them to hand over the amount that they had got from the bank and that accused snatched Rs.100,000/- from the deceased. Both these facts although were not got confronted during the course of cross-examination, however, a judicial notice can be taken as both the improvements, which on the face of it, were dishonest and deliberate, therefore, same cannot be ignored lightly. It is by now settled principle of law that if improvements are found to be deliberate and dishonest, same would cast doubt qua the veracity of the testimony of such witness of ocular account and no reliance can be placed on such testimony for conviction on a charge entailing death penalty for the simple reason that when a witness makes dishonest improvement while deposing

before the court, he simply exposes himself to his own dishonesty that ipso facto is sufficient to discard his evidence by counting him a dishonest person. Reliance in this regard may safely be placed on "Fida Hussain and another v. The State and another" (2021 PCr.LJ 174).

12. It may further be shown that complainant Sadiq Ali PW-10 admittedly was posted at Chak No.17 as Patwari Irrigation Department, as such on the day of occurrence, he was supposed to be present at his office whereas in Ex.P-U he was shown to be accompanying Hashmat Ali and also witnessed the occurrence. Claim of complainant qua his presence at the spot, in this view of the matter, makes him a chance witness particularly when it has never been the stance of complainant in his written application Ex.P-U that on the fateful date he in fact was on leave. Chance witness, in legal parlance, was a witness who claimed that he was present at the crime spot at the fateful event notwithstanding, his presence there was sheer per chance as in the ordinary course of events he was supposed to be present at the place of his duty. Testimony of chance witness in such context is ordinarily not accepted unless justifiable reasons were shown to establish his presence at the spot at relevant time. In normal course of events presumption under the law that would operate would be that such witness was not present at the crime spot. For considering the evidence of such witness two essential ingredients are required to be established; firstly that whether witness reasonably explained his presence at the spot and secondly narration of incident as given by such witness should also inspire confidence. Both these essential elements simply are lacking in the instant case inasmuch as neither presence of PW-10 has plausibly been explained and even narration of incident given by this PW hardly inspires confidence. Sajid Ali PW-11, in his examination-in-chief attempted to support the stance of PW-10 Sadiq Ali but he skipped to state the improved stance of complainant that accused persons demanded from them to hand over the amount. This PW instead came up with the assertion in his examination-in-chief that accused tried to snatch amount from Hashmat Ali and on his

resistance, Yasir Parvaiz fired shot with his pistol. This PW who was nephew of complainant, admittedly was posted at Police Post Chak No.4-SB which was at a distance of 2- kilometers from Bhalwal City, was supposed to be present at the place of his duty. No plausible explanation at all has been put forth by PW-11 justifying his presence at the spot during the hours when he was supposed to have been present at Police Post Chak No.4-SB. This PW too would conveniently be counted as a chance witness. It may further be shown that during the course of his cross-examination PW-11 stated that at the time of occurrence, none from the locality was present except them and even they did not try to apprehend the accused persons. The stance of PW-11 that none from the locality was present at the time of occurrence except them, stood clearly contradicted by the statement of Sadiq Ali PW-10 who in his examination-in-chief stated that many other persons of the locality along with Shahid Qamar and Sajid PWs came there upon hearing their hue and cry. Similarly, conduct of Sajid Ali PW-11 that they did not try to apprehend the accused was again unnatural. It is hard to believe that one of near and dear was being injured and robbed and PW-11 simply would have kept standing there like a silent spectator. Pathetic conduct as shown by the PWs of ocular account runs counter to the natural human conduct and behavior in the ordinary course of events. Provisions of Article 129 of Qanun-e-Shahadat Order, 1984 allow the courts to presume the existence of any fact, which it think likely to have happened in the ordinary course of natural events and human conduct in relation to the facts of a particular case. The conduct of witnesses of ocular account in the instant case vividly was contrary to the common course of natural events and human conduct, further suggesting that the witnesses of ocular account were not present at the time of occurrence. Guidance has been sought from case reported as "Pathan v. The State" (2015 SCMR 315).

13. It may also be seen that according to contents of FIR, on hearing the report of a fire shot as well as hue and cry made by them (Complainant and his deceased brother), Shahid Qamar (since given up) and Sajid Ali (PW-

11) attracted to the spot along with many other persons. Such narration given in the FIR suggests that the witnesses attracted to the spot after fire shot had been made, as such they cannot be considered to have seen the assailants who made said fire shot. It has never been the case of complainant that Shahid Qamar and Sajid Ali PWs were already present in the street before their arrival. However, during cross-examination, PW-10 volunteered that said witnesses were already present in the street at the time of occurrence. PW-11 Sajid Ali in his cross-examination also stated that he was present in the street where occurrence took place. Such claim of PW-10 and PW-11 is in utter contradiction with the contents of FIR where Sajid Ali and Shahid Qamar PWs were shown to have attracted to the spot after hearing report of fire shot. Matter may yet be viewed from another angle. In the scaled site plan Ex.PF which was prepared by PW-3 on the pointing out of witnesses, distance between point No.1 where deceased sustained firearm injury at the hands of Yasir Parvaiz, from point No.3 wherefrom the fire shot was made by Yasir Parvaiz, is three feet. However, during the course of cross-examination, complainant PW-10 stated that he could not say with certainty that from which side fire was shot at Hashmat Ali because they were grappling with each other. This assertion of PW-10 implies that fire shot was made on the deceased when he was grappling with the accused. As to distance of deceased from the accused when fire shot landed on the abdomen of Hashmat, two versions, thus in prosecution case emerged at trial. According to first version, fire shot was made by accused on the deceased from a distance of 3 feet as shown in scaled site plan Ex.PF whereas according to second version fire shot was made by accused on the deceased when they were grappling with each other, as stated by complainant PW-10. Both the versions are in clear contrast with each other and considering the statement of complainant that he could not say with certainty that from which side fire was shot because they were grappling with each other, as true, it can very conveniently be inferred that complainant did not see the happening whereby fire was made on the

deceased. In both the eventualities referred above, fire would be considered to have been made within a range of not more than three feet, as such, presence of burning around the entry wound was quite natural in view of principles of medical jurisprudence but strangely enough, there was no blackening around the wound as stated by Medical Officer PW-9 during the course of his cross-examination. It may also be shown that both the witnesses of ocular account have mentioned the time of occurrence as 12:00 noon but this deposition is not at all supported by the medical evidence. According to Dr. Muhammad Ali PW-9, Hashmat Ali injured was brought at THQ Hospital Bhalwal at 11:15 A.M through his brother on 02.07.2013. This deposition simply knocks the bottom out of whole prosecution story as given by the witnesses of ocular account as per whom occurrence took place at 12:00 noon on 02.07.2013. Had occurrence in this case taken place at 12:00 noon on 02.07.2013 as claimed by the witnesses of ocular account, there could have been no question that injured was brought before Medical Officer at 11:15 A.M, i.e., 45 minutes prior to occurrence. Dr. Muhammad Ali PW-9 was indeed an independent witness and the stance taken by him cannot be doubted particularly when he was under oath and even if a wrong fact was deposed by this PW, same could have been got corrected and rectified either through re-examination or even getting this PW declared as hostile to this extent but nothing of this sort was done at trial. Learned counsel for the complainant, however, argued that the time of the arrival of injured was inadvertently deposed by PW-9 as 11:15 A.M and in fact it was 11:55 A.M as per contents of MLC Ex.PO. This assertion did not at all impress us for the simple reason that this fact should have been got corrected during the course of trial. For the sake of arguments, if it is presumed that it was 11:55 A.M when Hashmat Ali in injured condition was brought to hospital, even then the time given in Ex.PU could not be reconciled particularly when evidence of Muhammad Ashraf SI PW-13 is seen in its entirety. According to Muhammad Ashraf S.I. PW-13, on 02.07.2013, when he was posted at Police Station City Bhalwal, Sadiq Ali

complainant appeared before him at Police Station and produced application Ex.PU and after lodging formal FIR, he prepared injury statement Ex.PM of Hashmat Ali and deputed Muhammad Razzaq Constable for getting him medically examined. If injury statement was prepared after registration of FIR at 12:50 P.M, presence of injured at THQ Hospital Bhalwal even at 11:55 A.M was beyond one's comprehension and reacts against the truthfulness of contents of Ex.PU and even the evidence of witnesses of ocular account qua the time of occurrence. It may further be seen that as per the contents of Ex.PU, Hashmat Ali deceased also sustained injuries on various parts of his head, claimed to have been caused by Muhammad Imran and Mukhtar accused with butts of pistol, however, no injury whatsoever on head of Hashmat Ali was noticed by Muhammad Ashraf SI PW-13 in injury statement Ex.PN. Similarly, as per Ex.PU, complainant also sustained pistol butt blows on various parts of his body but no MLC was obtained to show the injuries inflicted upon the person of complainant. So, medical evidence in this case is in conflict with the ocular account as to the time of occurrence. In Barkat Ali's case reported in 2007 SCMR 1812, it has been held that oral evidence to the extent of its inconsistency with medical evidence could not be accepted. It has also been held in Abdul Subhan's case (PLD 1994 SC 178) that if medical evidence leaves room for doubt, benefit of that doubt should go to accused and not to prosecution.

14. It may also be shown that Muhammad Ashraf S.I PW-13 during the course of his cross-examination admitted it correct that he did not mention the name of any of accused persons on injury statement Ex.PN, recovery memos regarding blood stained earth and empty of 30-bore. This omission is reflective of the fact that till the preparation of these documents, the names of the assailants were not known to this PW and application Ex.PU and FIR was belatedly drafted after due deliberation and consultation. It may further be observed that no record was either produced by the complainant or collected by the I.O. during the course of investigation to

establish the fact that on the date of occurrence amount to the tune of Rs.100,000/- was actually drawn from the bank as mentioned in Ex.PU. Complainant PW-10 during the course of his cross-examination stated that he did not produce any receipt before the I.O. about the withdrawal of money from the bank. Muhammad Ashraf SI PW-13 also admitted during the course of his cross-examination that he did not take any record from the concerned bank regarding withdrawal of the amount by the deceased. He further admitted it correct that he did not record the statement of any bank official in that regard.

15. There is yet another glaring aspect in the instant matter that needs to be hinted at this juncture. Hashmat Ali was claimed to have been brought at THQ Hospital, Bhalwal on 02.07.2013 in injured condition. Investigating Officer never made any attempt to record his statement while preparing injury statement Ex.P-N. According to Medical Officer PW-9, the pulse of the injured at the time of examination was 85 per minutes and BP was 100/70 mmhg. The fact as to why statement of injured (deceased) was not recorded by Muhammad Ashraf SI at the time of preparation of his injury statement, remained mystery throughout. According to Muhammad Ashraf S.I PW-13, he after preparing injury statement Ex.PN, deputed Muhammad Razzaq Constable for getting the injured medically examined and he himself proceeded to the place of occurrence where he conducted various proceedings and then went to Civil Hospital, Bhalwal where he was informed that the injured was shifted to DHQ Hospital, Sargodha and he on the same day claimed to have visited DHQ Hospital, Sargodha, however, Hashmat Ali was further referred to Mayo Hospital, Lahore. Investigating Officer did not visit Mayo Hospital for a period around ten days in order to record statement of the injured till he succumbed to the injuries on 12.07.2013. Non-recording of statement of injured for about ten long days simply shattered the whole prosecution story given in Ex.PU particularly where it has not been plausibly explained at trial that what refrained the Investigator from recording statement of injured. All these facts clearly

suggest that FIR in the instant case was lodged after due deliberation and consultation between complainant and police without recording statement of injured who received fire shot on his abdomen and he was in his senses when he was firstly medically examined at THQ Hospital, Bhalwal. Legitimate and irresistible conclusion that may conveniently be drawn from the above discussed facts is that the occurrence in consequence of which Hashmat Ali received fire shot injury and then lost his life, did not take place in the mode and manner as stated by the witnesses of ocular account who even otherwise are not only chance witnesses but also interested witnesses. It is established principle of criminal jurisprudence that conviction can only be based on evidence of unimpeachable character leading to certainty of the guilt of the accused and even a single doubt arising in the prosecution case must be resolved in favour of the accused whereas instant case from its inception to end remained replete with doubts. When evidence of ocular account lacks the test of credibility and is not found worthy of reliance for being not inspiring confidence, same cannot be accepted and cannot be made basis for the conviction and sentence on capital charge.

16. It is also relevant to note here that in the FIR which was shown to have been registered within an hour of the occurrence four accused persons are named whereas one was stated as unknown. Appellant Yasir Pervaiz is resident of Chak No.10 ML whereas remaining appellants are residents of other Chak No.9/ML Tehsil Bhalwal. During cross-examination both the witnesses of ocular account stated that accused were previously known to them. In such eventuality, it was quite natural that accused person also knew the complainant and his brother. As per the contents of FIR, fire shot was made on Hashmat Ali by the accused when he resisted the commission of dacoity. In the FIR none of the accused was shown to be muffled faced. It does not sound logical that accused persons would have dared to commit dacoity with the persons who previously knew them. Legitimate inference that might be drawn, therefore, would be that FIR was registered in this

case at some belated point of time after due deliberations and consultations by stopping the entries of daily diary register at police station. It may also be shown that according to contents of FIR, complainant and his brother (deceased) were going to their home after drawing cash from bank on a motorcycle and accused were also on motorcycles. Registration number of motorcycle of the accused persons Yasir Pervaiz and Ansar has been given in the FIR whereas registration number of the motorcycle on which complainant and his brother were going to their home, was not given in the FIR. No motorcycle either of accused or of complainant has been shown in the site plan.

17. It may further be seen that both witnesses of ocular account are closely related to deceased, therefore, they can conveniently be considered as interested witnesses, who even otherwise are chance witnesses as hinted in preceding paragraph and last but not the least, their evidence is not worthy of credit as being not confidence inspiring. Ocular testimony was not only in conflict with medical evidence but also was not fitting in the probabilities, the same cannot be relied upon without any corroboration which is lacking in the instant case. In such a situation benefit of doubt is required to be extended to accused for the simple reason that once doubts about the genuineness of prosecution story came into the mind of a judge, proper and permissible course would be to acquit the accused by extending benefit of doubt. Reliance in this regard can safely be placed on case titled "Mst. Nazia Anwar v. The State" (2018 SCMR 911).

18. Coming now to evidence of recovery of allegedly robbed amount, it may be observed that recoveries so effected are clearly in contravention of section 103 of Cr.P.C, therefore no reliance can be placed upon the same at all. Even otherwise, no specific denomination of looted amount was mentioned in Ex.PU, so, recovery of currency notes from the accused persons hardly lend any support to the prosecution case. It is an established principle of law that where prosecution case was mainly based on the evidence of ocular account and the moment truthfulness and intrinsic worth

of evidence of ocular account has come under the clouds of doubts and is disbelieved, no other evidence even that of a high degree and value would be sufficient for recording conviction for a crime entailing capital punishment. Reliance in this regard may safely be placed on case "Zafar v. The State and others" (2018 SCMR 326).

19. An empty was shown to have been recovered from the spot during first spot inspection by Muhammad Ashraf S.I. PW-13 and during investigation pistols were also shown to have been recovered on the pointing out of appellants, however, there is nothing on record to show that either the empty or the pistols were transmitted to the Punjab Forensic Science Agency for comparison in order to ascertain as to from which pistol the empty was fired and no report in this regard is available on the record. In absence of any such comparison report, recoveries of pistols shown against the appellants are simply inconsequential.

20. Now, there remains only a circumstance as argued by learned counsel for complainant that instant was a heinous crime in the result of which a person lost his life when he resisted an attempt to dacoity, it may be observed that mere heinousness of crime, if it has not been proved upto the hilt is not sufficient to provide a valid basis for conviction of the accused. Guidance has been sought from case law titled "Najaf Ali Shah v. The State" (2021 SCMR 736) wherein it was observed as follow:-

> " Mere heinousness of the offence if not proved to the hilt is not a ground to avail the majesty of the court to do complete justice. This is an established principle of law and equity that it is better that 100 guilty persons should let off but one innocent person should not suffer. As the preeminent English jurist William Blackstone wrote, "Better that ten guilty persons escape, than that one innocent suffer." Benjamin Franklin, who was one of the leading figures of early American history, went further arguing "it is better a hundred guilty persons should escape than one innocent person should suffer." All

the contradictions noted by the learned High Court are sufficient to cast a shadow of doubt on the prosecution's case, which entitles the petitioner to the right of benefit of the doubt. It is a well settled principle of law that for the accused to be afforded this right of the benefit of the doubt it is not necessary that there should be many circumstances creating uncertainty and if there is only one doubt, the benefit of the same must got to the petitioner. This Court in the case of Mst. Asia Bibi v. The State (PLD 2019 SC 64) while relying on the the earlier judgments of this Court has categorically held that "if a single circumstance creates reasonable doubt in a prudent mind about the apprehension of guilt of an accused, then he/she shall be entitled to such benefit not as a matter of grace and concession, but as of right. Reference in this regard may be made to the cases of Tariq Pervaiz v. The State (1998 SCMR 1345) and Ayub Masih v. The State (PLD 2002 SC 1048)." The same view was reiterated in Abdul Jabbar v. State (2010 SCMR 129) when this court observed that once a single loophole is observed in a case presented by the prosecution, such as conflict in the ocular account and medical evidence or presence of eye-witnesses being doubtful, the benefit of such loophole/lacuna in the prosecution's case automatically goes in favour of an accused."

21. Another important aspect of the matter to be noticed is that complainant along with PW-11 Sajid Ali and Shahid Qamar claimed to have witnessed the occurrence and shifted Hashmat Ali in injured condition to hospital. In doing so, staining of their clothes with blood oozing from the wound of Hashmat Ali was very much natural. There is no evidence available on the record to show that blood stained clothes of complainant and PWs were taken into possession by the Investigating Officer. Had such clothes been taken into possession and dispatched to laboratory for grouping with the blood stained clothes of the deceased, the same would have lent strongest corroboration to the evidence of PW-10 and PW-11

showing their presence at the spot. Said omission also struck at the roots of the case of prosecution. Guidance in this regard has been sought from the dicta laid down in case reported as "Azhar Abbas and another v. The State and others" (2019 MLD 1808 Lahore).

22. Prosecution case, in view of above discussion, is replete with many doubts, benefit of the same would be extended to the appellants not as a matter of grace but as a matter of right. In case of Abdul Jabbar v. The State (2019 SCMR 129), august Supreme Court held as under:-

> ".....It is the settled principle of law that once a single loophole is observed in a case presented by the prosecution much less glaring conflict in the ocular account and medical evidence or for that matter where presence of eye-witnesses is not free from doubt, the benefit of such loophole/ lacuna in the prosecution case automatically goes in favour of an accused....."

23. The upshot of above discussion is that prosecution hopelessly failed to prove its case against appellants. Findings of conviction recorded against appellants by learned Additional Sessions Judge, Bhalwal in the impugned judgment are not sustainable, which are hereby set aside allowing Criminal Appeals Nos. 53173-J of 2017 and 53156-J of 2017. Consequently, appellants Yasir Parvez, Muhammad Imran, Mukhtar Ahmad and Ansar are acquitted of the charge extending benefit of doubt to them. Appellants are in jail. They are ordered to be released forthwith if not required in any other case.

24. Murder Reference No.253 of 2017 is answered in NEGATIVE and the Death Sentence awarded to appellant Yasir Pervaiz is not confirmed.

25. As the appellants have been acquitted of the charge, Criminal Revision No.183857 of 2018 filed by complainant seeking enhancement of sentence of appellants has become infructuous and is filed as such.

JK/Y-2/L **Appeal allowed**.

PLJ 2023 Lahore (Note) 24

***Present*: SHAKIL AHMAD, J.**

MURAD ALI (deceased) through Legal Heirs and others--Petitioners

versus

MUKHTIAR AHMAD and others--Respondents

C.R. No. 220-D of 1999, heard on 13.9.2022.

Specific Relief Act, 1877 (I of 1877)--

----S. 42--Suit for declaration--Decreed--Dismissal of appeal--Concurrent findings--Suit property was inherited in names of two widows after death of their husband--After second marriage suit property was transfer in name of one widow--Sole and full owner of property--Sale of property by widow of deceased with active and direct knowledge of petitioners--Presumption of truth--Neither petitioners nor their predecessor-in-interest approach civil Court for challenge complete ownership of deceased's widow--Correctness and validity of sale-deed was not challenged by petitioners--Proper appreciation of evidence by Court below--Challenge to--Counsel for petitioners, remained unable to point out any document showing that *Mst.* Bakhat Bhari ever to be declared and recorded in revenue record as a limited owner of suit property--*Mst.* Bakhat Bhari was in fact fully owner of suit land and she transferred same with their active and direct knowledge--Petitioners, were estopped by their conduct to challenge the, correctness and validity of sale-deed which was duly registered and same has presumption of truth--N either petitioners nor their predecessor-in-interest despite having knowledge that suit land was transferred through a registered sale-deed by *Mst.* Bakhat Bhari through predecessors-in-interest of plaintiffs and defendants, approached civil Court to lay challenge *qua* complete ownership of *Mst.* Bakhat Bhari and her right to further transfer suit property for reason of being limited owner and in consequence whereof, to get cancelled or rescinded sale-deed--Concurrent findings of both Courts below on a question of fact are based on proper appreciation of evidence available on record and do not suffer from any illegality or

material irregularity affecting jurisdiction of Courts below, same cannot be taken to any exception at revisional stage--Civil revision dismissed.

[Para 6] A, B, C & D

2010 SCMR 1630 *ref.*

Mr. Bashir Ahmad Khan Buzdar, Advocate for Petitioners.

M/s. Quratulain Ejaz and Syed Muhammad Ali Gilani, Advocates for Respondents No. 1 to 32.

Mr. Sikandar-i-Azam, Assistant Advocate General for Respondents No. 33 to 36.

Date of hearing: 13.9.2022.

JUDGMENT

Concurrent findings of facts recorded by Courts below whereby suit filed by Mukhtar Ahmad and others (Respondents No. 1 to 32 herein) was decreed by learned Senior Civil Judge, Layyah *vide* judgment and decree dated 30.11.1989 and the appeal filed by Murad Ali and others (petitioners herein) was dismissed by learned Additional District, Layyah, *vide* judgment and decree dated 25.1 1.1998.

2. Facts, in brief, leading to the filing of instant revision petition are that Respondents No. 1 to 32 filed a Suit No. 547 of 1986 dated 23.12.1986 seeking declaration to the effect that they are owners in possession of suit property measuring 2703 Kanals 6 Marals, as detailed in the plaint, which according to contents of plaint was owned by *Mst.* Bakhat Bhari widow of Yar Muhammad as per the entries in the record of rights for the year 1944-45, who sold the land to Sultan Ahmad (predecessors-in-interest of Plaintiffs No. 8 to 19 of the suit). Mansab Dar Khan (predecessors-in-interest of Plaintiffs No. 1 to 7 and Defendant No. 21), Karam Elahi (predecessors-in-interest of Plaintiffs No. 20 to 32 and Defendants No. 19 to 21) and they are owners in possession of suit land along with Defendants No. 19 to 21 and Defendants No. 1 to 17 (petitioners herein) or any other person has no nexus with the said property. As per contents of plaint, mutation 755 was entered and sanctioned on the basis of sale-deed, however, Thal Development of Authority *(hereafter*

referred to as TDA) acquired some portion of the suit land for development schemes and for that reason, mutation was cancelled, however, subsequently suit land was adjusted as per possession of plaintiffs and when plaintiffs initiated the matter to get entered mutation on the basis of registered sale-deed dated 25.03.1954, revenue officer instead of sanctioning the mutation in favour of Plaintiffs No. 19 to 21, got entered inheritance Mutation No. 1743 dated 19.05.1979 in favour of petitioners and mutations sanctioned in favour of plaintiffs was cancelled and appeal filed by plaintiffs before Settlement Officer, Layyah was allowed, in pursuance of which, Mutation 1743 and subsequent mutations were cancelled. Order passed by Settlement Officer was assailed before Commissioner D.G Khan Division and appeals filed were dismissed and the decision of Settlement Commissioner was maintained. Petitioners filed revision petitions before Member Board of Revenue, Punjab Lahore and same were partially allowed *vide* order dated 23.06.1986 whereby plaintiffs were held entitled only to the extent of 1/8th share of *Mst.* Bakhat Bhari whereafter plaintiffs filed suit challenging the order of Member of Board of Revenue on various grounds including that defendants failed to prove themselves collateral of Yar Muhammad and even Defendant No. 19 to 21 were the attesting witnesses of sale-deed dated 25.03.1954. In the meanwhile, on 26.04.1987, Shahnaz Kausar and two (sic) filed declaratory Suit No. 166 of 1987, claiming themselves to be the owners in possession of the suit land on the basis of registered sale-deed dated 25.03.1954. Petitioners appeared and contested both suits. Eight issues, in view of divergent pleadings of the parties including that of relief were framed on 16.03.1987. Both the parties led their respective oral as well as documentary evidence and after hearing learned counsel for the parties, learned trial Court decreed both suits *vide* judgment and decree dated 30.11.1989. Petitioners preferred two separate appeals to impugn the said judgment and decree. Both appeals were dismissed by learned appellate Court *vide* judgment and decree dated 25.11.1998, hence, instant revision petition.

3. Learned counsel for petitioners argued that both Courts below failed to properly comprehend the real controversy between the parties and proceeded to pass the impugned judgments and decrees merely on

presumptive grounds. To explain the same, it has been argued that *Mst.* Bakhat Bhari, in fact, was limited owner and she was not at all competent to transfer the land through sale-deed and she was only entitled to sell the suit land only to the extent of 1/8th share. It has further been argued that petitioners' in fact were entitled to the inheritance of Yar Muhammad being his collateral and inheritance mutation was correctly sanctioned by Assistant Commissioner-II and final order passed by Member Board of Revenue was passed correctly but both Courts below without any lawful justification decreed the suit. It has further been argued that since learned counsel for the respondents (plaintiffs in suit) himself opted to give the statement before Member Board of Revenue *qua* settlement by way of compromise in the way that plaintiffs were entitled only to the extent of 1/8th share belonging to *Mst.* Bakhat Bhari, therefore, they were not entitled to challenge the same by way of filing of civil suit. According to learned counsel for petitioners, since *Mst.* Bakhat Bhari was a limited owner, therefore, she was not entitled to sell more than 1/8th share but both Courts below failed to resolve the controversy as evidence available on record and wrongly decided the matter against the petitioners and requested for acceptance of this revision petition.

4. As against that, learned counsel for respondents argued that *Mst.* Bakhat Bhari was sole owner of suit land as per the entries made in record of rights pertaining to the year 1944-45 and she sold the land through registered sale-deed No. 131 dated 25.03.1954 in favour of Sultan Ahmad and others and since then they were owners in possession of the suit property. According to learned counsel for respondents, some of the defendants, even were attesting witnesses of sale-deed dated 25.03.1954. It has further been argued that no tangible material/evidence was produced showing *Mst.* Bakhat Bhari as a limited owner and similarly there was no evidence available on the record suggesting any embargo upon *Mst.* Bakhat Bhari *qua* further alienation of the property as being limited owner. It was therefore argued that since *Mst.* Bakhat Bhari was full owner as per revenue record therefore she was fully competent to transfer the land. It has further been argued that neither petitioners nor their predecessor-in-interest ever challenged the sale-deed dated 25.03.1954 even when it was observed by the Commissioner D.G. Khan, while dismissing the

appeal filed by petitioners, that matter was required to be resolved properly by the civil Court instead of revenue authority, however, petitioners instead of resorting to the civil Court by challenging the right of *Mst.* Bakhat Bhari to transfer the suit land by way of sale-deed or even seeking the cancellation of sale-deed, preferred revision petition before Member Board of Revenue who proceeded to decide the matter on the basis of concurrence of learned counsel for the parties without even recording the statements of learned counsel for the parties in this regard. It was therefore concluded that concurrent findings of both Courts below on facts and law are not amenable through revisional jurisdiction and requested for dismissal of this revision petition.

5. Heard. Record perused.

6. Suit land originally was owned by Yar Muhammad, who died in the year 1930 and inheritance mutation was passed in favour of *Mst.* Bakhat Bhari and *Mst.* Jannat (both widows of Yar Muhammad) and on the eve of second marriage contracted by *Mst.*Jannat, her share stood transferred in favour of *Mst.*Bakhat Bhari and *Mst.*Allah Jiwai (real mother of Yar Muhammad) *vide* Mutation No. 131 dated 25.03.1933 and on the demise of *Mst.* Allah Jiwai, property reverted to *Mst.* Bakhat Bhari *vide* mutation dated 09.05.1933. As per entries of record of rights for the year 1944-45, *Mst.* Bakhat Bhari was golejnd full owner of the suit land and she transferred the land through sale-deed dated 25.03.1954. Learned counsel for petitioners, remained unable to point out any document showing that *Mst.* Bakhat Bhari ever to be declared and recorded in the revenue record as a limited owner of the suit property. Learned counsel for petitioners also failed to refer any entry in the revenue record showing any impediment in the way of *Mst.* Bakhat Bhari *qua* selling or further alienation of the suit property. Learned counsel for petitioners remained unable to controvert the proposition that Ghulam Haider [predecessor-in-interest of Petitioners No. 12-(i) to 12(vi)] and Sultan Mehmood [predecessor-in-interest of Petitioners No. 16-(i) to 16-(vi)] were attesting witnesses of impugned sale-deed dated 25.03.1954 and even Ahmad Ali (predecessor-in-interest of Petitioners No. 1-(i) to 1-(vii), 2-(i) to 2-(xiii), 3 and 4 also accepted the sale-deed as correct in appeal that was filed before Colonization Officer. Continuous and long acquiescence on the part of predecessor-in-interests of

Petitioners No. 1-(i) to 1-(vii), 2-(i) to 2-(xiii), 3, 4, 12-(i) to 12(vi) and 16-(i) to 16-(vi) is also reflective of the fact that even according to them *Mst.* Bakhat Bhari was in fact fully owner of the suit land and she transferred the same with their active and direct knowledge. These petitioners, therefore, were estopped by their conduct to challenge the, correctness and validity of sale-deed dated 25.03.1954 which was duly registered and same has presumption of truth. Even as per contents of document Exh:D-14 Mutation No. 294, a specific clog was put over *Mst.* Allah Jiwai (mother of Yar Muhammad) that she could not sell or mortgage her share but in subsequent mutations whereby share of *Mst.* Jannat and *Mst.* Allah Jiwai was transferred to *Mst.* Bakhat Bhari, no such clog was imposed by hinting any custom based on Wajib-ul-Arz (**واجب الارض**) for further alienation of the suit property or declaring *Mst.* Bakhat Bhari as limited owner of the suit property. Petitioners failed to bring on record any tangible document suggesting that *Mst.* Bakhat Bhari was in fact a limited owner. It may further be seen that neither petitioners nor their predecessor-in-interest despite having the knowledge that the suit land was transferred through a registered sale-deed by *Mst.* Bakhat Bhari through predecessors-in-interest of plaintiffs and defendants, approached civil Court to lay the challenge *qua* complete ownership of *Mst.* Bakhat Bhari and her right to further transfer/alienate the suit property for the reason of being limited owner and in consequence whereof, to get cancelled or rescinded the sale-deed dated 25.03.1954. Where concurrent findings of both the Courts below on a question of fact are based on proper appreciation of evidence available on the record and do not suffer from any illegality or material irregularity affecting the jurisdiction of the Courts below, the same cannot be taken to any exception at revisional stage. Reliance in this regard may safely be placed on case reported as *"Sultan Muhammad and another v. Muhammad Qasim and others"* (2010 SCMR 1630).

7. The upshot of above discussion is that instant civil revision is devoid of any merits, the same is dismissed. No order as to cost.

(Y.A.) **Revision dismissed.**

PLJ 2023 Lahore (Note) 76
[Multan Bench, Multan]

Present: **SHAKIL AHMAD, J.**

WASEEM BASHARAT--Appellant

versus

SADAQAT BUTT and 5 others--Respondents

FAO No. 124 of 2011, heard on 21.10.2022.

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

----O.XLIII & S. 104--Order XVIII Rule 4 of CPC--Order XIX rule 1 of CPC--Affidavits--Respondent No. 1 instituted a suit for specific performance of contract against petitioner and 2 others--Trial Court after hearing counsel for parties, dismissed suit--Additional District Judge, challenging judgment & decree of Trial Court was allowed--The evidence of a witness in attendance shall be recorded orally in open Court--This procedure, can be deviated only if parties agree to decision on affidavits or in case Court makes an order under Order XIX Rule 1 of CPC--Trial Court allowed respondent No. 1 to file affidavits in support of his claim without hinting any reason--Finding of Appellate Court do not suffer from any infirmity--Instant appeal is devoid of any merits, same is dismissed.

[Para 2 & 4] A, B & C

2022 SCMR 1021 *ref.*

Khawaja Qaisar Butt, Advocate for Appellant.

Mehr Imtiaz Younas, Advocate for Respondents.

Date of hearing: 21.10.2022.

JUDGMENT

Instant appeal has been filed under Order XLIII read with Section 104 of CPC by Waseem Basharat (appellant herein) to impugn judgment dated 16.05.2011 passed by learned Additional District Judge, Sahiwal, whereby appeal filed by Sadaqat Butt (Respondent No. 1 herein) against judgment and decree dated 08.12.2009 passed by learned Civil Judge 1st Class, Sahiwal was allowed and case was remanded to the learned trial Court for decision afresh strictly on merits after affording opportunity to parties to lead evidence while accepting appeal.

2. Facts, in brief, for the decision of instant appeal are that Respondent No. 1 instituted a suit for specific performance of contract against Petitioner and 2 others. Petitioner and 2 others contested the suit by way of filing joint written statement. Learned trial Court in view of divergent pleadings of the parties framed as many as six issues including that of relief. Both parties led their respective evidence and learned trial Court after hearing learned counsel for the parties, dismissed the suit. Appeal filed by Respondent No. 1 before learned Additional District Judge, Sahiwal challenging judgment and decree of learned trial Court was allowed *vide* judgment dated 16.05.2011 with following observation:

> *"In view of discussion made above without probing into the inns and outs of the impugned judgment and decree on merits, the case is remanded to the learned trial Court for decision afresh strictly on merits after affording opportunity to parties to lead evidence while accepting the appeal."*

Being aggrieved by the judgment of learned Appellate Court, appellant has preferred instant appeal.

3. Heard learned counsel for the parties and record perused.

4. Without touching upon the merits of the case lest it may prejudice case of either of sides before learned trial Court while deciding the main suit, it may be advantageous to reproduce hereunder Order XVIII Rule 4 of CPC for the facility of ready reference:

> *"**4. Witness to be examined in open Court.**--The evidence of the witnesses in attendance shall be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge."*

Plain reading of above hinted provisions of law vividly suggests that the evidence of a witness in attendance shall be recorded orally in the open Court. This procedure, however, can be deviated only if parties agree to decision on affidavits or in case the Court makes an order under Order XIX Rule 1 of CPC that any particular fact or facts may be proved by affidavits. In the instant case, learned trial Court allowed Respondent No. 1 to file affidavits in support of his claim without hinting any reason/circumstance suggesting deviation from modus operandi as provided under Order XVIII Rule 4 of CPC. It is almost an established principle of law that when law requires something to be done in a particular manner, it ought to have been done in the same manner and not otherwise. Reliance in this regard may safely be placed on case reported as *'Federation of Pakistan through Secretary Finance, Islamabad and another v. E-MOVERS (PVT.) LIMITED and another"* (2022 SCMR 1021). Findings of learned Appellate Court do not suffer from any infirmity. Learned counsel for the appellant remained unable to point out even a single circumstance suggesting illegal assumption, non-exercise or irregular exercise of jurisdiction by the learned Appellate Court while passing the impugned judgment. No case of taking any exception to the impugned judgment at all is made out.

5. The upshot of above discussion is that instant appeal is devoid of any merits, the same is dismissed. No order as to costs. As a natural corollary to the dismissal of instant appeal, CM No. 2638 of 2022 has become infructuous and is filed as such.

(K.Q.B.) **Appeal dismissed.**

PLJ 2023 Cr.C. (Note) 47
[Lahore High Court, Multan Bench]

***Present*: SHAKIL AHMAD, J.**

MUHAMMAD ADNAN--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 7786-B of 2022, decided on 23.11.2022.

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

----S. 9(1)-1(c)--Possession 'Bhang' weighing 10 kilograms was recovered--Offence u/S. 9(1)-1(c) of Control of Narcotic Substances (Amendment) Act, 2022 carries imprisonment which may extend to fourteen years but shall not be less than seven years along with fine which may be up to two hundred thousand rupees but not less than one hundred thousand rupees Quantum of sentence needs to be commensurate with quantum of substance recovered, therefore, keeping in view of quantity of contraband shown to have been recovered from petitioner's possession, there is least likelihood of awarding--Maximum punishment to accused/petitioner, in case of his conviction at conclusion of trial--Accused/petitioner is behind bars for more than one and half month--Petitioner is admitted to post arrest bail. [Para 2, 3 & 4] A, B, C & D

Mr. Muhammad Ali Butt, Advocate for Petitioner.

Malik Riaz Amad Saghla, Additional Prosecutor General for State.

Date of hearing: 23.11.2022.

ORDER

This is an application filed by Muhammad Adnan accused/ petitioner seeking post arrest bail in connection with case FIR No. 589 of 2022 dated 03.10.2022 registered at police station City Taunsa Sharif, District D.G.Khan in respect of offence under Section 9(1)-1(c) of the Control of Narcotic Substances Act, 1997. Earlier application of the petitioner for the same relief was dismissed by the learned Sessions Judge, Taunsa Sharif vide order dated 27.10.2022.

2. Allegation, in a nutshell, against accused/petitioner is that he was apprehended by complainant Allah Ditta ASI and other police officials and from his possession 'Bhang' weighing 10 kilograms was recovered from white colored shopper holding by him in his hand.

3. Having heard the learned counsel for the petitioner, learned Additional Prosecutor General and upon tentative assessment of material available on the record, it has been noticed that though case against accused/petitioner was registered under Section 9-(c) of Control of Narcotic Substances Act, 1997 yet the same is covered under the purview of Sections 9(1)-1(c) of Control of Narcotic Substances (Amendment) Act, 2022 inasmuch as instant case was registered on 03.10.2022 after amendment in Control of Narcotics Substances Act, 1997 promulgated on 06.09.2022. Offence under Sections 9(1)-1(c) of Control of Narcotic Substances (Amendment) Act, 2022 carries imprisonment which may extend to fourteen years but shall not be less than seven years along with fine which may be up to two hundred thousand rupees but not less than one hundred thousand rupees Quantum of sentence needs to be commensurate with the quantum of substance recovered, therefore, keeping in view of the quantity of the contraband shown to have been recovered from the petitioner's possession, there is least likelihood of awarding maximum punishment to the accused/petitioner, in case of his conviction at the conclusion of trial, as provided under the above hinted provision of law particularly in the backdrop of fact that learned Additional Prosecutor General frankly conceded that there is no case of similar nature in the credit of accused/petitioner. Accused/petitioner is behind the bars for more than one and half month. All these facts indeed tilt in favour of grant of bail rather than its refusal. Reliance in this regard may safely be placed on the case reported as *"Saeed Ahmed vs. State through P.G. Punjab and another"* (PLJ 2018 SC 812).

4. The upshot of the discussion is that 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. 200,000/- (Rupees two hundred thousand only) with two sureties in the like amount to the satisfaction of learned trial Court.

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

PLJ 2023 Cr.C. (Note) 59

[Lahore High Court, Multan Bench]

***Present*: SHAKIL AHMED, J.**

MUHAMMAD RIZWAN *alias* RAJU--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 3331-B of 2022, decided on 22.6.2022.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 392 & 411--Bail after arrest, grant of--Allegation of--On gun point snatched a shopper bag containing cash--According to DPG, identification parade was duly held and petitioner was correctly picked up as a culprit by complainant--In FIR, two unknown persons are mentioned to have committed robbery with the complainant and features of both accused are mentioned in F.I.R.--It was also stated by complainant during course of identification parade that this accused was known to him and he was also known by accused--If this was so, petitioner could have conveniently been named in F.I.R--In such scenario, identification of petitioner during course of identification parade becomes a moot point to be adjudged by learned trial Court after recording evidence at trial when legal worth of identification parade would properly be seen by trial Court--At present stage, however, case of petitioner becomes one of further inquiry as contemplated under provisions of Section 497, Cr.P.C.--Bail allowed. [Para 4] A, B & C

Khawaja Qaisar Butt and Mr. Muhammad Ali Butt, Advocates for Petitioner.

Malik Mudassar Ali, Deputy Prosecutor General for State.

Mr. Muhammad Imran Rashid, Advocate for Complainant.

Date of hearing: 22.6.2022.

ORDER

Instant petition has been filed under Section 497, Cr.P.C. by Muhammad Rizwan alias Raju petitioner seeking post arrest bail in case FIR

No. 06 of 2022 dated 06.01.2022 registered at Police Station Kup, Multan for the offences under Sections 392, 411, PPC. Earlier applications of the petitioner for the same relief were dismissed by learned trial Court and learned Additional Sessions Judge *vide* orders dated 10.03.2022 and 29.03.2022, respectively.

2. Allegation against petitioner, in a nutshell, is that he along with a co-accused on gun point snatched a shopper bag containing cash from complainant on gun point when he was present in connection with recovery of amounts.

3. Heard and record perused.

4. Having heard learned counsel for the parties and learned Deputy Prosecutor General, it has been noticed that petitioner is not named in the FIR. According to learned DPG, identification parade was duly held and petitioner was correctly picked up as a culprit by the complainant. In the FIR, two unknown persons are mentioned to have committed robbery with the complainant and features of both the accused are mentioned in the F.I.R. however, it would not be out of context to point out that during the course of identification parade, complainant while replying to the query of learned Magistrate, stated that accused mentioned at Serial No. 2 (present petitioner) was employed at shop of one of his customers namely Shehbaz. It was also stated by complainant during the course of identification parade that this accused was known to him and he was also known by the accused. If this was so, petitioner could have conveniently been named in the F.I.R. In such scenario, the identification of petitioner during the course of identification parade becomes a moot point to be adjudged by learned trial Court after recording evidence at trial when legal worth of identification parade would properly be seen by learned trial Court. At present stage, however, case of petitioner becomes one of further inquiry as contemplated under the provisions of Section 497, Cr.P.C.

5. For the reasons recorded above, petition in hand is allowed and petitioner is admitted to post arrest bail subject to his furnishing bail bonds in the sum of Rs. 5,00,000/-with two sureties in the like amount to the satisfaction of learned trial Court.

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

PLJ 2023 Cr.C. (Note) 65

[Lahore High Court, Multan Bench]

***Present*: SHAKIL AHMED, J.**

UMAR AZIZ--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 5793-B of 2022, decided on 21.9.2022.

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

----S. 498--Pakistan Penal Code, (XLV of 1860), S. 406--Pre-arrest bail, grant of--Allegation of--Accused persons demand an amount from complainant and promise to return amount, was promise--An amount of 2 lac was transferred by complainant in petitioners bank account--Amount was given by complainant to accused persons including petitioner as loan, as such dispute between parties appears to be of civil nature--Ingredients of criminal breach of trust as described in Section 405 of, PPC ex facie are not attracted to facts of case in hand--In such backdrop *mala fide* on part of complainant for false implication by converting dispute of civil nature into criminal one cannot be ruled out--Petition is allowed.

[Para 3] A

Mehar Shahid, Advocate vice-counsel with Petitioner.

Mr. Muhammad Ali Shahab, DPG for State.

Malik Badar Munir Bukhari, Advocate for Complainant.

Date of hearing: 21.9.2022.

ORDER

After dismissal, of his pre-arrest bail petition by learned Additional Sessions Judge, Lodhran *vide* order dated 01.09.2022, petitioner Umar Aziz has filed this petition seeking pre-arrest bail in case FIR No. 570 of 2022 dated

19.07.2022 registered at Police Station Saddar Lodhran for the offence under Section 406, PPC.

2. Heard and perused the record.

3. As per contents of FIR, petitioner along with co-accused Mujeeb-ur-Rehman, Muhammad Arshad and Wajahat Hussain went to complainant on 25.09.2020 at 04:00 p.m. and asked for an amount of Rs. 12,00,000/-as trust in order to purchase material for their grocery shop with the promise that they will return amount after six months, whereupon an amount of Rs. 10,00,000/-was given by complainant to said accused persons in cash and subsequently on 05.01.2021 an amount of Rs. 2,00,000/-was transferred by complainant in petitioner's bank account. Bare reading of the contents of FIR suggests that the amount was given by complainant to accused persons including the petitioner as loan, as such dispute between the parties appears to be of civil nature. Ingredients of criminal breach of trust as described in Section 405 of PPC ex facie are not attracted to the facts of case in hand. In such backdrop *mala fide* on the part of complainant for false implication by converting the dispute of civil nature into criminal one cannot be ruled out. Therefore, petition in hand is allowed and ad-interim pre-arrest bail already granted to the petitioner by this Court is confirmed subject to his furnishing of fresh bail bonds in the sum of Rs. 50,000/-with one surety in the like amount to the satisfaction of learned trial Court.

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

PLJ 2023 Cr.C. (Note) 82

[Lahore High Court, Multan Bench]

Present: **SHAKIL AHMAD AND MUHAMMAD AMJAD RAFIQ, JJ.**

MUHAMMAD HANIF--Appellant

versus

STATE and another--Respondents

Crl. A. No. 936 of 2022 decided on 12.12.2022.

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

----S. 9-C--No previous record--Reduction in sentence--Police officials, apprehended the appellant and from his possession charas weighing 1560 grams was recovered--PW-6 was Moharrir at relevant time who claimed to have received two sealed parcels of Charas as sample, case property (Charas) and wattak amount--Nothing is available on the record to show that the appellant is previous convict or he is drug barron--The sentence of imprisonment is modified and reduced to rigorous imprisonment for one year.

[Para 2, 3 & 4] A, B, C, D

2008 SCMR 865; 2009 SCMR 1220; 2011 SCMR 965; 2015 SCMR 735; 2021 SCMR 109; 2021 SCMR 531; 2015 SCMR 308; 2022 SCMR 1375; 2011 SCMR 1034; PLD 2017 SC 671 *ref.*

Khawaja Qaisar Butt, Advocate for Appellant.

Mr. Muhammad Ali Shahab, Deputy Prosecutor General for State.

Date of hearing: 12.12.2022.

JUDGMENT

Shakil Ahmad, J.--Muhammad Hanif (appellant herein) after having been tried by the learned Additional Sessions Judge, Multan on the charge

under Section 9(c) of the Control of Narcotic Substances Act, 1997 ("CNSA, 1997") in case FIR No. 41 of 2022 dated 03.02.2022 registered at Police Station Jalilabad District Multan was convicted under Section 9(c) of CNSA, 1997 and sentenced *vide* judgment dated 26.09.2022 (impugned judgment) as under:

> *To undergo rigorous imprisonment for 02-years & 06 q months along with fine of Rs. 50,000/- or in default, to further undergo simple imprisonment for 06 months. Benefit of Section 382-B of Cr.P.C was also extended in favour of convict/appellant.*

2. According to the prosecution case on 03.02.2022, Ansar Abbas, ASI (PW-1) along with other police officials, apprehended the appellant and from his possession charas weighing 1560 grams was recovered besides recovery of wattak amount Rs. 4000/-. On completion of investigation report under Section 173 Cr.P.C. was submitted and after framing of the charge against appellant, the trial commenced.

3. At trial as many as six PWs were examined by the prosecution in order to prove charge against the appellant. Ansar Abbas, ASI (PW-1) is the complainant of this case and he was heading the police party at the time of recovery from appellant. Muhammad Sadiq, 1216/C (PW-2) is the witness of recovery. Muhammad Ashraf, Inspector (PW-4) is investigator of the case. Shafqat Nabi (PW-6) was Moharrir at relevant time who claimed to have received two sealed parcels of Charas as sample, case property (charas) and wattak amount Rs. 4000/- for safe custody and handed over the said two sealed parcels of Charas as sample to Muhammad Arshad, Inspector for onward transmission to the office of Punjab Forensic Science Agency, collection center, Multan. After completion of prosecution evidence, appellant was examined under Section 342 Cr.P.C, wherein, he denied the prosecution evidence. He neither opted to produce any defence evidence nor to appear in the witness box in order to depose under Section 340(2) Cr.P.C. On conclusion

of trial, appellant was convicted and sentenced as detailed in the opening paragraph of this judgment.

4. Having heard learned counsel for the appellant and learned Deputy Prosecutor General, we find that the prosecution has successfully proved charge against the appellant. All the PWs remained consistent qua the time, place, mode and manner of proceedings whereunder recovery of contraband was got effected from the possession of the appellant. They also stood successful to the test of cross-examination and intrinsic value of their testimonies could not be shattered. The report of Punjab Forensic Science Agency Ex-PE also confirmed the narcotics characters of the recovered contraband and nothing is available on record that there is any broken link qua the safe custody of parcels and its onward transmission to the Punjab Forensic Science Agency (PFSA). Therefore, we see no reason to interfere in the impugned judgment so for as conviction of the appellant is concerned. However, as regards quantum of sentence, we are mindful of the fact that nothing is available on the record to show that the appellant is previous convict or he is drug baron. He has already faced the agony and rigors of investigation and trial. He is behind the bars in this case since 03.02.2022. So, while following the guidelines provided by Hon'ble Supreme Court in cases *"Gul Raeef Khan v. The State"* (2008 SCMR 865), *"Muhammad Tariq v. The State"* (2009 SCMR 1220), *"Abdul Rehman v. The State"* (2011 SCMR 965), *"Khuda Bakhsh v. The State"* (2015 SCMR 735), *"Mst. Sughran and another v. The State"* (2021 SCMR 109), *"Zulfiqar alias Zulfa v. The State"* (2021 SCMR 531), *"Shaukat Ali alias Billa v. The State"* (2015 SCMR 308), *"Zafar Iqbal v. The State"* (2022 SCMR 1375), "Sanjha v. The State" (2011 SCMR 1034), *"State through the Deputy Director (Law), Regional Directorate, Anti-Narcotics Force v. Mujahid Naseem Lodhi"* (PLD 2017 Supreme Court 671) and *"Khuda Bakhsh v. The State"* (2015 SCMR 735), we dismiss this appeal and uphold the conviction of the appellant, however, the sentence of imprisonment is modified and reduced to rigorous imprisonment for one year,

which is considered sufficient to meet the ends of justice. However, the amount of fine and the imprisonment in default thereof, as imposed by the learned trial Court, shall remain intact. The benefit of Section 382-B Cr.P.C. already granted by the learned trial Court shall also hold the field. The file of the learned trial Court be sent back immediately and the case property, if any, shall be disposed of in accordance with law.

(M.A.B.) **Appeal dismissed.**

PLJ 2023 Cr.C. (Note) 88

[Lahore High Court, Multan Bench]

Present: **SHAKIL AHMAD, J.**

NIAZ AHMAD and another--Petitioners

versus

STATE and another--Respondents

Crl. Misc. No. 1857-B of 2022, decided on 19.5.2022.

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

----S. 498--Pakistan Penal Code, (XLV of 1860), Ss. 419 & 420--Pre-arrest bail, grant of--Allegation of--Cheating and impersonation by producing a fake person--Allegation against petitioners, as per contents of FIR, is that they committed cheating and impersonation by producing a fake person before Tehsildar in proceeding of partition of immovable property, showing him to be grandfather of complainant, who in fact was not alive at that time--None of petitioners is alleged to have presented himself to be grandfather of complainant--Therefore, moot point as to liability of petitioners for offence u/S. 419, PPC can be determined after recording evidence at trial, whereas Section 420, PPC is bailable. [Para 3] A

Syed Asad Abbas Kazmi, Advocate with Petitioners.

Malik Mudassar Ali, Deputy Prosecutor General for State.

Mr. Ahsan Raza Hashmi, Advocate for Complainant.

Date of hearing: 19.5.2022.

ORDER

After dismissal of their pre-arrest bail petition by learned Additional Sessions Judge, Layyah *vide* order dated 03.03.2022, petitioners Niaz Ahmad

and Ghulam Abbas have filed this petition seeking pre-arrest bail in case FIR No. 55 of 2022 dated 26.01.2022 registered at Police Station City, Layyah for the offence under Sections 419, 420, PPC.

2. Heard and perused the record.

3. Allegation against petitioners, as per contents of FIR, is that they committed cheating and impersonation by producing a fake person before Tehsildar in proceeding of partition of immovable property, showing him to be Allah Bakhsh, grandfather of the complainant, who in fact was not alive at that time. None of the petitioners is alleged to have presented himself to be Allah Bakhsh. Therefore, the moot point as to liability of petitioners for the offence under Section 419, PPC can be determined after recording evidence at trial, whereas Section 420, PPC is bailable.

4. For the reasons recorded above, petition in hand is allowed and ad-interim pre-arrest bail already granted to the petitioners by this Court is confirmed subject to their furnishing of fresh bail bonds in the sum of Rs. 50,000/- each with one surety each in the like amount to the satisfaction of learned trial Court.

(A.A.K.) **Petition allowed.**

PLJ 2023 Cr.C. (Note) 114
[Lahore High Court, Multan Bench]

***Present*: SHAKIL AHMAD, J.**

IKRAM-ULLAH--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 4699-B of 2022, decided on 18.10.2022.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), S. 380--Pre-arrest bail, grant of--Allegation of--Petitioner took away a cow belonging to complainant--Petitioner was not named in FIR--Supplementary statement--No source from where complainant got information about petitioner's involvement has been disclosed in supplementary statement--Merely suspicion has been raised against petitioner in supplementary statement and no tangible material has been collected by Investigating Officer so far to connect the; petitioner with commission of theft--**Held:** It is by now established principle of law that mere suspicion how strong it may be, cannot replace legal evidence--In such backdrop, possibility of petitioner's involvement in this case on basis of *mala fide* and ulterior motive on part of complainant cannot be ruled out altogether--Bail allowed.

[Para 4] A & B

Syed Asad Abbas Kazmi, Advocate for Petitioner.

Mr. Ishfaq Ahmad Malik, Deputy Prosecutor General for State.

Ms. Asghari Begum, Advocate for Complainant.

Date of hearing 18.10.2022.

ORDER

After dismissal of his pre-arrest bail petition by learned Additional Sessions Judge, Taunsa Sharif *vide* order dated 30.06.2022, petitioner Ikram Ullah has filed this petition seeking pre-arrest bail in case FIR No. 197 of 2021

dated 07.09.2021 registered at Police Station Vahowa District D.G. Khan for the offence under Section 380, PPC.

2. Allegation, in a nutshell, against petitioner is that he took away a cow belonging to complainant.

3. Heard and perused the record.

4. Having heard learned counsel for the parties and learned DPG, it has been noticed that occurrence as per contents of FIR took place on the intervening night of 24th & 25th of August, 2021 whereas matter was reported to police with delay of fourteen on 07.09.2021. Petitioner is not named in the FIR. He was implicated in this case through supplementary statement of the complainant after more than one month of the occurrence on 03.10.2021 and no source from where the complainant got information about petitioner's involvement has been disclosed in the supplementary statement. Merely suspicion has been raised against petitioner in the supplementary statement and no tangible material has been collected by the Investigating Officer so far to connect the petitioner with commission of theft. It is by now established principle of law that mere suspicion how strong it may be, cannot replace the legal evidence. In such backdrop, possibility of petitioner's involvement in this case on the basis of *mala fide* and ulterior motive on the part of complainant cannot be ruled out altogether.

5. For the reasons recorded above, petition in hand is allowed and ad-interim pre-arrest bail already granted to the petitioner by this Court is confirmed subject to his furnishing fresh bail bonds in the sum of Rs. 1,00,000/- with one surety in the like amount to the satisfaction of learned trial Court.

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

PLJ 2023 Cr.C. (Note) 124

[Lahore High Court, Multan Bench]

***Present*: SHAKIL AHMED AND MUHAMMAD AMJAD RAFIQ, JJ**

***Mst.* GAMI MAI--Petitioner**

versus

STATE--Respondent

Crl. Rev. No. 437 of 2022, decided on 6.12.2022.

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

----S. 435--Anti Terrorist activities, 1997, Ss. 7, & 23--Section 12 read with III Schedule of the Anti-Terrorism Act, 1997--Criminal Revision--Firing made in court premises--Jurisdiction of the court--Distinction between cases of terrorism and cases of specified heinous offences--Element of creating fear or terror, etc. may be missing in the instant case, but otherwise, as is the clear stance of the prosecution, obviously firing made in court premises is a scheduled offence as per section 12 read with III Schedule of the Anti-Terrorism Act, 1997, which is to be tried by Anti-Terrorism Court alone without charging the accused under section 7 of ATA, 1997--Element of causing fear or terror, etc. may not be there, still it being a scheduled offence is to be tried by the Anti-Terrorism Court--Instant criminal revision is allowed, the impugned order is set-aside with a direction that challan of the case shall be deemed to be pending before the Court established under Anti-Terrorism Act, 1997, where the trial/further proceedings shall continue, accordingly--Revision allowed. [Para 5] A & B

PLD 2020 SC 61; PLJ 2017 SC 408; PLD 2017 SC 661;
2019 SCMR 1362 *ref.*

Kh. Qaisar Butt, Advocate for Petitioner.

Mr. Muhammad Ali Shahab, DPG for State.

Rana Muhammad Nadeem Kanju, Advocate for private Respondents.

Date of hearing: 6.12.2022.

ORDER

This criminal revision has been filed to challenge the order dated 21.09.2022, whereby, the learned Special Judge, Anti-Terrorism Court No. 2, Multan while allowing application of accused/respondent filed under Section 23 of ATA returned the challan of case FIR No. 106 dated 24.02.2022 under Sections 302/109/34, PPC read with Section 7 of ATA at police station City Kabirwala, to prosecution for it presentation before the Court of ordinary jurisdiction for the purpose of trial.

2. The contention of learned counsel for the petitioner is that the case in hand is not triable by Court of Sessions on the touchstone of judgment reported as *"Ghulam Hussain and others v. The State and others"* (PLD 2020 SC 61) and the learned trial Court while passing the impugned order in Para-4 has misread the said judgment of the apex Court.

3. The learned counsel for the respondents opposed this petition and defended the impugned order but the learned Deputy Prosecutor General in attendance has conceded the legal position as explained by the learned counsel for the petitioner.

4. Heard. Record perused.

5. The relevant Paragraph No. 4 of the impugned order of learned trial Court is reproduced for ready reference:

> *"Perusal of record reveals that the incident took place due to the enmity between the parties and the purpose of the accused party was*

not to create fear or terror or insecurity in Court premises rather to take personal revenue or vendetta from the deceased party. Therefore, after placing reliance on the esteemed judgment PLD 2020 SC 61, I am of the considered view that creating nexus between Section 6 & 7 of Anti-Terrorism Act, 1997 is still begging question from the prosecution. From the perusal of FIR, it is crystal clear the ease did not fall within the purview of ATA 1997, as according to the narration of the prosecutions tery, there was no design, object or intent to cause terror and thus the provisions of Anti-Terrorism Act, 1997 have been misapplied by the IO in this case. The bare perusal of FIR does not invite the wrath of ingredient of Section 6 & of Anti-Terrorism Act, 1997. By any stretch of imagination element of terrorism is missing in this case. Moreover, the story of FIR itself speaks volume about the trial of instant in this Court."

It may be correct that element of creating fear or terror, etc. may be missing in the instant case, but otherwise, as is the clear stance of the prosecution, obviously firing made in Court premises is a scheduled offence as per Section 12 read with III Schedule of the Anti-Terrorism Act, 1997, which is to be tried by Anti-Terrorism Court alone without charging the accused under Section 7 of ATA, 1997 and this has been explained in supra judgment in following terms:

"A careful reading of the Third Schedule shows that an Anti-Terrorism Court has been conferred jurisdiction not only to try all those offences which attract the definition of terrorism provided by the Act but also some other specified cases involving heinous offences which do not fall in the said definition of terrorism. For such latter category of cases it was provided that although those offences may not constitute terrorism yet such offences may be tried by an Anti-

Terrorism Court for speedy trial of such heinous offences. This distinction between cases of terrorism and cases of specified heinous offences not amounting to terrorism but triable by an Anti-Terrorism Court has already been recognized by this Court in the cases of Farooq Ahmed v State and another (PLJ 2017 SC 408), Amjad Ali and others v The State (PLD 2017 SC 661) and Muhammad Bilal v The State and others (2019 SCMR 1362). It has been clarified by this Court in those cases that such specified heinous offences are only to be tried by an Anti-Terrorism Court and that Court can punish the person committing such specified heinous offences only for commission of those offences and not for committing terrorism because such offences do not constitute terrorism. For the purposes of further clarity on this issue it is explained for the benefit of all concerned that the cases of the offences specified in entry No. 4 of the Third Schedule to the Anti-Terrorism Act, 1997 are cases of those heinous offences which do not per se constitute the offence of terrorism but such cases are to be tried by an Anti-Terrorism Court because of their inclusion in the Third Schedule. It is also clarified that in such cases of heinous offences mentioned in entry No. 4 of the said Schedule an Anti-Terrorism Court can pass a punishment for the said offence and not for committing the offence of terrorism. It may be pertinent to mention here that the offence of abduction or kidnapping for ransom under Section 365-A, PPC is included in entry No. 4 of the Third Schedule and kidnapping for ransom is also one of the actions specified in Section 7(e) of the Anti-Terrorism Act, 1997. Abduction or kidnapping for ransom is a heinous offence but the scheme of the Anti-Terrorism Act, 1997 shows that an ordinary case of abduction or kidnapping for ransom under Section 365-A, PPC is merely triable by an Anti-Terrorism Court but if kidnapping for ransom is committed with the design or purpose

mentioned in clauses (b) or (c) of subsection (1) of Section 6 of the Anti-Terrorism Act, 1997 then such offence amounts to terrorism attracting Section 7(e) of that Act. In the former case the convicted person is to be convicted and sentenced only for the offence under Section

365-A, PPC whereas in the latter case the convicted person is to be convicted both for the offence under Section 365-A, PPC as well as for the offence under Section 7(e) of the Anti-Terrorism Act, 1997. The same may also be said about the other offences mentioned in entry No. 4 of the Third Schedule to the Act pertaining to "Use of fire-arms or explosives by any device, including bomb blast in a mosque, imambargah, church, temple or any other place of worship, whether or not any hurt or damage is caused thereby", "Firing or use of explosive by any device, including bomb blast in the Court premises", "Hurt . caused by corrosive substance or attempt to cause hurt by means of a corrosive substance" and "Unlawful possession of an explosive substance or abetment for such an offence under the Explosive Substances Act, 1908 (VI of 1908)". Such distinction between cases of terrorism and other heinous offences by itself explains and recognizes that all heinous offences, howsoever serious, grave, brutal, gruesome, macabre or shocking, do not ipso "facto constitute terrorism which is a species apart. Through an Mmendment of the Third Schedule any heinous offence not constituting terrorism may be added to the list of offences which may be tried by an Anti-Terrorism Court and it was in this context that the Preamble to the Act had mentioned "Whereas it is expedient to provide for the prevention of terrorism, sectarian violence and for speedy trial of heinous offences".

In this view of the matter, irrespective of the fact that element of causing fear or terror, etc. may not be there, still it being a scheduled offence is to be tried by the Anti-Terrorism Court. Consequently, the instant criminal revision is **allowed,** the impugned order is **set-aside** with a direction that challan of the case shall be deemed to be pending before the Court established under Anti-Terrorism Act, 1997, where the trial/further proceedings shall continue, accordingly.

(M.A.B.) **Revision allowed.**

PLJ 2023 Cr.C. (Note) 141

[Lahore High Court, Multan Bench]

***Present*: SHAKIL AHMAD AND MUHAMMAD AMJAD RAFIQ, JJ.**

***Mst.* SHABANA BIBI--Appellant**

versus

STATE and another--Respondents

Crl. A. No. 554 of 2022, heard on 21.11.2022.

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

----S. 9-C--Affixation of seal 'S.S'--Signatures of constable--Acquittal of--Personal search was conducted and in a bag that she was containing in her left hand, two packets of charas were recovered and on weighing, each packet came to 1100 grams. 55 grams charas was separated from each packet for sample--Recovery memo. attested by two police constables--Names of witnesses are also written with the same pen--Their signatures in urdu are also shown to have been made thereon--Name of one constable is not written on the recovery memo. along with her place of posting and only her signatures are shown to have been taken through a different pen--It transpires that signatures of said constable has been taken subsequently and same were not in fact taken while preparing recovery memo--PW-4 in his examination-in-chief stated to have affixed seal 'S.S' on all the four sealed parcels--PW-7 / S.I stated to have received four parcels in all--He did not state in his examination-in-chief that seal of S.S was affixed on all the four sealed parcels--None of the PWs deposed about the presence of seal namely SS on the sealed parcels--Prosecution failed to establish the chain of safe custody of sample parcels--Even a single reasonable doubt in the prosecution case is sufficient to acquit the accused not as a matter of grace but as matter of right--Harder the sentence is, stricter the standard of proof should be--Appellant is acquitted.

[Para 2, 9, 12, 13 & 14] A, B, C, D, E, F, G

2022 SCMR 1627; 2018 SCMR 2039; 2020 SCMR 687;
PLD 2012 SC 380; 2009 SCMR 230; 1995 SCMR 1345 *ref.*

Syed Imran Abbas Kazmi, Advocate for Appellant.

Mr. Shahid Aleem, Additional Prosecutor General for State.

Date of hearing: 21.11.2022.

JUDGMENT

Shakil Ahmad, J.--*Mst.* Shabana Bibi (appellant herein) after having been tried by the learned Additional Sessions Judge, Lodhran in case FIR No. 44 of 2022 dated 10.01.2022 for the offence under Section 9(c) of the Control of Narcotic Substances Act, 1997 ("CNSA, 1997") registered at Police Station City, Lodhran, was convicted under Section 9(c) of the CNSA, 1997 and sentenced *vide* judgment dated 01.06.2022 (impugned judgment) as under:

> To undergo simple imprisonment for 3½ years along with fine of Rs. 10,000/-or in default, to further undergo simple imprisonment for three months. Benefit of Section 382-B of, Cr.P.C. was also extended in favour of the convict/appellant.

2. Muhammad Shoaib Saeed TASI (PW-1) reported the matter to Station House Officer, Police Stat on City, Lodhran through written Complaint Ex.PB drafted on 10.01.2022 at 07:30 A.M, by stating therein that he along with Abdul Maalik 372/C, Zawar Hussain 1031/C, Shaukat 705/C, Farhana Aslam 1085/LC was present at thana Balochan Phatak in connection with patrolling duty when spy information was received that a woman named Shabana having huge quantity of charas was present at Lataska Hotel Morr at Super Chowk Kehror Pacca and she could be apprehended and charas could be recovered if raid was conducted. Thereupon, by constituting raiding party, complainant reached Super Chowk Kehror Pacca and on pointing out of spy, apprehended a woman, who disclosed her name as Shabana widow of Muhammad Babar (appellant), whose personal search was conducted through Farhana Aslam 1085/LC and in a bag that she was containing in her left hand,

two packets of charas were recovered and on weighing, each packet came to 1100 grams. 55 grams charas was separated from each packet for sample and made the same as well as remaining charas into separate parcels. Recovery memo. was prepared whereupon signatures of witnesses were obtained. Complainant drafted complaint Ex.PB and sent the same to police station through Shaukat 705/C (PW-4) on which, formal FIR Ex.PD was registered by Qaisar Ameer 83/HC (PW-5).

3. Muhammad Irfan (PW-7) having received police file for investigation, proceeded to the place of recovery. According to PW-7, Muhammad Shoaib Saeed TASI handed over to him four parcels, two sample parcels and two parcels of remaining case property as well as custody of accused. He claimed to have inspected the place of recovery and prepared rough site plan (Ex.PE); recorded statements of PWs under Section 161 of Cr.P.C; formally arrested the accused, recorded her first version, returned to police station, confined her to the police lock up and handed over the parcels of case property and sample parcels to Moharrir and on 10.01.2022 sent the accused to judicial lock up. According to PW-5, on 12.01.2022 Moharrir Qaisar Ameer 83/HC handed over to him two sample parcels for onward transmission and he deposited the same in the office of Punjab Forensic Science Agency, Lahore on the same day.

4. Report under Section 173 of, Cr.P.C. was prepared by SHO and sent to the Court. Appellant was formally indicted on 17.03.2022. She pleaded not ginilty and the trial commenced.

5. In order to prove its case, the prosecution examined as many as eight witnesses whereas Abdul Maalik 372/C was given up being unnecessary and learned ADPP, by placing on record report of PFSA Ex.PC and certain other documents as Ex.PF to Ex.PJ, closed the prosecution evidence on 30.05.2022.

6. Statement of the appellant was recorded under Section 342 of Cr.P.C. She mainly pleaded her innocence and in reply to the question that

why case was registered against her and why the PWs deposed against her, appellant took the following stance:

> *"The recovery is fake and planted one. Nothing was recovered from me. No independent/private person of the locality supported the version of the complainant. In order to show his performance, complainant lodged this false case against me a ad planted fake recovery against me"*

Appellant neither opted to appear in the witness box in disproof of the allegations under Section 340(2) of Cr.P.C, nor produced defence evidence.

7. Learned trial Court on conclusion of trial, convicted and sentenced the appellant in terms as hinted in the opening paragraph of this judgment, hence this appeal.

8. Heard. Record perused.

9. Having scanned the whole evidence produced at trial by the prosecution to prove its case, with the able assistance of learned counsel for the appellant and learned APG, we are constrained to observe at the outset that there exist material inconsistencies and discrepancies in prosecution's evidence *qua* initial and basic version of prosecution case besides some fundamental flaws in handling and safe custody of sample parcels which create serious doubts. As per F.I.R, the police contingent comprising of Muhammad Shoaib Saeed TASI (PW-1) along with Abdul Maalik 372/C, Zawar Hussain 1031/C (PW-3), Shiukat 705/C (PW-4), Farhana Aslam 1085 LC (PW-2) and Muhammad Nadir 378/C, driver of the official vehicle after conducting raid following a tip off, apprehended the appellant and upon her personal search that was carried out by lady constable Farhana Aslam, recovered two packets of charas weighing 1100 grams each from a bag carried by the appellant in her left hand. As per narration of events in the complaint Ex.P-B as well examination in chief of Muhammad Shoaib Saeed TASI PW-1, after recovery of charas from the accused, 55 grams charas was separated from each packet and two sample parcels were prepared, thereafter two sample parcels and two

parcels of remaining charas were taken into possession by the complainant through recovery memo. (Ex.PA) whereafter complaint was drafted and sent to Police Station. In this way, the first document shown to have been prepared by the police in this case, at the place of recovery, is the recovery memo. Ex.PA, attested by Abdul Maalik 372/C, Zawar Hussain 1031/C and Farhana Aslam 1085/LC. The whole writing of the recovery memo. Ex.PA is with a blue ball point pen. Names of witnesses Abdul Maalik 372/C and Zawar Hussain 1031/C are also written with the same pen along with place cf their posting *i.e.* Police Station City, Lodhran and their signatures in urdu are also shown to have been made thereon. However, name of Farhana Aslam 1085/LC is not written on the recovery memo. Ex.PA along with her place of posting and only her signatures are shown to have been taken through a different pen *i.e* gel pen. From bare perusal of Exh.PA, it transpires that signatures of Farhana Aslam Exh.PA/2 has been taken subsequently and same were not in fact taken while preparing Exh.PA, leading to unference that name of Farhana Aslam 1085/LC initially was not written on the recovery memo. at the time of its preparation and her signatures were obtained on this document subsequently. Muhammad Shoaib Saeed TASI PW-1 during the course of his cross examination admitted it correct that name of Farhana Aslam is wriiten with different pen. However, he made an attempt to explain the said position by volunteering that Farhana Aslam signed with her own pen but the fact remains that name of Farhana Aslam was not written on the recovery memo. in the way names of other witnesses Abdul Maalik 372/C and Zawar Hussain 1031/C were written on said document and that position was admitted by PW.1 in his cross examination. Had Farhana Aslam 1085/LC made signatures on Ex.PA with her own pen at the place of recovery, her name as well as place of posting should have been written by the complainant/author of Ex.PA with the same pen with which names of other two witnesses were written. Relevant to note here is that Farhana Aslam 1085/LC appeared as PW-2 and in her cross examination admitted it correct that in her statement recorded under Section 161, Cr.P.C. she did not mention that she signed the recovery memo. Ex.PA.

10. It may also be seen that investigation of this case was conducted by Muhammad Irfan SI who after inspecting the place of recovery, stated to have prepared site-plan Ex.PE. Point No. 2 shown in the site plan Ex.PE is the place where witnesses Abdul Maalik 372/C and Zawar Hussain 1031/C were present at the time of recovery of charas. Name of Farhana Aslam 1085/LC on the document Ex.PE too, appears to have been inserted subsequently with a different pen on the margin of the paper by making an abortive attempt to adjust said name in the narration of writing of point No. 2 so as to show her presence during the alleged recovery proceedings.

11. In his examination-in-chief, Muhammad Irfan SI PW-7 who is the investigator of this case, stated that he formally arrested the accused lady, recorded her first version, returned to police station, confined the accused in police lock up and handed over the case property and samples of charas to the Moharrir concerned for safe custody. During the course of his cross examination, PW-7 stated that after completion of whole proceedings at the place of recovery, he came back to police station and also written rapat No. 05/02 and he entered no other rapat in this regard. A copy of rapat No. 05/02 dated 10.01.2022 shown to have been incorporated at 09:00 A.M. by Muhammad Irfan SI is available on the record as Ex.PF/1, according to which after investigation of this case Muhammad Irfan SI returned to Police Station after formally arresting accused Shabana and after her personal search, she was confined in police lock up. Quite surprisingly, there is no mentioning in the said rapat as to the conducting of personal search of accused through a lady constable. Likewise, there is no mentioning in the said rapat as to handing over of any parcel of charas to Moharrir by Muhamamd Irfan SI. Similarly, Qaisar Ameer 83/HC Moharrir PW-5 in his cross examination stated that he did not get incorporated any rapat *qua* receipt of case property from Muhammad Irfan SI. In this backdrop, the fact of handing over of sample parcels of that of case property in this case by Muhammad Irfan SI to Moharrir PW-5 is nowhere mentioned in the daily diary register of police station and the said fact only finds mention in the statement of Moharrir but quite astonishing to observe

here is that Moharrir PW-5 in the course of his cross examination admitted it correct that in his statement under Section 161, Cr.P.C. he did not get recorded specifically the number of parcels received by him, rather he stated to have received the case property. Prosecution version, as per the complaint, was that two sample sealed parcels were made at the spot in addition to two sealed parcels of remaining recovered charas, however, taking the examination in chief of Moharrir PW-5 as a whole, number of parcels shown to have been received by him from the Investigating officer comes to more than four parcels presumably eight in number inasmuch as he stated that Muhammad Irfan SI handed over to him four sealed parcels of charas and their samples for keeping into safe custody. Relevant excerpt of the statement of PW-5 is reproduced hereunder for the facility of ready reference:

> *"On the same day, Muhammad Irfan SI handed over to me four sealed parcels of charas and their samples for keeping into safe custody and their further transmission which I kept in maal khana for safe custody."*

12. According of Muhammad Shoaib Saeed TASI (PW-1), two packets containing Charas were recovered from the appellant and he separated 55-grams Charas from each packet and made them into sealed parcels. PW-4 in his examination-in-chief stated to have affixed seal 'S.S' on all the four sealed parcels. According to him, he handed over two sealed sample parcels and remaining parcels to Muhammad Irfan S.I. PW-7 Muhammad Irfan S.I stated to have received four parcels in all. He did not state in his examination-in-chief that seal of S.S was affixed on all the four sealed parcels. He further deposed that all the sealed parcels were handed over to Moharrar Qaisar Ameer 83/HC. Qaisar Ameer 83/HC Moharrar while appearing as PW-5, in his examination-in-chief said to have received total four sealed parcels of charas and their samples from Muhammad Irfan SI, out of which two sealed parcels containing 55/55 grams each were handed over to Muhammad Irfan SI on 12.01.2022. From the above, it clearly transpires that except PW-1 none of the PWs deposed about the presence of seal namely SS on the sealed parcels

particularly on the sample sealed parcels. We have also seen the contents of report of PFSA Ex.PC, according to which two sample parcels were received in the lab on 12.01.2022 but there is also no mentioning of presence of seal SS on any of the sealed parcels that were received at PFSA. From the whole prosecution evidence it cannot be established that sample parcels said to have been prepared at the spot were in fact the parcels which were transmitted, received and examined by PFSA authorities. In the face of these inherent flaws in handling of sample sealed parcels and also parcels of remaining case property, serious doubt *qua* the safe transmission of the sample parcels to the PFSA as well as safe custody of the case property has been created and in consequence whereof recovery of narcotics substance and even positive report of Forensic Science Laboratory would become of less value and conviction based on such report can hardly be maintained. It is by now an established principle of law that where prosecution fails to establish safe custody of sample parcels that commences with the moment when the narcotics substance is recovered, till its' dispatch to the concerned laboratory, it is considered unsafe to convict an accused on the basis of report of PFSA. In the instant matter, prosecution failed to establish the chain of safe custody of sample parcels, therefore, positive report of PFSA would be insufficient to be made basis for conviction of the appellant. Reliance in this regard may safely be placed on case titled *"The State through Regional Director ANF vs. Imam Bakhsh and others"* (2018 SCMR 2039). It is pertinent to mention here that the damage caused to the prosecution case by not proving the safe custody of the recovered substance at police station, as hinted in the preceding paragraph, could not be repaired and benefit of same would also go to the appellant. Reliance in this regard may be placed on case *"Haji Nawaz v. The State"* (2020 SCMR 68"), wherein it was held as under:

> *"Apart from that we have further observed that no evidence worth its name had been produced by the prosecution before the trial Court establishing safe custody of the recovered substance at the local Police Station or safe transmission of the samples of the recovered substance*

form the Police Station to the office of the Chemical Examiner. This Court has already held in the case of Amjad Ali v. The State (2012 SCMR 577) and Ikramullah and others v. The State (2015 SCMR 1002) that in the absence of any proof regarding safe custody or safe transmission of the recovered substance or the samples thereof a conviction cannot be recorded in a case of this nature "

13. Another defect in the prosecution case which has been noticed by us is that according to the prosecution's case, charas was placed in a bag that the accused was carrying in her left hand, however, no description as to colour or make of bag was mentioned and the bag neither was shown to have been taken into possession nor the same was produced at trial, further creating doubt in the prosecution story. It is an established principle of law that even a single reasonable doubt in the prosecution case is sufficient to acquit the accused not as a matter of grace but as matter of right. Reliance in this regard may safely be placed on case reported as *"Akhtar Gul vs The State"* (2022 SCMR 1627) whereas in the instant case, statements of prosecution witnesses when are seen in their entirety, same neither are coherent nor confidence inspiring and in consequence whereof cannot be made basis for conviction of the appellant.

14. Since provisions of CNSA, 1997 provide severe punishments, proving of the case up to hilt, in such cases has been emphasized by the august Supreme Court of Pakistan in case *"Ameer Zeb v. The State"* (PLD 2012 SC 380), wherein it was observed that harder the sentence is, stricter the standard of proof should be. Assessing the present case on the touchstone of the dicta laid down in Ameer Zeb's case, we are constrained to observe that prosecution failed to prove its case beyond the shadow of a reasonable doubt. It is by now a settled principle of law that prosecution primarily is bound to establish the guilt of accused beyond the shadow of a reasonable doubt by producing trustworthy, convincing and reliable evidence and even a single doubt in the prosecution story is fatal rather disastrous for the prosecution case and benefit of the same would go to the accused being favourite child of law who is to be treated as innocent unless his guilt is proved up to the hilt. Reliance in the

respect may safely be placed on case *"Muhammad Akram v. The State"* (2009 SCMR230). In case *"Tariq Pervaz v. The State"* (1995 SCMR 1345) while elaborating the principle of benefit of doubt, august Supreme Court observed as under:

> *"It is well embedded principle of criminal justice that there is no need of so many doubts in the prosecution case, rather any reasonable doubt arising out of the prosecution evidence, pricking the judicial mind is sufficient for acquittal of the accused".*

15. The upshot of the above discussion is that findings of conviction recorded against appellant by learned Additional Sessions Judge, Lodhran in the impugned judgment dated 01.06.2022 are not sustainable, which are hereby set aside by allowing instant Criminal Appeal No. 554 of 2022. Consequently, appellant Shabana Bibi is acquitted of the charge by extending benefit of doubt to her. Appellant is in jail. She is ordered to be released forthwith, if not required/detained in any other case. Case property shall be dealt with in accordance with taw.

(A.A.K.) **Appeal accepted.**

PLJ 2023 Cr.C. (Note) 160

[Lahore High Court, Multan Bench]

***Present*: SHAKIL AHMAD AND MUHAMMAD AMJAD RAFIQ, JJ.**

ZAHOOR AHMAD etc.--Petitioners

versus

STATE, etc.--Respondents

Crl. Misc. Nos. 7602-B and 7810-B of 2022, decided on 8.12.2022.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 302/365-A/365/427/201/109/148/149--Anti-Terrorism Act, (XXVII of 1997), S. 7--Post arrest bail--grant of--Not nominate in FIR--Prosecution introduced two witness later on--Rule of consistency--Matter was reported to the police with delay of three days and none was nominated in the complaint--Subsequently the prosecution introduced two witnesses--With the assertion that they had seen the accused going alongwith the husband of the complainant in a car and also had conversation with the deceased--Neither of the above two witnesses already knew the petitioners nor were they residents of the vicinity--Co-accused of the petitioners who too had been involved in abduction for ransom and Qatl-e-Amd of deceased has been enlarged on bail--Criminal liability of the petitioners shall be determined by the trial--Petitions are allowed.

[Para 3] A, B, C & D

2022 SCMR 1612; 2019 SCMR 1914; 2021 SCMR 63 *ref.*

Kh. Qaisar Butt, Advocate for Petitioner (in Crl. Misc. No. 7602-B/2022).

Mr. Habib Ullah Shakir, Advocate for Petitioner (in Crl. Misc. No. 7810-B/2022).

Mr. Muhammad Ali Shahab, Deputy Prosecutor General for State.

Ch. Salamat Ali Wains, Advocate for Complainant.

Date of hearing: 8.12.2022.

ORDER

Through this single order, we intend to decide two bail applications *i.e*. Crl. Misc. No. 7602-B/2022 filed by Zahoor Ahmad and Crl. Misc. No. 7810-B/2020 instituted by Muhammad Azhar, whereby, both the petitioners have sought post arrest bail in case FIR No. 314 dated 08.04.2022 under Sections 365, 365-A, 302, 148, 149, 201, 427, 109, PPC read with Section 7 of Anti-Terrorism Act, 1997 Police Station Cantt, Multan.

2. Heard. Record perused.

3. The alleged occurrence, when purportedly the husband of the complainant went missing, took place on 05.04.2022, but matter was reported to the police on 08.04.2022 *i.e*. with delay of three days and none was nominated in the complaint. Though, subsequently the prosecution introduced two witnesses namely Abid Hussain and Muhammad Azhar, with the assertion that they had seen the accused going along with the husband of the complainant in a car and also had conversation with the deceased, where after the deceased continued on to his journey with the accused petitioners. In addition to the above, neither of the above two witnesses already knew the petitioners nor were they residents of the vicinity. There is no evidence that ransom was demanded or received by either of these two petitioners, nor

anything connecting them with the commission of the alleged crime has been effected from them. Co-accused of the petitioners (*Mst.* Bashiran Mai) who too had been involved in abduction for ransom and Qatl-e-amd of Mukhtar Ahmad (deceased) has been enlarged on bail by this Court *vide* order dated 05.10.2022 in Crl. Misc. No. 4839-B/2022. Zahoor Ahmad petitioner was arrested on 02.05.2022 and Muhammad Azhar petitioner is behind the bars since 08.06.2022, with no noticeable progress in the trial. Criminal liability of the petitioners shall be determined by the learned trial after recording of evidence and at present sufficient material is not available on record to connect the petitioners with the commission of crime. The learned counsel for the petitioners have placed reliance on cases reported as *'Faqir Dad Khan Khoso and others versus National Accountability Bureau through Chairman and others"* (2022 SCMR 1612) and *"Husnain Mustafa versus The State and another"* (2019 SCMR 1914). All these circumstances make the case of petitioners that of further inquiry. The Hon'ble Supreme Court of Pakistan in the case *"Jahanzeb and others versus State through A.G. Khyber Pakhtunkhwa Peshawar and another"* (2021 SCMR 63), with reference to Section 497(2), Cr.P.C. has held as under:

> *"Perusal of the aforesaid provision reveals the intent of the legislature disclosing pre-condition to establish the word "guilt" against whom accusation is levelled has to be established on the basis of reasonable ground, however, if there exists any possibility to have a second, view of the material available on the record then the case advanced against whom allegation is levelled is entitled for the relief in the spirit of Section 497(2), Cr.P. C."*

5. Resultantly, both these petitions are allowed and the petitioners are admitted to bail subject to furnishing bail bonds in the sum of Rs. 500,000/-

each with one surety each in the like amount to the satisfaction of learned trial Court.

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

PLJ 2023 Cr.C. (Note) 166

[Lahore High Court, Multan Bench]

***Present*: SHAKIL AHMAD, J.**

MUHAMMAD TARIQ AMIN--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 5205-B of 2022, decided on 06.9.2022.

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

----S. 498--Pakistan Penal Code, (XLV of 186), Ss. 324, 337-F(ii), 337-F(i), 354, 34--Medical board opinion--Pre-arrest bail--Confirmation of--During investigation Section 337-F(ii) PPC has been deleted in view of report of Medical Board--All the remaining offences with which petitioner has been charged, are bailable--Ad-interim pre-arrest bail already granted to the petitioner by High Court is confirmed. [Para 3] A

Khawaja Qaisar Butt, Advocate for Petitioner.

Mr. Tanvir Haider, ADPP for State.

Date of hearing: 6.9.2022.

ORDER

After dismissal of bis pre-arrest bail petition by learned Additional Sessions Judge, Vehari *vide* order dated 27.07.2022, petitioner Muhammad Tariq Amin has filed this petition seeking pre-arrest bail in case FIR No. 381 of 2022 dated 30.05.2022 registered at Police Station Saddar Vehari for the offences under Sections 337-F(ii), 337-F(i), 354, 34, PPC.

2. On previous date written request for adjournment was sent by learned counsel for complainant but today nobody has appeared on behalf of complainant.

3. At the very outset, it has been pointed out by learned Law Officer that during investigation Section 337-F(ii), PPC has been deleted in view of report of Medical Board. All the remaining offences with which petitioner has been charged, are bailable. Therefore, petition in hand is allowed and ad-interim pre-arrest bail already granted to the petitioner by this Court is confirmed subject to his furnishing of fresh bail bonds in the sum of Rs. 50,000/- with one surety in the like amount to the satisfaction of learned trial Court.

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

PLJ 2023 Cr.C. (Note) 168

[Lahore High Court, Multan Bench]

***Present*: SHAKIL AHMAD, J.**

AHTISHAM-UL-HAQ--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 4776-B of 2022, decided on 3.10.2022.

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

----S. 498--Pakistan Penal Code, (XLV of 1860), S. 379--Compromise. Pre-arrest bail--Confirmation of--Complainant has entered appearance and raised no objection to the acceptance of this petition. Matter between her and accused has been settled by way of compromise and her grievance has already been redressed--Ad-interim pre-arrest bail already granted to petitioner by High Court is confirmed. [Para 2] A

Khawaja Qaisar Butt, Advocate with Petitioner.

Mr. Tanvir Haider, ADPP for State.

Complainant in person.

Date of hearing: 3.10.2022.

ORDER

This petition has been filed under Section 498, Cr.P.C. by Ahtisham ul Haq petitioner seeking pre-arrest bail in case FIR No. 363 of 2022 dated 07.06.2022 registered at Police Station Saddar, Khanewal for the offence under Section 379, PPC. Earlier application of the petitioner for the same relief was dismissed by learned Additional Sessions Judge, Khanewal *vide* order dated 23.06.2022.

2. At the outset, *Mst.* Parveen Bibi complainant has entered appearance and raised no objection to the acceptance of this petition; in view of the fact that matter between her and accused has been settled by way of compromise and her grievance has already been redressed by petitioner. In view of the statement of complainant, petition in hand is allowed and ad-interim pre-arrest bail already granted to petitioner by this Court is confirmed subject to his furnishing of fresh bail bonds in the sum of Rs. 50,000/- with one surety in the like amount to the satisfaction of learned trial Court.

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

PLJ 2023 Cr.C. (Note) 177

[Lahore High Court, Multan Bench]

***Present*: SHAKIL AHMAD, J.**

MUHAMMAD SHAHID--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 3289-B of 2022, decided on 22.9.2022.

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

----S. 498--Complainant affidavit--Plea of Nikah--Pre-arrest bail--confirmation of--Complainant sworn affidavit to the effect that he had no objection on acquittal of accused or acceptance of the bail--In her statements recorded u/S. 161 & 164 Cr.P.C. although abductee raised allegation of abduction--Investigating Officer after recording statements of Nikah Khawan found nikah nama as genuine--Accused/petitioner has filed suit for restitution of conjugal rights and suit for jactitation of marriage by abductee--Benefit of doubt can be extended in favour of an accused--Ad-interim pre-arrest bail already granted to petitioner by High Court is confirmed. [Para 3] A, B, C & D

Mr. Ghulam Farid Birmani, Advocate for Petitioner.

Mr. Muhammad Ali Shahab, DPG for State.

Sheikh Jamshed Hayat, Advocate for Complainant.

Date of hearing: 22.9.2022.

ORDER

Instant petition has been filed under Section 498 Cr.P.C. by Muhammad Shahid petitioner seeking pre-arrest bail in case FIR No. 1147 of 2020 dated 20.10.2020 registered at Police Station Baha-ud-Din Zakariya, Multan for the offence under Section 365-B, PPC. Earlier application of the petitioner for the same relief was dismissed by learned Additional Sessions Judge, Multan *vide* order dated 29.05.2021.

2. Allegation against petitioner as per contents of FIR, precisely is that he along with co-accused abducted *Mst.* Aalia Zafar aged about 16-17 years, niece of the complainant.

3. Learned counsel for petitioner contended that in fact *Mst.* Aalia Zafar contracted nikah with petitioner of her free consent on 21.10.2020 against the wishes of her parents and close relatives, due to which complainant got registered FIR with false allegation of abduction against petitioner and his real sister and thereafter in a punchayat *Mst.* Aalia Zafar was returned to her parents on 23.10.2020 and at that time complainant sworn affidavit to the effect that he had no objection on acquittal of accused or acceptance of their bail in this case and that *Mst.* Aalia Zafar also sworn an affidavit whereby she acknowledged her nikah with petitioner waiving her rights arising as result of nikah. Copies of affidavits of complainant and *Mst.* Aalia Zafar dated 23.10.2020 are annexed with the petition along with nikah nama between Aalia Zafar and Muhammad Shahid petitioner. In her statements recorded under sections 161 & 164, Cr.P.C. although *Mst.* Aalia Zafar raised allegation

of abduction against petitioner, yet the Investigating Officer after recording statements of Nikah Khwan as well as witnesses 'of nikah, found nikah between petitioner and Aalia Zafar as genuine. It was also opined by the Investigating Officer that victim got recorded her statements under Section 161 & 164, Cr.P.C. on pressure of her parents. Version of petitioner qua return of Aalia Zafar to her parents through punchayat and affidavits of complainant and Aalia Zafar dated 23.10.2020 were also verified by the Investigating Officer. It has also not been denied that accused/ petitioner has filed suit for restitution of conjugal rights and suit for jactitation of marriage has been filed by Alia Zafar and both suits are pending adjudication in the Court of learned Judge Family Court. Taking stock of whole material available on the record and upon tentative assessment of the same, it can safely be observed that case against accused/petitioner appears to be fishy. It is by now established principle of law that benefit of doubt can be extended in favour of an accused even at bail stage. Reliance in this regard may safely be placed on cases reported as *"Resham Khan and another vs. The State through Prosecutor General Punjab, Lahore and another"* (2021 SCMR 2011). Possibility of false implication of petitioner for some ulterior motives, in view of foregoing discussion, cannot be ruled out altogether.

4. For the reasons recorded above, petition in hand is allowed and ad-interim pre-arrest bail already granted to petitioner by this Court is confirmed subject to his furnishing of fresh bail bonds in the sum of Rs. 1,00,000/- with one surety in the like amount to the satisfaction of learned trial Court.

Before parting with this order, it seems apt to clarify that the observations recorded supra are tentative in nature and the same would not prejudice case of either of the parties at trial.

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

PLJ 2023 Cr.C. (Note) 189

[Lahore High Court, Multan Bench]

Present: **SHAKIL AHMAD, J.**

MUHAMMAD YAR--Appellant

versus

STATE etc.--Respondents

Crl. A. No. 851 of 2019, decided on 7.4.2022.

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

----S. 426(1-A)(c)--Suspension of sentence--Statutory ground--Grant of--Provides concession to a convict whose appeal could not be decided within a period of two years--Statutory period as contemplated under the provisions of Section 426(1-A)(c) of Cr.P.C has already lapsed--No material whatsoever has been referred or hinted showing the petitioner/Convict to be a hardened, desperate or dangerous criminal or that he remained accused of an act of terrorism punishable with death or imprisonment for life--Where case of a convict is not converted under the exceptions as enumerated under Section 426(1-A) of Cr.P.C, he becomes entitled to be released on bail not as a matter of grace but as a matter of rig--This petition is allowed and the execution of sentence of the petitioner/convict is suspended. [Para 2 & 3] A, B, C & D

2012 PCr.LJ 21 *ref.*

Mr. Muhammad Sharif Meo, Advocate for Appellant.

Mr. Ansar Yasin, DPG for State.

M/s. Khawaja Qaisar Butt and Muhammad Shahid Khan Baloch, Advocates for Complainant.

Date of hearing: 7.4.2022.

ORDER

Through this petition filed under Section 426 of Cr.P.C. Muhammad Yar petitioner/convict seeks suspension of execution of sentence awarded to him by learned Additional Sessions Judge, Vehari through judgment dated 06.09.2019, whereby the petitioner was convicted and sentenced as under:-

- *"Convicted under Section 302(b) of PPC and sentenced to imprisonment for life and was directed to pay Rs. 5,00,000 to the legal heirs of the deceased. In default thereof, he shall further undergo simple imprisonment of six months.*
- *Convicted under Section 324 of PPC and sentenced to rigorous imprisonment for five years'*
- *Convicted under Sections 337-A(i), 337-F(i), 337-F(iii), 337-F(v), 337-L(2) read with Section 34 of PPC and sentenced to pay Daman Rs. 50,000/- each for causing injuries to injured Shoukat Ali and Imran. In case of non- payment of Daman, it shall be recovered from convict and until Daman is paid in full, the convict be kept in jail and dealt with in the same manner as if sentenced to simple imprisonment."*

All the sentences were ordered to be run concurrently and benefit of Section 382-B of Cr.PC was also extended to the petitioner/ convict.

2. Without touching upon the merits of the instant case, lest it may prejudice the case of either of the sides while deciding the main appeal, it may be observed that Section 426(1-A)(c) of Cr.P.C. provides concession to a convict whose appeal could not be decided within a period of two years, to be released on bail till the final decision of the main appeal. Learned counsel for petitioner/convict confined his arguments merely on statutory ground as enshrined under the provisions of Section 426(1-A)(c) of Cr.P.C. Same is reproduced hereunder for ready reference:

Section 426 (1-A) of Cr.P.C. "An Appellate Court shall, except where it is of opinion that the delay in the decision of appeal has been occasioned by an act or omission of the appellant or any other person acting on his behalf, order a convicted person to be released on bail who has been sentenced:-

a. ....

b. ...

c. to imprisonment for life or imprisonment exceeding seven years and whose appeal has not been decided within a period of two years of his conviction.

Provided that the provisions of the foregoing paragraph shall not apply to a previously convicted offender for an offence punishable with death or imprisonment for life or to a person who, in the opinion of Appellate Court, is a hardened, desperate or dangerous criminal or is accused of an act of terrorism punishable with death or imprisonment for life.

(emphasis supplied)

Plain reading of above hinted provisions of law vividly suggests that right of a convict seeking suspension of his sentence on statutory ground can only be denied where case of convict is either covered under the provisions of sub-section (1-A) of Section 426, Cr.P.C or to its proviso. Nothing, however is available on the record to even remotely suggest that delay in the decision of main appeal was occasioned by an act or omission on the part of petitioner/convict or any other person acting on his behalf. Main Appeal was filed on 20.09.2019 and statutory period as contemplated under the provisions of Section 426 (1A)(c) of Cr.P.C has already lapsed on 19.09.2021. Main appeal could not be decided for a period of more than 02-years and 06-months. Petitioner/convict was taken into custody after pronouncement of impugned

judgment. In this backdrop, if after suffering the incarceration in jail for years, petitioner is ultimately acquitted, there would be no compensation for the period he served in jail. No material whatsoever has been referred or hinted showing the petitioner/convict to be a hardened, desperate or dangerous criminal or that he remained accused of an act of terrorism punishable with death or imprisonment for life. Case of petitioner/convict, therefore, is not covered under sub-section (1-A) of section 426 of Cr.P.C or to its proviso. Where case of a convict is not covered under the exceptions as enumerated under Section 426 (1-A) of Cr.P.C, he becomes entitled to be released on bail not as a matter of grace but as a matter of right. Reliance in this regard may safely be placed on recently pronounced celebrated judgment of august Supreme Court of Pakistan in case *"Nadeem Samson vs. The State, etc"* (Crl. P. No. 1016-L/2021) and case titled *"Abdul Ghaffar alias Kalo and another vs. The State and another"* reported as (2012 PCr.LJ 21).

3. For the foregoing reasons, this petition is allowed and the execution of sentence of the petitioner/convict is suspended and he is directed to be released on bail subject to his furnishing bail bonds in the sum of Rs. 200,000/- (rupees two hundred thousand only) with two sureties in the like amount to the satisfaction of the Deputy Registrar (Judicial) of this Bench. The petitioner is directed to appear before this Court on each and every date of hearing till the final decision of main appeal.

(M.A.B.) **Petition allowed.**

PLJ 2023 Cr.C. (Note) 252
[Lahore High Court, Multan Bench]

Present: **SHAKIL AHMAD, J.**

TANVEER AHMAD--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 5119-B of 2022, decided on 31.1.2023.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 302/109/148/149--Specific role of firing on deceased--Post arrest bail--Dismissal of--Accused/petitioner is named in FIR with specific role of making two fire shots hitting on person of deceased at his left side of his chest and right side of lips--The said role ex-facie finds full corroboration from postmortem report according to opinion of Medical Officer injuries attributed to accused/ petitioner were also cause of death--Prosecution witnesses in their statements recorded under section 161 Cr.P.C fully implicated petitioner--In two successive investigations, accused/petitioner has been found involved in matter only to extent of abetment, same does not find support from record as none of investigator opined in categorical terms--No case of post-arrest bail at all is made out--Petition in hand being devoid of any force is dismissed. [Para 3] A & B

M/s. James Joseph and *Ch. Shakir Ali*, Advocates for Petitioner.

Mr. Muhammad Umar Farooq, Auditional Prosecutor General for State.

M/s. Syed Badar Raza Gilani and Khawaja Qaisar Butt, Advocates for Complainant.

Date of hearing: 31.1.2023.

ORDER

This is a petition filed under Section 497, Cr.P.C. by Tanveer Ahmad petitioner seeking post arrest bail in case FIR No. 43 of 2022 dated 11.02.2022 registered at Police Station Bohar Gate, Multan for the offences under Scctions 302,109,148,149 of PPC. Earliera Application of the petitioner for the same relief was dismissed by learned Additional Sessions Judge, Multan *vide* order dated 07.07.2022.

2 Brief facts as gleaned from FIR are that accused/ petitioner while armed with pistol along with co-accused assaulted upon complainant party and resorted to firing, in result of which, Awais (brother of complainant) lost his life. Specific allegation agairst accused/petitioner is that he made two fire shots hitting on the deceased at his left side of his chest and right side of lips.

3. Having heard learned counsel for the parties. Learned APG and upon tentative assessment of then material available on the record, it has been noticed that accused/petitioner is named in F.I.R with specific role of making two fire shots hitting on the person of deceased at his left side of his chest and right side of lips. The said role *ex facie* finds full corroboration from the postmortem report and according to the opinion of Medical Officer injuries attributed to accused/petitioner were also cause of death. Motive is also alleged against accused/petitioner and one of his co-accused. The prosecution witnesses in their statements recorded under Section 161, Cr.P.C. fully implicated the petitioner with the commission of alleged crime. So far as submission of learned counsel for accused/petitioner that in two successive investigations, accused/petitioner has been found involved in the matter only to the extent of abetment, same does not find support from the record as none of the investigator opined in categorical terms that accused/ petitioner was merely involved in matter to the extent of abetment. There exists overwhelming evidence available on the record linking accused/ petitioner with the commission of alleged crime entailing capital punishment. No case of post-arrest bail at all is made out. Petition in hand being devoid of ány force is **dismissed.**

(K.Q.B.) **Petition dismissed.**

PLJ 2023 Cr.C. (Note) 262

[Lahore High Court Multan Bench]

***Present*: SHAKIL AHMAD, J.**

AMIR SHAH--Appellant

versus

STATE and another--Respondents

Crl. A. No. 460 of 2020, heard on 21.2.2023.

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

----S. 376--Rape--Improved statement--Medical examination--Swabs to PFSA--delay of 15 days--Sole testimony of Prosecutrix--No definite opinion of medical evidence--DNA report--No recovery--No independent corroboration--Criminal Appeal--Acquittal of--Complainant in his examination-in-chief improved his version--By improving his version *qua* accompanying of his other children with his wife--In fact made an attempt to establish that none of his other children was at home at the time of occurrence--Story narrated in the FIR and deposed by the PWs as to the mode of entry of accused persons in the house of complainant and their departure after the occurrence in presence of three witnesses including the complainant, does not appear to the natural--Both the independent witnesses namely did not support the stance of complainant and victim as they were given up being won over the accused--Victim was medically examine--two external and two internal vaginal swabs were taken, made into sealed parcels--However, one external and one internal vaginal swabs were received at PFSA--After delay of 15-days and where these swabs remained for 15-days is a question that cannot be answered from the whole prosecution evidence and same creates doubt qua proper and safe handling as well as custody of sample parcels--Chain of safe custody and safe transmission of sample parcels has to be established by the prosecution and if any link is missing in such like offences the benefit must have been

extended to the accused--Sole testimony of the prosecutrix should be accepted, is not an absolute rule--Women Medical Officer did not give definite opinion that the victim girl was subjected to rape--Presence of two witnesses was claimed alongwith the complainant when he entered the house and claimed to have seen the appellant--Both the said witnesses were given up--No independent corroboration worth its name was available to the extent of commission of rape with victim girl--During investigation no recovery whatsoever was effected from the appellant--Prosecution has hopelessly failed to prove its case against appellant beyond the shadow of a reasonable doubt--Prosecution is duty bound to prove its case beyond any reasonable doubt and if any single and slightest doubt is created, benefit of the same will go to the accused--There is no need of so many doubts in the prosecution case--Findings of conviction recorded against appellant by trial court in the impugned judgment are not sustainable, which are hereby set aside--Appellant is acquitted.

[Para 7, 9, 10 & 11] A, B, C, D, E, F, G, H, I

2021 SCMR 363; 2019 SCMR 1300; 2018 SCMR 2039; 2015 SCMR 1002; 2012 SCMR 577; PLD 2011 SC 554; 2019 SCMR 129 *ref.*

Khawaja Qaisar Butt, Advocate for Appellant.

Mr. Muhammad Umar Farooq, Additional Prosecutor General for State.

Date of hearing: 21.2.2023.

JUDGMENT

This criminal appeal has been directed against judgment dated 30.09.2020 passed by the learned Additional Sessions Judge-I, Shuja-abad, whereby appellant was convicted under Section 376, PPC and sentenced to undergo rigorous imprisonment for ten years with fine Rs. 1,00,000/- to be paid to the victim under Section 544-A, Cr.P.C., or in default, to further undergo simple imprisonment for six months. Appellant was also convicted

under Section 449, PPC and was sentenced to undergo rigorous imprisonment for five years with fine Rs. 50,000/- , or in default, to further undergo six months SI. He was indicted and tried along with Sajid co-accused for the offences under Sections 376, 449, PPC in case FIR No. 219 of 2018 dated 20.06.2018 registered at Police Station Saddar, Shuja-abad. On conclusion of trial, appellant was convicted and sentenced as mentioned above, hence this appeal. Co-accused Sajid was acquitted of the charge, however, no appeal against acquittal of said co-accused is before this Court.

2. Muhammad Ishaq complainant moved written application Ex.PA before SHO Police Station Saddar, Shuja-abad on 20.06.2018, on the basis of which FIR was registered for the offence under Section 376, PPC. As per contents of application Ex.PA, complainant was a labourer and permanent resident of mauza Basti Mithhu Tehsil Shuja-abad District Multan. On 19.06.2018 at 12:00 p.m., complainant was out of his house whereas his wife went to her relatives at Bahawalpur. Complainant's daughter *Mst.* Sonia Bibi aged about fourteen-fifteen years was alone in house and was busy in household work when all of sudden Aamir (appellant) and Sajid (co-accused since acquitted) both armed with pistols .30-bore entered the complainant's house by scaling over the northern wall of the house and caught complainant's daughter in the kitchen and by pointing arms, threatened her of life. Aamir forcibly put complainant's daughter on the ground, removed her shalwar; also removed his own shalwar and started committing rape whereas Sajid accused kept on guarding outside. On hearing hue & cry of complainant's daughter, complainant along with Muhammad Mushtaq and Ramzan and others entered the house by opening the outer door and saw that Aamir was committing rape with complainant's daughter inside the kitchen. On seeing the complainant and witnesses accused persons Aamir and Sajid by brandishing the arms fled towards north by scaling over the wall. Complainant informed rescue 15, whereupon police reached the spot and inspected the spot.

3. Mushtaq Ahmad ASI (PW-7) claimed to have reached the spot in response to call at rescue 15 on 19.06.2018 at 12:15 p.m. and sent *Mst.* Sonia

Bibi for medical examination after preparing docket Ex.PC. After registration of FIR, investigation of this case was conducted by Safdar Naseer SI '(PW-6), who claimed to have inspected the spot, prepared site-plan Ex.PD, recorded statements of the complainant and PWs under Section 161, Cr.P.C. took into possession clothes of the victim girl through recovery memo Ex.PE, arrested the accused, got conducted DNA analysis as well as potency test of the accused/appellant. On completion of investigation report under Section 173, Cr.P.C. was submitted. Charge was framed against appellant and co-accused Sajid. They pleaded not guilty and the trial commenced.

4. Muhammad Ishaq complainant appeared in the witness-box as PW-1 and *Mst.* Sonia Bibi victim as PW-2. Dr. Saqib Hassan Khan (PW-3) conducted potency test of the appellant. Zahid Hussain 3618/HC (PW-4) chalked formal FIR Ex.PA/1. Victim girl was medically examined by Dr. Kiran Mushtaq (PW-5). Learned ADPP gave up PWs Mushtaq Ahmad and Mohammad Ramzan as having been won over by the accused and closed the prosecution evidence after tendering PFSA reports Ex.PG and Ex.PH. Thereafter, statements of accused were recorded under Section 342, Cr.P.C. They did not opt to appear in the witness box as required under Section 340(2) Cr.P.C, however, appellant tendered certain documents in his defence. In reply to the question why this case against him and why PWs had deposed against him, appellant took the following stance:

> *"I am totally innocent. There was long standing enmity between my father and the complainant Muhammad Ishaq. Prior to the occurrence complainant fraudulently got whole property of my grandfather in his name and deprived remaining all the legal heirs including sons and daughters and on this my father deadly opposed to the complainant by moving applications to the high rank revenue authorities. Resultantly, when case was going to be registered against the complainant and due to that grudge he got this case registered against me and Sajid. Not only this mother of the victim also leveled allegation against my father about committing Zina with her but in this connection "Panchayat"*

was convened and my father gave "SAFAI holding the Holy Quran in the Mosque in presence of respectable persons of brotherhood. I am totally innocent. Nothing was recovered in form of bangle from the place of Occurrence".

5. On conclusion of trial, appellant was convicted and sentenced as detailed in the opening paragraph of this judgment, hence this appeal.

6 I have heard learned counsel for the appellant as well as learned APG and perused the record with their able assistance.

7. As per contents of FIR, on 19.06.2018 at 12:00 p.m. when complainant was out of his house and his wife went to Bahawalpur and complainant's daughter *Mst.* Sonia Bibi was alone in her house, appellant along with co-accused Sajid entered the house by scaling over the outer wall and the appellant committed rape with *Mst.* Sonia Bibi by forcibly putting her on the ground in the kitchen by threatening him on gun point whereas Sajid co-accused kept on guarding outside and when complainant and PWs Muhammad Mushtaq and Ramzan attracted to the spot on hearing hue and cry of *Mst.* Sonia Bibi, they saw the appellant while committing rape and then both the accused fled away by scaling over the wall again. During the course of evidence it surfaced that complainant had ten children who all were living in the same house, however, in the FIR, there was no mentioning as to where the other children of complainant were at the time of occurrence and only it was mentioned that his wife had gone to Bahawalpur. While appearing in the witness box as PW-1, (complainant in his examination-in-chief improved his version by stating that his wife and other children had already gone to Bahawalpur. By improving his version qua accompanying of his other children with his wife to Bahawalpur complainant PW-1 in fact made an attempt to establish that none of his other children was at home at the time of occurrence. In the F.I.R Sajid co-accused is shown to have been guarding outside when appellant was committing rape with *Mst.* Sonia Bibi in the kitchen. Except that, no detail whatsoever of any role or act of Sajid co-accused during the

occurrence has been specified in the F.I.R. Likewise, in the F.I.R it is mentioned that when complainant and PWs entered the house, accused persons Aamir and Sajid fled away by scaling over the outer wall of the house while brandishing arms, however, complainant PW-1 in his examination-in-chief improved his version to the effect that when he along with PWs entered the house after hearing hue and cry of his daughter, Sajid co-accused who was standing on watch, cautioned the appellant and fled away from the spot by scaling over the northern wall and then appellant after taking his clothes and pistol also fled away. In this way, an attempt was made by complainant PW-1 to explain presence and role of Sajid co-accused in the occurrence. In his examination-in-chief, PW-1 also claimed to have tried to catch the appellant whereas in the FIR it was nowhere mentioned that complainant or the PWs ever attempted to catch the accused persons. Statements of both the witnesses of ocular account also contain certain other improvements to their earlier version recorded under Section 161, Cr.P.C. Apart, the story narrated in the FIR and deposed by the PWs as to the mode of entry of accused persons in the house of complainant and their departure after the occurrence in presence of three witnesses including the complainant, does not appear to be natural. It was version of prosecution that accused persons entered the house of complainant

by scaling over the northern wall. Complainant PW-1 in his cross-examination stated that when the accused persons entered his house, his daughter raised hue and cry. He further stated that when we heard hue and cry, he along with PWs reached at the spot. It was version of PW-1 during cross-examination that he and PWs were present near to his house. If complainant's daughter had raised hue and cry on seeing the accused persons when they entered the house by scaling over the wall and the complainant and PWs who were present in a nearby house, immediately attracted to his house, it is not believable on any stretch of imagination that in such a short span of time accused was successful in committing rape by removing his clothes and those of the victim. Complainant's stance during the course of his cross-examination

as PW-1 was that he saw the appellant while committing rape with Sonia Bibi and at that time clothes of accused were lying near and his pistol was lying on the clothes. Had this been so, there would have been no occasion for the complainant and PWs of not apprehending the appellant at the spot particularly when co-accused Sajid had already left the spot. Successful escape of accused persons by scaling over the wall of house in presence of complainant and two witnesses, by all stretches of imagination, is a highly doubtful affair that also depicts unnatural conduct of the PWs at the spot. Undeniably, both the independent witnesses namely Muhammad Mushtaq and Muhammad Ramzan did not support the stance of complainant and victim as they were given up being won over by the accused. Prosecution's version was not acceded to in toto by the Investigating Officer PW-6 who opined that Sajid co-accused was not involved in this occurrence.

8. Occurrence was shown to have taken place on 19.06.2018 at 12:00 P.M. and the victim girl was medically examined on the same day at 03:00 p.m. In her statement before the Woman Medical Officer PW-5. victim girl took the stance that she was ravished by her cousin. She neither named the accused/appellant nor took the stance that there was any other person accompanying her cousin. According to Woman Medical Officer, hymen was found torn, however, she did not opine whether it was fresh torn or old one. No stain whatsoever of semen was detected on the clothes of the victim. Pertinent to note here is that no injury whatsoever was noticed by the Woman Medical Officer on any part of the body of victim girl despite the fact that according to prosecution's version victim girl was thrown on the floor by the accused forcibly and her bangles also broken during the occurrence. Had she been thrown on the floor forcibly and her bangles broken, there must have been some sort of injury on her back or wrists.

9. Upon perusal of Medicolegal Examination Certificate of victim Exh:PC, it transpires that victim was medically examined on 19.06.2018 and She was accompanied by Zawar Hussain Constable and according to Dr. Kiran Musthaq (PW-5), two external and two internal vaginal swabs were taken,

made into sealed parcels but she did not state to whom she handed over the parcels. PW-5 secured two external and two internal vaginal swabs, however, one external and one internal vaginal swabs were received at PFSA on 04.07.2018 from Safdar Naseer S.I (PW-6) after delay of 15-days and where these swabs remained for 15-days is a question that cannot be answered from the whole prosecution evidence and same creates doubt qua proper and safe handling as well as custody of sample parcels. It would be highly unsafe to make such report as basis for conviction of the appellant in case of rape. This chain of safe custody and safe transmission of sample parcels has to be established by the prosecution and if any link is missing in such like offences the benefit must have been extended to the accused. Reliance in this regard may safely be placed on the cases *"Qaiser Khan v. The State through Advocate-General, Khyber Pakhtunkhwa. Peshawar"* (2021 SCMR 363). *"Mst. Razia Sultana v. The State and another"* (2019 SCMR 1300), *"The State through Regional Director ANF v. Imam Bakhsh and others"* (2018 SCMR 2039), *"Ikramullah and others v. The State"* (2015 SCMR 1002) and *"Amjad Ali v. the State"* (2012 SCMR 577) wherein it was held that in a case containing the above mentioned defects on the part of the prosecution it cannot be held with any degree of certainty that the prosecution had succeeded in establishing its case against an accused person beyond any reasonable doubt. Moreover, positive report qua external vaginal swab from *Mst.* Sonia Bibi cannot be considered as a conclusive proof that offence of rape was committed by the appellant. Mere positive report qua external vaginal swab is not sufficient to prove the charge of rape particularly where internal vaginal swabs were taken but on examination, no final opinion was given, as such report to the extent of internal vaginal swabs would be counted as negative. Learned Law Officer emphasized that sole statement of the victim was sufficient to award conviction to the appellant. There is no cavil to the proposition that conviction in rape case can even be recorded on the sole statement of victim but only when same finds corroboration and appears to be natural and confidence inspiring. In this respect, it is pointed out that in *The State and*

others v. Abdul Khaliq and others (PLD 2011 SC 554) the Hon'ble Supreme Court of Pakistan authoritatively held that the principle that sole testimony of the prosecutrix should be accepted, is not an absolute rule. Relevant excerpt of said judgment is reproduced hereunder for the facility of ready reference:

> *"It depends upon the facts and circumstances of each case and has to be assessed by the Court on the basis of the entire evidence on the record whether the sole testimony of the victim should be believed or not, particularly in the light of her cross- examination, and the other evidence produced by the prosecution; if on account of totality of facts the Court is of the view that such a statement should not be believed and for that good reasons are assigned it cannot be said that any illegality has been committed by the Court in this behalf. Thus, rule pressed into service by the learned counsel shall not apply to each and every case of rape, as a matter of routine and course, because it is not the command of any law/statute, that in deviation of the general principles of jurisprudence mentioned above, the accused must be put to the test of strict liability and should be asked to prove his Innocence because the prosecutrix's version under all circumstances should be taken as correct."*

In the case in hand the Woman Medical Officer did not give definite opinion that the victim girl was subjected to rape. In the FIR as well as statements of PW-1 and PW-2 presence of two witnesses namely Muhammad Mushtaq and Muhammad Ramzan was claimed along with the complainant when he entered the house and claimed to have seen the appellant while committing rape. However, both the said witnesses were given up by learned ADPP as being won over by the accused. No independent corroboration worth its name was available to the extent of commission of rape with victim girl by the appellant inasmuch as presence of complainant PW-1 at the spot at relevant time was a doubtful affair as noted in the preceding paragraphs.

10 It may also be shown that appellant was shown to have been armed with pistol and he committed rape by threatening the victim girl on pistol point, however, during investigation no recovery whatsoever was effected from the appellant.

11. On re-appraisal of evidence, I have come to the conclusion that prosecution has hopelessly failed to prove its case against appellant beyond the shadow of a reasonable doubt. It is settled law that prosecution is duty bound to prove its case beyond any reasonable doubt and if any single and slightest doubt is created, benefit of the same will go to the accused. It is by now settled principle of criminal justice that there is no need of so many doubts in the prosecution case, rather a single doubt arising out of the prosecution case is sufficient for acquittal of the accused. In the case of *Abdul Jabbar and another v. The State* (2019 SCMR 129). Hon ble Supreme Court of Pakistan has held as under:

> *"--It is the settled principle of law that once a single loophole is observed in a case presented by the prosecution much less glaring conflict in the ocular account and medical evidence or for that matter where presence of eye-witnesses is not free from doubt, the benefit of such loophole/lacuna in the prosecution case automatically goes in favour of an accused--"*

Therefore Findings of conviction recorded against appellant by learned trial Court in the impugned judgment are not sustainable, which are hereby set aside allowing this Criminal Appeal. As a result, **appellant Aamir Shah is acquitted of the charge extending him benefit of doubt.** Appellant is in jail. He is directed to be released forthwith if not required in any other case.

(M.A.B.) **Appeal allowed.**

PLJ 2023 Cr.C. (Note) 270
[Lahore High Court, Multan Bench]

Present: **SHAKIL AHMAD, J.**

QURBAN ALI--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 2998-B of 2022, decided on 26.5.2022.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), S. 337-A(iii)/337-A(ii)/337-A(i)/337F(i)/148/149--Medical board--Non appearance of the injured--Post arrest bail--grant of--Petitioner allegedly gave two sota blows on one injured, hitting on his left side of jaw and neck and second landed on backside of his left shoulder--District standing medical board for re-examination of the injured persons was constituted and injured did not join the proceedings of the said board--Two other injured persons joined the proceedings before the district standing medical board and the Board was of the opinion that the injuries sustained by the said injured persons were fabricated one--Said facts make the case one of further inquiry--Post arrest bail allowed. [Para 2 & 3] A & B

PLD 2012 SC 222; PLD 1985 SC 182; 1985 SCMR 382 *ref.*

Khawaja Qaisar Butt, Advocate for Petitioner.

Malik Mudassar Ali, Deputy Prosecutor General for State.

Despite service, none has entered appearance on behalf of Complainant.

Date of hearing: 26.5.2022.

ORDER

Instant petition has been filed under Section 497, Cr.P.C. by Qurban Ali petitioner seeking post arrest bail in case FIR No. 762/2021 dated 30.10.2021 registered at Police Station Gaggo, District Vehari for the offences under Sections 337-A(iii), 337-A(ii), 337-A(i), 337-F(i), 148, 149, PPC. Earlier applications of the petitioner for the same relief were dismissed by

learned trial Court and learned Additional Sessions Judge, Vehari, *vide* order dated 25.03.2022 and 07.04.2022 respectively.

2. As per FIR, briefly, accused/petitioner along with co-accused persons, launched an attack on complainant side, in result of which complainant Irfan, Zaman, Imran and Amanat became injured. Specific allegation against accused/ petitioner Qurban is that he gave two Sota blows on person of Imran, one hitting on his left side of jaw and neck and second landed on backside of his left shoulder.

3. Having heard learned counsel for the petitioner, learned Law Officer and upon tentative assessment of the record, it has been noticed that although accused/petitioner is named in FIR with specific role of giving two Sota blows on the corpus of injured Imran yet the said injured, in his statement under Section 161 of Cr.P.C. did not name specifically accused/petitioner who caused him injuries rather he state that:

"شوروا ویلہ پر میں امانت علی اور عرفان آگئے ہمیں بھی الزام علیہان نے مضروب کیا۔"

Apart, District Standing Medical Board for reexamination of injured was constituted and accused/petitioner did not join proceedings the said Board. The injured persons namely Zaman and Irfan joined proceedings before District Standing Medical Board and the Board was of the opinion that the injuries sustained by the said injured were fabricated one. The above mentioned facts make the case of accused/petitioner one of further inquiry. It is by now established principle of law that whenever case of accused/ petitioner becomes that of further inquiry, then petitioner would be entitled to the grant of post-arrest bail not as a matter of grace but as a matter of right. Reliance in this regard be safely placed on the cases reported as *"Muhamumad Sadiq v. Sadig and others* (PLD 1985 SC 182). *"Ibrahim v. Hayat Gul and others* (1985 SCMR 382) and *"Qamar alias Mitho v. The State and others* (PLD 2012 SC 222).

4. For the reasons recorded above, petition in hand is **allowed** and petitioner is admitted to post arrest bail subject to his furnishing bail bonds in the sum of Rs. 100,000/- with one surety in the like amount to the satisfaction of learned trial Court.

(M.A.B.) **Petition allowed.**

PLJ 2023 Cr.C. (Note) 276
[Lahore High Court, Multan Bench]

***Present*: SHAKIL AHMAD, J.**

MUSTANSAR HUSSAIN--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 2481-B of 2022, decided on 10.5.2022.

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

----S. 498--Pakistan Penal Code, (XLV of 1860), S. 337-A(iii)/341/109/ 34--Supplementary statement--Opinion of police--Pre-arrest bail--confirmation of--Petitioner is not nominated in FIR and implicated through supplementary statement got recorded after one and half month of the registration of FIR--Matter was reported after nine days--in FIR, no specific role was ascribed to any of unknown accused in FIR--Injury near right eye of the injured covered u/s 337-A(iii) is neither attributed to any of the accused--Mere opinion of the police inflicted injury on the person of injured, makes the case of two version--Pre-arrest bail of nominated accused has already been confirmed and case of the petitioner is on better footings--Pre-arrest bail confirmed. [Para 3] A, B & C

Khawaja Qaisar Butt, Advocate with Petitioner.

Malik Mudassar Ali, Deputy Prosecutor General for State.

Mr. Muhammad Sharif Karkhi Khaira, Advocate for Complainant.

Date of hearing: 10.5.2022.

ORDER

This is a petition filed under Section 498, Cr.P.C. by Mustansar Hussain (petitioner herein) seeking pre-arrest bail in case FIR No. 764 of 2021 dated 14.10.2021, registered at Police Station Saddar Vehari for the offences under Sections 337-A(iii), 337-A(i), 341, 34, 109, PPC. Earlier application of

petitioner for the same relief was dismissed by learned Additional Sessions Judge, Vehari, *vide* order dated 18.01.2022.

2. Precisely, as per FIR, co-accused Naveed along with two unknown accused persons assaulted upon Muhammad Saleem (brother of complainant) and caused him injuries.

3. Having heard learned counsel for the parties, learned Law Officer and upon tentative assessment of the record, it has been noticed that accused/petitioner is not named in the FIR and was implicated through supplementary statement of the complainant got recorded after more than one and half month of registration of FIR. Even, the alleged occurrence took place on 05.10.2021, whereas the matter was reported to the police on 14.10.2021 with the delay of nine days and no plausible explanation has been put forth by the Complainant while lodging the instant FIR. In FIR, no specific role whatsoever has been ascribed to any of unknown accused. The injury. Near right eye of the injured, covered under Section 337-A(iii), PPC is neither attributed to any of the accused nor the injured PW specifically assigned the same to any accused. Mere opinion of police that accused/petitioner inflicted injury on the person of injured, even otherwise, makes the case of prosecution as that of two version. Moreover, pre-arrest bail of nominated accused Naved has already been confirmed by this Court *vide* order dated 28.02.2022 passed in Crl.Misc. No. 460-B of 2022. Case of accused/petitioner is on better footing than that of said bailed out accused. Keeping in view the above circumstances, possibility of involvement of accused/ petitioner on the basis of some malice or ulterior motive on part of the complainant by throwing a wider net cannot be ruled out.

4. The upshot of above discussion is that, petition in hand is accepted and ad-interim pre-arrest bail already granted to him by this Court *vide* order dated 18.04.2022 is confirmed subject to his furnishing of fresh bail bonds in the sum of Rs. 100,000/- (Rupees one hundred thousand only) with one surety in the like amount to the satisfaction of learned trial Court.

(M.A.B.) **Bail confirmed.**

PLJ 2023 Cr.C. (Note) 278

[Lahore High Court, Multan Bench]

***Present*: SHAKIL AHMAD. J.**

MUHAMMAD AKRAM--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 3036-CB of 2022, decided on 7.6.2022.

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

----S. 497(5)--Pakistan Penal Code, (XLV of 1860), Ss. 365/342/337L--Police Order, 2002 (10 of 2002), Art. 156-D--Police torture--Bail cancellation, dismissal of--Allegation against the respondent/ Police official is that he alongwith co-accused persons forcibly took the petitioner and subject to physical torture--There is no mention the names of the witnesses in whose presence an amount was given--I.O. opined that allegation qua abduction of the petitioner was not substantiated and S. 365, PPC was deleted--No material irregularity that may justify to take any exception to the impugned order--No case of cancellation of bail is made out--petition dismissed. [Para 2 & 4] A, B & C

Khawaja Qaisar Butt, Advocate for Petitioner.

Malik Mudassir Ali, Deputy Prosecutor General for State.

Rana Muhammad Nadeem Sheraz, Advocate with Respondent No. 2.

Date of hearing: 7.6.2022.

ORDER

Instant application has been filed by Muhammad Akram (petitioner herein) seeking cancellation of pre-arrest bail granted to Sheikh Aftab Ahmad (Respondent No. 2 herein) by the learned Additional Sessions Judge, Chichawatni *vide* order dated 15.03.2022 in case FIR No. 17/2022 dated

19.01.2022 registered under Sections 365, 342, 337L(2) of, PPC. Article 156-D of the Police Order, 2022 at police station Okanwala Bangla, District Sahiwal.

2. Allegation, in a nutshell, against Respondents No. 2 is that he along with his co-accused persons forcibly took petitioner to an unknown Dera and subjected to physical torture and subsequently released him after getting bribe of Rs. 1,00,000/- from his brother in presence of PWs.

3. Heard learned counsel for the parties and record so annexed with the petition perused.

4. Allegation qua demand of Rs. 2,00,000/- for the release of petitioner, on the face of it, is vague and general in nature. Similarly, there is no mentioning of the names of any PWs in whose presence an amount to the tune of Rs. 1,00,000/- was given to Respondent No. 2 for the release of petitioner. Upon conclusion of investigation I.O opined that allegation qua abduction on the petitioner was not substantiated and Section 365 of, PPC was deleted. Learned Additional Sessions Judge while granting bail to Respondent No. 2 committed no material irregularity that may justify to take any exception to the impugned order. When bail is granted by a Court of competent jurisdiction on the basis of justifiable grounds, the same cannot be recalled unless the same has been granted in capricious manner without assigning any reason or on the basis of perverse on invalid reasons but the same was not the case in the instant matter. Learned counsel for the petitioner remained unable to point out any inherent flaw in the impugned order. No case of taking any exception to the impugned order at all is made out.

5. For the reasons recorded above, no case on cancellation of bail at all is made out, hence instant petition is dismissed.

(M.A.B.) **Petition dismissed.**

2024 M L D 1070

[Lahore]

Before Asjad Javaid Ghural and Shakil Ahmad, JJ

COMMISSIONERATE OF AFGHAN REFUGEES---Appellant

Versus

The STATE and another---Respondents

Criminal Appeal No. 74897 of 2023, heard on 18th April, 2024.

Criminal Procedure Code (V of 1898)---

----S. 516-A---Control of Narcotic Substances Act (XXV of 1997), Ss.9& 74---Vehicle used in transportation of narcotic---Release of vehicle on superdari---Owner having no knowledge of the vehicle being used for transporting narcotics---Effect---If the owner of the vehicle is not the accused of the case and has no knowledge that his vehicle would be used for trafficking narcotics, the provisions of S.74 of the Control of Narcotic Substances, Act 1997 ("CNSA 1997") shall not create any bar for giving the vehicle to him on temporary custody --- In the present case the narcotics were not recovered from the secret cavity of the vehicle in question which was being driven by the accused, rather the same were found lying in the trunk of the car and said accused himself handed over the same to the complainant/inspector---Admittedly, the vehicle in question was owned by the appellant/ Commissionerate of Afghan Refugees---Keeping in view the principles of law on superdari (temporary custody), and appellant being in possession of valid documents showing its undisputed ownership, the appellant was entitled to the custody of vehicle in question---High Court ordered that the vehicle in question be given to the appellant on superdari subject to furnishing of surety bonds with the direction that the appellant shall be bound to produce the vehicle before the trial court as and when so required during trial, and that the appellant shall also furnish an affidavit

to the effect that he will not dispose of the vehicle till the final decision of the case---Appeal was allowed accordingly.

Allah Ditta v. The State 2010 SCMR 1181 and Amjad Ali Khan v. The State and others PLD 2020 SC 299 ref.

Muhammad Ahmad Pansota for Appellant.

Hammad Akbar Wallana, Special Prosecutor ANF for Respondent No. 2.

JUDGMENT

SHAKIL AHMAD, J.--- This is an appeal that has been filed by Commissionerate of Afghan Refugees (Ministry of Saffron) through its Transport Officer (appellant herein) under section 48(1) of the Control of Narcotic Substances Act, 1997 ("CNSA, 1997") to impugn order dated 09.05.2023 passed by learned Additional Sessions Judge/Judge Special Court CNSA, Faisalabad, whereby an application moved by appellant for Superdari of Car Toyota Yaris white colour bearing Registration No.GAA-250 Model 2022 Engine No.2A50401, Chasis No.NSP 150R7031764 (hereinafter referred to as "vehicle in question') was dismissed.

2. Heard learned counsel for the parties. Record perused.

3. Section 32 of the CNSA, 1997 mandates that the receptacles or packages and the vehicles, vessels and other conveyances used in carrying narcotic drugs and substances should be liable to confiscation. Undeniably, narcotics were not recovered from the secret cavity of the vehicle in question which was being driven by Syed Asif Shah rather the same was found lying in the trunk of the car and said accused himself handed over the same to the complainant/inspector. Admittedly, the vehicle in question is owned by the appellant/Commissionerate of Afghan Refugees. The Supreme Court of Pakistan in the case of Allah Ditta v. The State (2010 SCMR 1181) held that if the owner of the vehicle is not accused of the case and has no knowledge that his vehicle would be used for trafficking the

narcotics, the provisions of Section 74 of CNSA, 1997, shall not create any bar for giving the vehicle to him on temporary custody. Reliance can also be placed on case Amjad Ali Khan v. The State and others (PLD 2020 SC 299) wherein the Supreme Court of Pakistan has held as under:-

> "11. Joint reading of Ss. 32 and 74 of CNSA show that an applicant can seek release of a vehicle on superdari, which has been seized under CNSA and is a case property in a criminal case; if the applicant can show that he is the lawful owner of the vehicle; that he is neither the accused nor an associate or a relative of the accused or an individual having any nexus with the accused. While the prosecution has to show that the applicant knew that the offence was being or was to be committed. Under S.33 if the vehicle is finally held not liable to confiscation it can be released to its owner. As a corollary, where the court can pass a final order, it can also pass an interim order. Therefore, a vehicle can also be released as an interim measure or temporarily on superdari under CNSA after the court is prime facie satisfied regarding the ownership of the applicant and the absence of the association of the owner with the accused and the commission of the offence. The applicant while asserting his ownership of the vehicle must specify in his application for superdari how he was deprived of the vehicle, how and when he found out that his vehicle was missing, and the legal proceedings initiated by him thereafter, if any. This becomes important in the light of S.109 of MVO which attracts criminal liability if one drives a vehicle without the consent of the owner. On the other hand, in order to oppose the release of vehicle on superdari, the prosecution has to prima facie show from the record that the owner knew that the offence was being or was to be, committed. It is underlined that it is during the trial that the prosecution has to prove that the owner knew that the offence was being or was to be, committed."

Keeping in view the principles of law of Superdari (temporary custody), being in possession of valid documents showing its undisputed ownership, appellant is entitled to the custody of vehicle in question.

4. The upshot of the above discussion is that the impugned order is not sustainable, which is hereby set aside by allowing this appeal. The vehicle in question is ordered to be given to the appellant on superdari subject to furnishing of surety bonds in the sum of Rs.2,00,000/- with one surety in the like amount to the satisfaction of the learned trial court. It is made clear that appellant shall be bound to produce the vehicle in question before the learned trial court as and when so required during trial. Appellant shall also furnish affidavit to the effect that he will not dispose of the vehicle till the final decision of the case.

MWA/C-15/L **Appeal allowed.**

PLJ 2024 Lahore 63 (DB)

[Multan Bench, Multan]

Present: **SARDAR MUHAMMAD SARFRAZ DOGAR AND SHAKIL AHMAD, JJ.**

IMRAN MUSTAFA--Petitioner

versus

GOVERNMENT OF PUNJAB, etc.--Respondents

W.P. No. 16629 of 2023, decided on 21.11.2023.

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

----Ss. 9(A)(1) & 9-C--Constitution of Pakistan, 1973, Art. 199--Insertion of Section 9(A)(1) through Amendment Act, 2022--Remissions--Contention and sentence--Retrospective effect--Effect after amendment--Convict having been booked in case u/S. 9(c) of CNSA Act, 1997 and tried was convicted--His conviction and sentence before High Court by way of filing Criminal Appeal which was dismissed--No remission could have been awarded to him--Section 9(A)(1) was introduced by virtue of an amendment through Amended Act 2022--Provisions of Section 9(A) (1) of amendment Act, 2022 from their bare reading are prospective in nature and same cannot be given effect retrospectively by placing any sort of embargo on right of a convict qua earning remissions who had been arrested, indicted and even convicted prior to insertion of Section 9(A) (1) through amendment Act, 2022--Convict entitled to earn remissions albeit insertion of Section 9(A) (1) in CNSA, 1997 through Amendment Act, 2022--Petition is allowed.

[Pp. 64, 65, 66 & 68] A, B, C, D, E, F

PLD 2009 SC 460; PLD 2010 SC 1021; PLD 2011 Lahore 323; 2002 SCMR 1023; PLD 1971 SC 252; PLD 1975 SC 1 *ref.*

Mr. Muhammad Usman Sharif Khosa, Advocate for Petitioner/Convict.

Miss Samina Mahmood Rana, Assistant Advocate General with Dr. Qadeer Alam, AIG (Prison), Punjab.

Mr. Muhammad Ali Shahab, Deputy Prosecutor General.

Kizar Abbas, SO (Legal), Home Department, South Punjab.

Date of hearing: 21.11.2023.

ORDER

Instant is a petition that has been filed by Imran Mustafa *(convict herein)* under Article 199(1)(ii) of the Constitution of Islamic Republic of Pakistan 1973 *(hereinafter referred to as the "Constitution")* with the supplication that reads:

> "… awfully implored that instant solicitation be approved and application of newly inserted Section 9(A)1 be declared as having no legal effect on the petitioner/convict as he was charge sheeted under Section 9-C Control of Narcotic Substances Act, 1997 prior to promulgation of Narcotic Substances Amended Act, 2022 dated 5th September, 2022.
>
> It is correspondingly prayed that Respondent No. 2 be directed to award all special remission earned by the petitioner on special occasions since his arrest on 12.11.2020 till to date and his sentence be reduced accordingly.

It is correspondingly prayed that Respondent No. 2 be directed to award all monthly, quarterly as well as annually ordinary remission earned by the petitioner since his arrest on 12.11.2020 till to date and his sentence be reduced accordingly.

Any other relief ……..”

2. Facts in brief giving rise to the filing of instant petition are that convict having been booked in case F.I.R. No. 810 of 2020 dated 12.11.2020, under Section 9(c) of the Control of Narcotic Substances Act, 1997 (“CNSA, 1997”), registered at Police Station Qutabpur, Multan was sent to face the trial and after being indicted and tried was convicted under Section 9(c) of CNSA, 1997 and sentenced to ten years and six months rigorous imprisonment with fine of Rs.50,000/-, in default of payment of fine to further undergo simple imprisonment for eight months.

3. Convict assailed his conviction and sentence before this Court by way of filing Criminal Appeal No. 514/2022 which was dismissed vide judgment dated 15.12.2022 by maintaining his conviction, however, sentence awarded to him by learned trial Court was reduced to rigorous imprisonment for six years by also maintaining the amount of fine and imprisonment in default whereof. Convict who was rounded up on 12.11.2020 in above referred case requested the respondents for his release but was informed that owing to insertion of Section 9(A)(1) through an Act namely Control of Narcotic Substances (Amendment) Act, 2022 (Act No. XX of 2022) *(hereinafter referred to as the “Amendment Act, 2022)*, no remission could have been awarded to him and his probable date of release as told was 24.01.2025. Hence, this petition.

4. Report was requisitioned from Respondent No. 2 and same was submitted containing their stance precisely that in view of insertion of Section 9(A) (1) through an amendment promulgated under Amended Act, 2022, no remission in sentence for the prisoners convicted under CNSA, 1997 could have been granted.

5. Learned counsel for the convict contended that when convict was booked in the case and even when was indicted and convicted, provisions of Section 9(A) (1) were not inserted in CNSA, 1997 and even the provisions of Section 9(A) (1) of Amendment Act, 2022 had no retrospective effect as the said section do not contain any provision signifying the intention of legislature qua its applicability with retrospective effect. Learned counsel by placing reliance on *"Shah Hussain v. The State"* (PLD 2009 SC 460) and *"Nazar Hussain and another v. The State"* (PLD 2010 SC 1021) argued that convict is entitled to earn remissions.

6. Learned Law Officers argued that in reply to the guidance sought by Inspector General of Prisons, Punjab, Lahore from Government of Punjab, Law and Parliamentary Affairs Department through Letter No. OP:15-11/2023/5503 dated 28.09.2023, opined that the principle of grant of no remissions in sentence seems to be applicable in all cases from the date of insertion of the Amendment Act, 2022 notwithstanding anything contained in Prison Rules, 1978. Learned Law Officers, however, when confronted with the query put by us that where certain rights were available with the convict qua his entitlement to get the benefit of remissions in accordance with existing law when he was arrested, tried and convicted, how he can be deprived of getting remissions in view of insertion of Section 9(A) (1) through Amendment Act, 2022 that was inserted subsequent to his conviction and sentence, failed to meet the point.

7. Heard either of the sides and record perused.

8. The moot point that requires our consideration and its decision is that whether the provisions of Section 9(A) (1) of the Amendment Act, 2022 have retrospective effect and in turn depriving of the convict who has been arrested, indicted and convicted before 06.09.2022 when the said section was inserted. Undeniably convict was rounded up on 12.11.2020 in case F.I.R. No. 810/2020 dated 12.11.2020, under Section 9(c) of CNSA, 1997, registered at Police Station Qutabpur, Multan and after having been sent to face trial, was indicted on 23.12.2020 and was convicted and sentenced on 10.05.2022. There is also no denial to the fact that Section 9(A) (1) was introduced by virtue of an amendment through the Amended Act 2022 dated 06.09.2022. Provisions of Section 9(A) (1) are reproduced hereunder for the facility of ready reference:

> "9(A)(1) Notwithstanding anything contained in any other law or prison rules for the time being in force, no remissions in any sentence shall be allowed to a person, who is convicted under this Act:
>
> Provided that in case of a juvenile or female convicted and sentenced for an offence under this Act, remission, may be granted as deemed appropriate by the Federal Government."

Bare perusal of above would vividly suggest that same have given no retrospective effect by the legislature. Even it does not transpire therefrom that the rights available to an accused involved in case falling within the purview of CNSA, 1997 prior to the amendment made on 06.09.2022 have been taken away in any manner whatsoever. The provisions of Section 9(A) (1) of Amendment Act, 2022 from their bare reading are prospective in nature and same cannot be given effect retrospectively by placing any sort of embargo on

the right of a convict *qua* earning remissions who had been arrested, indicted and even convicted prior to insertion of Section 9(A) (1) through Amendment Act, 2022. Almost similar sort of point in issue was taken up and dealt with by this Court in case *"M. Aslam Mouvia v. Home Secretary and others"* (PLD 2011 Lahore 323), wherein after having referred to good number of case laws on the moot point by the apex Court, this Court resolved the same in the following terms:

> "20. The trial of the petitioner commenced before insertion of Section 21-F of the ATA. Certain rights had already accrued in favour of the petitioner by way of his entitlement to the benefit of remissions in accordance with law in the field at the relevant time *i.e*. the time that the alleged offence was committed, F.I.R. was registered against him, he was arrested and his trial commenced. Any subsequent changes in law would not have the effect of depriving him of the rights which were available to him at the time when the offence was committed and the trial commenced. In addition, there is nothing in Section 21-F of ATA to indicate even remotely that it has retrospective operation or that it has the effect of taking away the rights that were available to certain convicts under the prevalent law when the offenc e was committed, the F.I.R. was registered or the trial commenced. Looked at from this point of view, the provisions of Section 21 -F are prospective in nature and, therefore, cannot take away or affect the rights which were available to the petitioner at the relevant time. In support of this contention, reliance may also usefully be placed on the dictum of the honourable Supreme Court of Pakistan in the case of Commissioner Sindh Employees etc. (2002 SCMR 39).

21. In the case of *Pakistan Steel Mills* (2002 SCMR 1023), the honourable Supreme Court of Pakistan has held that any amendment in law will not take away, empower, nullify or destroy a vested right, which has attained finality and has become past and closed transaction. Admittedly, registration of the case against the petitioner, his arrest and initiation of his trial were all prior to the insertion of Section 21-F. As a result, the dictum of the honourable Supreme Court of Pakistan in the aforesaid cases is clearly applicable to the facts and circumstances of the present case. In Muhammad Rafi-ud-Din's case reported as PLD 1971 SC 252 and Hassan's case reported as PLD 1975 SC 1, it has clearly and unambiguously been laid down that where a law was altered during pendency of an action, the rights of the parties are to be decided according to the law as it existed when the action was initiated and not under the law prevailing on the date of the judgment/order. Looked at from this angle also, the act of the respondents whereby the petitioner has been denied the benefit of remissions under the Pakistan Prisons Rules is neither legally justified nor sustainable.

(Underlining is to supply emphasis).

The dicta laid down in case referred supra is squarely applicable to the facts and circumstances of the instant case on its all fours and we see no reason to take a different view.

9. As natural and logical corollary to the above discussion, we hold the convict entitled to earn remissions albeit insertion of Section 9(A) (1) in CNSA, 1997 through Amendment Act, 2022. Petition in hand is **allowed** with the direction to Respondent No. 2 to grant remissions to the convict in accordance with law and rules. Office is directed to transmit copies of this

order to the Additional Chief Secretary (Home), Government of the Punjab, Home Department, Lahore and I.G. Prisons, Punjab, Lahore, who in turn will circulate this order to Superintendents of all the Jails in the Province of Punjab for compliance.

(KQB) **Petition allowed.**

PLJ 2024 Cr.C. (Note) 81

[Lahore High Court, Multan Bench]

***Present*: SHAKIL AHMAD, J.**

RAFIQ KHAN--Appellant

versus

STATE and another--Respondents

Crl. A. No. 786 of 2018, decided on 18.4.2022.

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

----S. 426(1-A)--Pakistan Penal Code, (XLV of 1860), Ss. 302(b)/324/ 337F(v)--Suspension of sentence--Statutory ground--Delay in decision of main appeal was not occasioned by an act or omission on the part of the petitioner/convict or any other person acting on his behalf--Where case of a convict is not covered under the exceptions as enumerated u/S. 426 (1-A) of Cr.P.C., he becomes entitled to be released on bail not as a matter of grace but as a matter of right--This petition is allowed and the sentence of the petitioner/convict is suspended. [Para 3 & 4] A, B & C

2012 PCr.LJ 21 *ref.*

Rana Mehraj Khalid, Advocate for Petitioner/Appellant.

Mr. Ansar Yasin, Deputy Prosecutor General for State.

Khawaja Qaisar Butt, Advocate for Complainant.

Date of hearing: 18.4.2022.

ORDER

Crl. Misc. No. 01 of 2021.

By filing this petition under Section 426, Cr.P.C. petitioner/ convict seeks suspension of execution of sentence awarded to him by learned Additional Sessions Judge, Multan, through judgment dated 26.06.2018, whereby petitioner was convicted and sentenced as under:--

(i) Convicted under Section 302(b), PPC and sentenced to undergo Imprisonment for Life as Tazir and was also directed to pay Rs. 200,000/-as compensation to legal heirs of deceased Waseem Javed under Section 544-A of Cr.P.C. In case of non-payment of amount of compensation, to further undergo six months S.I.

(ii) Convicted under Section 324, PPC and sentenced to undergo Rigorous Imprisonment for seven years and fine of Rs. 50,000/- and in case of default, he shall further undergo for six months.

(iii) Convicted under Section 337-F(v), PPC and sentenced to undergo five years Rigorous Imprisonment as Tazir and was also liable to pay 'Daman' of Rs. 50,000/-payable to Ikhlaq Ahmad injured PW.

All sentences shall run concurrently. Benefit of Section 382-B of Cr.P.C. was also extended to the petitioner.

2. Arguments heard. Record perused.

3. Without dilating upon the merits of the instant case, lest it may prejudice the case of either of the sides while deciding the main appeal, it may be observed that Section 426(1-A)(c) of Cr.P.C. provides concession to a convict whose appeal could not be decided within a statutory period of two years, to be released on bail till the final decision of the main appeal. Learned counsel for petitioner/convict, confined his arguments merely on statutory ground as enshrined under the provisions of Section 426(1-A)(c) of Cr.P.C. Same is reproduced hereunder for ready reference:

> ***Section 426 (1-A) of Cr.P.C.*** *"An Appellate Court shall, except where it is of opinion that the delay in the decision of appeal has been occasioned by an act or omission of the appellant or any other person acting on his behalf, order a convicted person to be released on bail who has been sentenced:-*
>
> *a.* ……..

b. *……..*

c. *to imprisonment for life or imprisonment exceeding seven years and whose appeal has not been decided within a period of two years of his conviction.*

Provided that the provisions of the foregoing paragraphs shall not apply to a previously convicted offender for an offence punishable with death or imprisonment for life or to a person who, in the opinion of Appellate Court, is a hardened desperate or dangerous criminal or is accused of an act of terrorism punishable with death or imprisonment for life.

(emphasis supplied)

Plain reading of above hinted provisions of law vividly suggests that right of a convict seeking suspension of his sentence on statutory ground can only be denied where his case is either covered under the provisions of subsection (1-A) of Section 426, Cr.P.C. or to its proviso. It may further be observed that Statutory right of a convict to be released on bail under Section 426 of Cr.P.C. is subject to two exceptions, one embodied in subsection (1-A) of Section 426 of Cr.P.C. and second in its proviso. Nothing, however, is available on the record to even remotely suggest that delay in the decision of main appeal was occasioned by an act or omission on the part of petitioner/convict or any other person acting on his behalf. Main appeal was filed on 19.07.2018. Statutory period as contemplated under the provisions of Section 426 (1A) (c) of Cr.P.C. has already lapsed on 18.07.2020. Main appeal could not be decided for a period of more than 03 years & 09 months and there is no likelihood of its decision in near future. Learned Law Officer remained unable to point out any material whatsoever suggesting that petitioner is a hardened, desperate or dangerous criminal or that he remained accused of an act of terrorism punishable with death or imprisonment for life. Case of petitioner/convict, therefore, is not covered under subsection (1-A) of Section 426 of Cr.P.C. or to its proviso. Where case of a convict is not covered under

the exceptions as enumerated under Section 426 (1-A) of Cr.P.C., he becomes entitled to be released on bail not as a matter of grace but as a matter of right. Reliance in this regard may safely be placed on recently pronounced celebrated judginent of august Supreme Court of Pakistan in case *"Nadeem Samson vs. The State, etc"* (Crl.P.No. 1016-L/2021) and case titled *"Abdul Ghaffar alias Kalo and another vs. The State and another"* (2012 PCr.LJ 21).

4. For the foregoing reasons, this petition is allowed and the sentence of the petitioner/ convict is suspended and he is directed to be released on bail subject to his furnishing of bail bonds in the sum of Rs. 500,000/-(rupees five hundred thousand only) with two sureties in the like amount to the satisfaction of the Deputy Registrar (Judicial) of this Bench. The petitioner is directed to appear before this Court on each and every date of hearing till the final decision of main appeal.

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

PLJ 2024 Cr.C. (Note) 96

[Lahore High Court, Multan Bench]

Present: **SHAKIL AHMAD, J.**

MUREED HUSSAIN--Appellant

versus

STATE and another--Respondents

Crl. A. No. 1069 of 2017, heard on 20.11.2023.

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

----S. 302(b)--*Qatl-i-amd*--Conviction and sentence--Challenge to--Delay in post-mortem--Medical evidence--Conflict between ocular account and medical evidence--This delay in post-mortem examination, particularly when complainant claimed to have shifted the dead body to hospital immediately after the occurrence and FIR was shown to have been registered within three hours and police papers were ready prior to registration of FIR, is suggestive of the fact that delay so caused was for preliminary investigation and prior consultation--Arrival of PWs at the venue exactly on a point of time when assailants allegedly did away with deceased, in itself is a circumstances that reflected on the very genesis of the prosecution case--As regards recovery, it is case of prosecution that during investigation appellant got recovered a pistol. In view of the report of PFSA that the crime empty shown to have been secured from the spot, did not match with the pistol, this recovery even if is believed to have been proved, would be treated as inconsequential. No other independent evidence was collected by the investigating officer linking the appellant with the commission of alleged crime and even motive set up by prosecution was not proved and the same was disbelieved by the trial Court--Prosecution has hopelessly failed to prove its case against appellant

beyond the shadow of a reasonable doubt--**Held:** It is settled law that prosecution is duty bound to prove its case beyond any reasonable doubt and if any single and slightest doubt is created, benefit it of the same will go to the accused. [Para 7, 9 & 12] A, H, J & K

2019 SCMR 1068, 2019 SCMR 1154, 2020 SCMR 857 and
2019 MLD 1808.

Corroborative Piece of Evidence--

----Principle--It is an established principle of law that corroborative piece of evidence is meant to test the veracity of ocular evidence and both corroborative and ocular testimonies are to be read together and not in isolation. [Para 8] B

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

----S. 302(b)--Ocular account--Had witnesses of ocular account been present at the spot and witnessed the occurrence as claimed by them, there was no possibility of conflict in between ocular account and medical evidence. Where oral evidence is inconsistent with the medical evidence, oral evidence cannot be accepted to be made basis for the conviction of an accused. [Para 8] C

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

----S. 302(b)--Oral evidence--Oral evidence to the extent of its inconsistency with medical evidence could not be accepted.

[Para 8] D

PLD 1994 SC 178

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

----S. 302(b)--Medical evidence--If medical evidence leaves room for doubt, benefit of that doubt should go to accused and not to prosecution. [Para 8] E

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

----S. 302(b)--Conflict between ocular evidence and medical evidence--Conflict in between ocular account and medical evidence that belies the version of witnesses of ocular account for having witnessed the occurrence at the spot, their presence at the spot cannot be accepted except with a pinch of salt. [Para 8] F

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

----S. 302(b)--Eye-witnesses--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. [Para 8] G

2016 SCMR 1763 and 2019 SCMR 631.

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

----Art. 129--Provisions of Article 129 of Qanun-e-Shahadat Order, 1984 allow the Court to presume the existence of any fact, which it thinks likely to have happened in the ordinary course of natural events and human conduct in relation to the facts of a particular case. The conduct of witnesses of ocular account in the instant case vividly was opposite to the common course of natural events and human conduct, further suggesting that the witnesses of ocular account were not present at the time of occurrence. [Para 9] I

2015 SCMR 315.

Criminal Justice--

----Benefit of doubt--It is by now settled principle of criminal justice that there is no need of so many doubts in the prosecution case, rather a single doubt arising out of the prosecution case is sufficient for acquittal of the accused. [Para 13] L

2019 SCMR 129.

M/s. Syed Jaffar Tayyar Bukhari, Abdullah Siraj Qaiserani, M. Naeemullah Khan and Muhammad Zahid Habib, Advocates for Appellant.

Mr. Tariq Mehmood Dogar, Advocate for Complainant.

Mr. Tanvir Haider Buzdar, Assistant District Public Prosecutor for State.

Date of hearing: 20.11.2023.

JUDGMENT

Mureed Hussain (appellant herein) after having been tried by the learned Additional Sessions Judge, Shujaabad on the charge under Sections 302, 148, 149 of PPC in case FIR No. 148 of 2010 dated 14.04.2010 registered at Police Station Saddar, Shujaabad was convicted and sentenced *vide* judgment dated 11.11.2017, as under:

> *Convicted under Section 302(b) of PPC as ta'zir and sentenced to undergo imprisonment for life and was directed to pay Rs. 2,00,000/- to the legal heirs of Muhammad Yaqoob deceased as compensation under Section 544-A of Cr.P.C. In case of default in payment of compensation amount, the convict will undergo simple imprisonment for a period of six months.*

2. Sagheer Ahmad complainant got recorded his statement Ex.PB before Muhammad Aslam Sub-Inspector of Police Station Saddar Shujaabad, stating that on 13.04.2010 at 10:00 P.M., his brother Muhammad Yaqoob after attending barat of Tayyab Raza was returning home and when he was at

distance of some acres from his home, all of sudden Mureed Hussain armed with pistol, Juma, Ghulam Hussain both armed with soty, Muhammad Nasir, Muhammad Junaid and Kaneez Mai armed with pistols, who were hiding in wheat crop, encircled Muhammad Yaqoob; Ghulam Hussain raised *lalkara* that they will not leave Muhammad Yaqoob alive. As per Ex.PB, complainant's brother raised uproar, whereupon complainant while carrying a torch along with witnesses Ghulam Qasim, Muhammad Javed Iqbal and Muhammad Iqbal rushed towards the spot and within their view Ghulam Hussain gave blow with sota above left eye of complainant's brother; accused Juma gave blow with sota on hips of brother of complainant; Mureed Hussain accused made fire with pistol 30 bore which shot hit on forehead of complainant's brother. According to complainant, he and witnesses tried to intervene but Junaid, Kaneez Mai and Nasir created terror by making aerial firing by threatening that if anybody came forward, he would be treated in the same manner and due to fear complainant and witnesses did not go forward. It has been asserted in Ex.PB that accused persons carried complainant's brother and took him to their home and in the meanwhile many people of locality gathered, whereupon accused persons fled away by leaving complainant's injured brother in their home.

3. After recording of statement (Ex.PB) of complainant, Muhammad Aslam SI endorsed and sent the same to police station for registration of FIR. He prepared application for post-mortem examination Ex.PG and inquest report Ex.PJ. Appellant was investigated by Abdul Razzaq SI PW-14. Upon conclusion of usual investigation, report under Section 173 of, Cr.P.C. was prepared and sent to the trial Court. Appellant and co-accused were indicted by learned trial Court. They pleaded not guilty and the trial commenced.

4. Sagheer Ahmad complainant appeared in the witness box as PW-3 whereas Ghulam Qasim appeared as PW-4. Muhammad Aslam SI PW-11 and

Abdul Razzaq SI PW-14 are investigators of this case. Muhammad Iqbal 1116/C PW-12 deposed on behalf of Jehangir Ahmad SI (since died) who also investigated the case. Irfan Hayat Draftsman was examined as PW-15. Remaining PWs are formal witnesses. Medical evidence was furnished by Dr. Muhammad Tahir PW-16 who conducted post-mortem examination on the dead body of Muhammad Yaqub on 14.04.2010 and observed following injuries:

1. An entry wound, measuring 0.8 cm x 0.7 cm on middle of forehead. The margins of the wound were inverted and collar of abrasion was present around the wound. **No burning, blackening and tattooing was seen.**
2. An exit wound measuring 1 cm x 0.8 cm on occipital region of the skull. The margins of this wound were everted. Clotted blood was present on the head, face, neck and body and clothes were blood stained. The clotted blood was present inside the right ear.
3. A contused swelling around the left eye (black eye) measuring 3cm x 2.5cm was present.
4. A bruise bluish black in colour measuring 5 cm x 2.cm on right buttock was present.

Medical Officer PW-16 was of the opinion that probable time between injuries and death was within one to one and half hour and **between death and post-mortem examination was within 10 to 12 hours.**

5. On completion of prosecution evidence, statements of accused under Section 342, Cr.P.C were recorded. Appellant professed his innocence and did not opt to appear as his own witness as required under Section 340(2), Cr.P.C., however, tendered certain documents in his defence. Version of the appellant

in reply to the question why this case was against him and why PWs deposed against him, was as under:

> *"I am innocent. We have not committed any offence at all. We had strained relations with Mian Muhammad Ameer Jahndir a local landlord of District Lodhran. Said Ameer Jhandir had a grudge in connection with abduction of a lady. He involved our co-accused in connivance of local police in a bogus case. A case F.I.R No. 104/15, dated 24.03.2015 u/s 379/411 of PPC was registered at p/s Lodhran in which our co accused Ghulam Abbas has been acquitted vide dated 30.05.2017. Said landlord had deep and friendly relations with the complainant party of this case. On asking of said landlord of Lodhran, complainant party involved us. Local police of p/s Sadar Shujabad asked said PWs of this case on asking of said landlord involved us. Police of p/s Sadar Shujabad brought me from Lodhran and planted bogus recovery of pistol which was actually produced by the complainant party. Actually my name is Ghulam Abbas s/o Muhammad Bakhsh caste Blouch, r/o Shujaat Pur, p/o Jalalpur Pirwala. I tender my birth certificate as Ex.D2 in support of my name Ghulam Abbas. Not only this, I contracted marriage with Mumtaz Mai. I also produce my Nikah Nama. The documents which have been produced by the complainant have been engineered to strengthen the story of this case. At the very outset, during investigation, I stated to the IO that I am Ghulam Abbas and not Murid Hussain. In support of my version 1 also produced my Nikah Nama and Birth certificate to verify this fact but the 10 never bothered to get it verified. Not only this, I requested to Mr. Akhtar Hussain Kalyar, the then the learned Judl: Magistrate Section 30, Shujabad who directed the I.O to verify these documents but the IO being won over by the complainant party*

did not verify the same because it wanted to please said local landlord of Lodhran. I am innocent. I have not committed any offence at all."

Learned trial Court upon conclusion of trial, convicted and sentenced the Appellant, hence this appeal.

6. Heard. Record perused.

7. Occurrence as per the contents of F.I.R took place at 10:00 P.M. on 13.04.2010 in presence of complainant and PWs and they shown to have immediately shifted Muhammad Yaqoob in injured condition to hospital where he succumbed to the injuries. F.I.R in this case was shown to be registered at 12:55 A.M. on 14.04.2010 *i.e*. within three hours after the occurrence on the basis of statement Ex.PB of Sagheer Ahmad recorded by Muhammad Aslam SI at Civil Hospital Shuja-abad at 12:40 A.M. on 14.04.2010. As per endorsement recorded by Muhammad Aslam SI on Ex.PB, documents for post-mortem examination were prepared and handed over to Farman 4174/C, implying thereby the police papers were ready till 12:40 A.M. Despite that post-mortem examination was conducted with delay. Although no exact time of conducting of autopsy is mentioned in the post-mortem examination report Ex.PS, however, according to said report Ex.PS probable time between injuries and death was 01 to 1-½ hours and between death and post-mortem examination was within 10 to 12 hours. No plausible explanation is forthcoming by the prosecution to justify such a belated post-mortem examination. This delay in post-mortem examination, particularly when complainant claimed to have shifted the dead body to hospital immediately after the occurrence and FIR was shown to have been registered within three hours and police papers were ready prior to registration of FIR, is suggestive of the fact that delay so caused was for preliminary investigation and prior consultation. Reliance in this regard may safely be placed on case reported as

Muhammad Rafique alias Feeqa v. The State (2019 SCMR 1068), wherein following observation was made:

> *"----Such unexplained delay in the post-mortem of a deceased would surely put a prudent mind on guard to very cautiously assess and scrutinize the prosecution's evidence--In such circumstances, the most natural inference would be that the delay so caused was for preliminary investigation and prior consultation to nominate the accused and plant eyewitnesses of the crime."*

8. Adverting to medical evidence, according to scaled site plan Ex.PR, fire was made by appellant at deceased from a very close range. Sagheer Ahmad complainant PW-3 in cross examination stated that accused persons had encircled Muhammad Yaqoob within diameter of three feet. Ghulam Qasim PW-4 in his examination in chief stated that Mureed Hussain from a point blank fired at Yaqoob which hit him on forehead. However, Medical Officer PW-16 noticed no blackening or burning on the entry Wound, In this way, Medical evidence is in utter contrast with the ocular account as to the distance between deceased and the appellant at the time of making fire by him. Medical evidence although is corroboratory in nature, yet it is an established principle of law that corroborative piece of evidence is meant to test the veracity of ocular evidence and both corroborative and ocular testimonies are to be read together and not in isolation. Guidance has been sought from case *"Noor Muhammad v. The State* (2010 SCMR 97). Had witnesses of ocular account been present at the spot and witnessed the occurrence as claimed by them, there was no possibility of conflict in between ocular account and medical evidence. Where oral evidence is inconsistent with the medical evidence, oral evidence cannot be accepted to be made basis for the conviction of an accused. Guidance has been sought from case *"Barkat Ali vs. Muhammad Asif and others* (2007 SCMR 1812). Oral evidence to the extent

of its inconsistency with medical evidence could not be accepted. It has been held in *Abdul Subhan's* (PLD 1994 C 178) that if medical evidence leaves room for doubt, benefit of that doubt should go to accused and not to prosecution. In view of glaring conflict in between ocular account and medical evidence that belies the version of witnesses of ocular account for having witnessed the occurrence at the spot, their presence at the spot cannot be accepted except with a pinch of salt. Both parties in the instant matter indeed were known to each other. Complainant seemed to have involved as many persons from the other side including a female (*Mst.* Kaneez Mai) by ascribing her role of making fires with pistol 30-bore. Three accused persons namely Ghulam Hussain. Muhammad Junaid and *Mst.* Kaneez Mai who were ascribed an active role in the occurrence, have already earned acquittal and in this way evidence of ocular account qua those acquitted accused persons has been disbelieved by the learned trial Court. 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. Reliance In this regard may safely be placed on case *"Shahbaz v. The State"* (2016 SCMR 1763) and *Muhammad Arif v. The State"* (2019 SCMR 631).

9. In the F.I.R it was claim of complainant that accused persons were already hiding in the wheat crop and Muhammad Yaqoob after attending barat of Tayyab Raza when reached at some distance of his house, accused persons encircled him and raised *lalkara* that they will not leave him alive, whereupon Muhammad Yaqoob raised uproar and then complainant while carrying a torch along with PWs attracted to the spot and within their view accused persons committed the occurrence. First point to be noticed is that in view of the contents of Ex.PB complainant himself or any of the PWs did not witness the accused persons while hiding in the wheat crop or waylaying by them when Muhammad Yaqoob reached there and was encircled by accused persons. The

whole prosecution case is silent as to who told this event to the complainant. It may also be seen that as per contents of Ex.PB. Muhammad Yaqoob was encircled by accused at distance of some acres from his home and when he raised hue & cry, complainant and PWs attracted there. Contents of Ex.PB also indicate that accused persons started beating Muhammad Yaqoob when complainant and PWs reached at the spot. It would be hard to believe that assailants after encircling Muhammad Yaqoob, would have waited for arrival of PWs so as to enable them to witness the occurrence and on their arrival they started causing injuries on the person of Muhammad Yaqoob. Such a behavior on the part of assailants is not in consonance with the natural human behavior and it can very conveniently be inferred that PWs were not present at the spot and they have merely been introduced as witnesses of ocular account after due deliberations and consultation. Reliance in this respect may safely be placed on case reported as *"The State through Advocate General Khyber Pakhtunkhwa, Peshawar v. Hassan Jalil and others"* (2019 SCMR 1154), wherein it was observed that arrival of PWs at the venue exactly on a point of time when assailants allegedly did away with deceased, in itself is a circumstances that reflected on the very genesis of the prosecution case. Similar view was taken by the apex Court in case reported as *"Muhammad Imran v The State"* (2020 SCMR 857). Conduct of PWs of ocular account also runs against human nature, behavior and conduct. According to Ex.PB, accused persons after causing injuries on the person of Muhammad Yaqoob, took him to their home and many people gathered there, whereupon accused persons fled away by leaving Muhammad Yaqoob in injured condition at their home. It was strange rather unusual conduct of the PWs of ocular account that they kept standing at the distance of around 50 feet like silent spectators witnessing one of their near and dear being killed by the assailants and after that taken to their home and did not even made any earnest supplication to the assailants or informed the police or sought help from the other people of the

locality. Pathetic conduct as shown by the PWs of ocular account runs counter to the natural human conduct and behavior in the ordinary course of events. Provisions of Article 129 of Qanun-e-Shahadat Order, 1984 allow the Court to presume the existence of any fact, which it thinks likely to have happened in the ordinary course of natural events and human conduct in relation to the facts of a particular case. The conduct of witnesses of ocular account in the instant case vividly was opposite to the common course of natural events and human conduct, further suggesting that the witnesses of ocular account were not present at the time of occurrence. I am fortified in my view from the principles laid down by the apex Court in case reported as *"Rathan v. The State"* (2015 SCMR 315), wherein it was observed that causing of large number of injuries one after another to the deceased with scissors must have consumed reasonable time due to pause in between the first injury and the last one but all the three PWs including the son with a strong stature and built remained as silent spectators and did not react or showed any response when the accused was causing injuries. It was further observed in said case as under:

> *"No man on the earth would believe that a close relative would remain silent spectator in a situation like this because their intervention was very natural to rescue the deceased but they did nothing ..."*

10. Looking the matter from another angle, as per contents of Ex.PB, complainant hearing uproar of Muhammad Yaqoob carried a torch and attracted to the spot along with PWs and witnessed the whole occurrence. Firstly, photographic narration of occurrence given by witnesses of ocular account by assigning specific roles to six accused including appellant, in such precise terms and with accuracy, was highly improbable rather beyond the feat of human intellect, particularly in a situation where as many accused persons were shown to be making firing with their respective weapons and secondly, prosecution's case qua witnessing of the occurrence by PWs of ocular account

in the light of a torch, is a highly doubtful affair. Undeniably, the torch was not produced before police during first spot inspection and after considerable delay of around nine months a torch was presented by complainant before Jehangir Sl on 15.01.2011 and the same was taken into possession *vide* recovery memo Ex.PK.

11. It is case of complainant and PWs that their clothes were stained with blood of deceased while attending him and shifting him to hospital. However, no such clothes were shown to have been taken into possession by the IO. Had said clothes been taken into possession and sent to the Chemical Examiner for examination and grouping with that of the blood stained clothes of the deceased and blood stained earth, the same would have provided the strongest corroboration of the testimony of the two eye-witnesses. Said omission struck at the roots of the case of prosecution. Reliance in this regard may safely be placed on case *Azhar Abbas and another v The State and others* 2019 MLD 1808 [Lahore].

12. As regards recovery, it is case of prosecution that during investigation appellant got recovered a pistol. In view of the report of PFSA that the crime empty shown to have been secured from the spot, did not match with the pistol, this recovery even if is believed to have been proved, would be treated as inconsequential. No other independent evidence was collected by the investigating officer linking the appellant with the commission of alleged crime and even motive set up by prosecution was not proved and the same was disbelieved by the learned trial Court.

13. In the sequel of above discussion, it can very safely be concluded that prosecution has hopelessly failed to prove its case against appellant beyond the shadow of a reasonable doubt. It is settled law that prosecution is duty bound to prove its case beyond any reasonable doubt and if any single and slightest doubt is created, benefit of the same will go to the accused. It is

by now settled principle of criminal justice that there is no need of so many doubts in the prosecution case, rather a single doubt arising out of the prosecution case is sufficient for acquittal of the accused. In the case of *Abdul Jabbar and another v. The State* (2019 SCMR 129), Hon'ble Supreme Court of Pakistan has held as under:

> *"---- It is the settled principle of law that once a single loophole is observed in a case presented by the prosecution much less glaring conflict in the ocular account and medical evidence or for that matter where presence of eye-witnesses is not free from doubt, the benefit of such loophole/lacuna in the prosecution case automatically goes in favour of an accused ----"*

Therefore, findings of conviction recorded against appellant by learned trial Court in the impugned judgment are not sustainable, which are hereby set aside allowing this Criminal Appeal No. 1069 of 2017. As a result, **appellant Mureed Hussain is acquitted of the charge extending him benefit of doubt.** Appellant is in jail. He is directed to be released forthwith if not required in any other case.

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

PLJ 2024 Cr.C. (Note) 112

[Lahore High Court, Bahawalpur Bench, Bahawalpur]

Present: **SHAKIL AHMAD, J.**

MUHAMMAD ISHFAQ--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 8752-B of 2023, decided on 26.1.2024.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 376(i), 376(ii)--Post-arrest bail, grant of--Allegation of--Accused committed rape with complainant's sister--Medical Officer did not observe any injury on body of victim and also noted that victim's hymen was not ruptured--It may also be observed that report of Forensic Science Agency qua DNA comparison is in negative as no seminal material was found on items sent for DNA comparison--These facts are sufficient to make case of accused/petitioner one of further inquiry into his guilt as contemplated under provisions of Section 497, Cr.P.C.--Investigation of case has already been finalized and person of petitioner is no longer required by police for further investigation. [Para 3] A & C

Further Inquiry--

----It is admitted principle of law that once case of accused/petitioner becomes that of further inquiry, then petitioner would be entitled to grant of post-arrest bail not as a matter of grace but as a matter of right. [Para 3] B

PLD 1985 SC 182, 1985 SCMR 382 & PLD 2012 SC 222.

Mr. Muhammad Faisal Bashir Chaudhary, Advocate for Petitioner.

Mr. Javed Iqbal Bhaaya, ADPP for State.

Ch. Tahir Rasool, Advocate for Complainant.

Date of hearing: 26.1.2024.

ORDER

Through this petition, Muhammad Ishfaq petitioner seeks post-arrest bail petition in FIR No. 899 of 2023 registered at Police Station Saddar Dunyapur, District Lodhran for the offences under Sections 376(i), 376(iii), P.P.C. Earlier application of the petitioner for the same relief was dismissed by learned Additional Sessions Dunyapur *vide* order dated 26.09.2023.

2. Precisely, as per FIR, the allegation against accused/petitioner is that he committed rape with *Mst.*Rukhsana Bibi, complainant's sister.

3. Having heard the learned counsel for the parties, learned ADPP and upon tentative assessment of material available on the record, it has been noticed that there is delay of eight days in lodging of FIR, which has not plausibly been explained. The alleged occurrence took place on 26.07.2023, however, the victim was medically examined on 03.08.2023, after considerable delay of 07 days. It may further be observed that the Medical Officer did not observe any injury on the body of the victim and also noted that victim's hymen was not ruptured. It may also be observed that report of Forensic Science Agency qua DNA comparison is in negative as no seminal material was found on the items sent for DNA comparison. These facts are sufficient to make case of accused/petitioner one of further inquiry into his guilt as contemplated under the provisions of Section 497, Cr.P.C. It is admitted principle of law that once the case of accused/petitioner becomes that of further inquiry, then petitioner would be entitled to the grant of post-arrest bail not as a matter of grace but as a matter of right. Reliance in this regard be safely placed on the cases reported as *"Muhammad Sadiq v. Sadiq and others"* (PLD 1985 SC 182), *"Ibrahim v. Hayat Gul and others"* (1985 SCMR 382) and *"Qamar alias Mitho v. The State and others"* (PLD 2012 SC 222). Moreover, investigation of the case has already been finalized and person of petitioner is no longer required by the police for further investigation.

4. For the reasons recorded above, instant petition is **allowed** and petitioner is admitted to post arrest bail subject to his furnishing bail bonds in the sum of Rs. 2,00,000/-with one surety in the like amount to the satisfaction of learned trial Court.

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

PLJ 2024 Lahore (Note) 118
[Multan Bench, Multan]

***Present*: SHAKIL AHMAD, J.**

***Mst.* GULZARAN BIBI--Petitioner**

versus

MUHAMMAD ASLAM and others--Respondents

C.M. No. 675 of 2022 in W.P No. 3044 of 2015, decided on 19.10.2022.

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

----S. 12(2)--Constitution of Pakistan, 1973, Art. 199--Application for setting aside of ejectment order--Ejectment petition--Allowed—Appeal--Allowed--Petitioner was not party in petition--No element of collusiveness between respondents--No fraud and misrepresentation--It had not been denied by counsel for petitioner that both petitioner and Respondent No. 2 were still man and wife and no separation took place between them--Respondent No. 2 contested matter before Special Judge (Rent), and took stance while appearing as RW-1 that he was living in demised property since 1999 as he purchased plot from father of Respondent No. 1--He, however, admitted it correct that property was not transferred through any registered deed--From filing of ejectment petition till decision before High Court, Respondent No. 2 had been vigorously contesting matter before all forums and there appears no element of collusiveness at end of Respondent No. 2 with Respondent No. 1 so as to deprive petitioner of her property particularly in circumstances that still petitioner and Taj Din were maintaining status of spouses--Counsel for petitioner remained unable to point out any instance of fraud or misrepresentation within purview of Section 12(2) of CPC--Mere word of mouth that judgment was obtained through fraud and misrepresentation was not sufficient to invoke provisions of Section 12(2) CPC--Petition dismissed.

[Para 3] A, B, C & D

Syed Shamshad Haider Rizvi, Advocate for Petitioner.

M/s. Ali Raza Alvi, Nadir Sultan Mirali and Hamid Raza, Advocates for Respondents.

Date of hearing: 19.10.2022.

ORDER

Mst. Gulzaran Bibi (**'petitioner'** herein) has filed instant petition under Section 12(2) of CPC impugning the validity of judgment dated 24.02.2021 passed by this Court in Writ Petition No. 3044 of 2015 precisely on the ground that respondents by committing fraud and misrepresentation obtained the impugned judgment without impleading her party in the ejectment petition titled *"Muhammad Aslam vs Taj Din"* filed by Muhammad Aslam **('Respondent No. 1** herein) against Taj Din **('Respondent No. 2** herein) which was allowed by learned Special Judge (Rent), Multan *vide* judgment dated 21.03.2014 and appeal filed by Taj Din (Respondent No. 2) who also happens to be husband of petitioner, was allowed *vide* judgment dated 27.01.2015 passed by learned Additional District Judge, Multan. Respondent No. 1 assailed the said judgment before this Court by filing Writ Petition No. 3044 of 2015 and that was allowed through order dated 24.02.2021 whereby order passed by learned Additional District Judge, Multan was set-aside and that of learned Rent Controller was restored. According to petitioner, she in fact is owner of the property measuring 5-Marlas situated in Khewat No. 21 situated in Mouza Jangal Bhera Tehsil City, District Multan on the basis of Mutation No. 6767 dated 20.08.2009 which was transferred to her by her deceased father. According to petitioner, her husband Taj Din being connived with Respondent No. 1 made an attempt to deprive her of property for the reason that she had strained relations with him for last 12-years and there is a separation between the spouses.

2. Heard. Record perused

3. It has not been denied by learned counsel for the petitioner that both petitioner and Respondent No. 2 are still man and wife and no separation took place between them. He, however, emphasized that relationship between spouses are strained and that prompted Respondent No. 2 to deprive petitioner of her property having been connived with Respondent No. 1. Learned counsel for the petitioner, however, remained unable to controvert the proposition that no separation in fact took place and still both parties are living as husband and wife and in such eventuality there was hardly any question of collusiveness between Respondent No. 1 and her husband so as to deprive her of property belonging to her. Undeniably, Respondent No. 2 contested the matter before learned Special Judge (Rent), Multan and took the stance while appearing as RW-1 that he was living in the demised property since 1999 as he purchased the plot from father of Respondent No. 1. He, however, admitted it correct that the property was not transferred through any registered deed and even when learned Special Judge (Rent) accepted ejectment petition, he also filed an appeal before learned Additional District Judge, Multan and same was ultimately allowed and the said order was assailed before this Court through Writ Petition No. 3044 of 2015 by Respondent No. 1 and he also contested the matter and was duly represented by his counsel namely Malik Muhammad Akbar Bhutta, Advocate and that petition was allowed. From the filing of ejectment petition till the decision before this Court, Taj Din had been vigorously contesting the matter before all forums and there appears no element of collusiveness at the end of Respondent No. 2 with Respondent No. 1 so as to deprive petitioner of her property particularly in the circumstances that still petitioner and Taj Din are maintaining the status of spouses. It may further be seen that petitioner has not given the abuttals of her property as detailed in her petition reflecting her ulterior designs so as to cause unnecessary impediment in the way of execution proceedings pending before the Court of competent jurisdiction. Filing of instant petition, even in view of contents of petition, appears to be a reprehensible attempt to frustrate the decree obtained by Respondent No. 1 in the result of litigation covering the

long period around 12 years. Learned counsel for the petitioner remained unable to point out any instance of fraud or misrepresentation within the purview of Section 12(2) of CPC. Mere word of mouth that judgment was obtained through fraud and misrepresentation was not sufficient to invoke the provisions of Section 12(2), CPC. Application, on the face of it, is improper and smacks *mala fide*s and seemed to have been filed in order to protract litigation.

4. The upshot of above discussion is that petition in hand is devoid of any merits, therefore, the same is **dismissed.**

(Y.A.) **Petition dismissed.**

2021 LHC 10249

Case No. **Writ Petition No.700 of 2021**

Majida Naz **Versus** ***National Database and Registration Authority and 02 others***

Sr.No.of order/ Proceedings	Date of order/ Proceedings	Order with signatures of Judge, and that of parties or counsel, where necessary.

04.10.2021 Malik Amjad Ali, Advocate for petitioner.

Malik Ihtisham Saleem, Assistant Attorney General.

Mst. Majida Naz being a Pakistani Citizen by birth and having computerized National Identity Card No.37101-8334577-0 applied on 09th March, 2020 for issuance of Pakistan Origin Cards *(hereinafter referred to as "POC")* for her minor daughters, namely Javeria Inam Khan and Maryam Inam Khan *(hereinafter to be called as 'minors')* both born on 22nd September, 2013 and 12th April, 2015, respectively. Her request, however, was finally regretted, hence she approached this Court by filing instant petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 with the following prayer: -

> *"It is, therefore, respectfully prayed that this writ petition may very kindly be accepted and respondents may very kindly be directed to issue the*

POC for daughters of the petitioner in accordance with law.

Any other relief which this honourable court deems fit may also be granted to the petitioner"

2. Stance taken by respondents No.1 & 3 in their parawise comments, precisely, is that it was not an absolute right of the daughters of petitioner to obtain POC and the same was declined as per the rules. According to them, issuance of POC was subject to sovereignty, integrity, security and defence of Pakistan and the Authority has power to refuse registration or issuance of card and in petitioner's case security agency did not clear to issue the POC to petitioner and refused to issue NOC for issuance of POC. Respondent No.2 in his written reply came up with the following version: -

"The instant case relates to the issue of grant of POC (Pakistan Origin Card) to the petitioner's daughters of List-B country, namely, Javeria Inam Khan & Maryam Inam Khan. Ministry of Interior processes the case for grant of POC to applicant(s) of List-B country, as per its policy dated 02nd April, 2013 (Annex-I). The grant of POC to applicants of List-B country is subject to security clearance of security agencies. The case of petitioner was not supported for grant of POC by security agency and the same was forwarded to NADRA (Annex-II) on 9th November, 2020. Furthermore, grant of POC is not an absolute right of the petitioner. As provided under rule 13 of the National Database and Registration Authority (Pakistan Origin Card) Rules, 2002 (Annex-III) "any person who is

otherwise eligible for registration and issuance of a card, may be refused registration, or issuance of a card, if in the opinion of the Authority, the registration, or issuance, of a card to such person is prejudicial to the sovereignty, integrity, security, or defence of Pakistan or any part thereof, or to friendly relations of Pakistan with foreign states or countries, or to the maintenance of law and order in Pakistan or any part thereof, or to the public interest"

3. Learned counsel for petitioner contended that petitioner since is a Pakistani citizen, therefore, in view of the provisions of section 5 of Pakistan Citizenship Act, 1951 *(hereinafter referred as to 'the Act')*, the minors are also citizens of Pakistan and entitled to get POC. Learned counsel explained that although father of the minors is an Afghan citizen, yet a person born after the commencement of the Act shall be citizen of Pakistan by descent if his parent is citizen of Pakistan at the time of his birth. Learned counsel further explained that admittedly, the petitioner was born on 18.12.1984 in Pakistan, therefore, her children would be counted as citizens of Pakistan by descent as contemplated under the provisions of section 5 of the Act. Learned counsel added that as per the provisions of the National Database and Registration Authority (Pakistan Origin Card) Rules, 2002 *(hereinafter referred to as 'the Rules')* minors were entitled to receive POC. Learned counsel further added that respondents have declined the issuance of POC on the grounds which are not tenable for the reason that SOPs etc issued under any rules, in no way militate against the statutory provisions. According to learned counsel for petitioner, the authority cannot clothe itself with power which

is not given to it under the provisions of statute, therefore, any SOPs made under the statute would not make the statutory provisions redundant. It was, therefore, concluded that minors being citizen of Pakistan, are entitled to the issuance of POC.

4. As against that, learned Assistant Attorney General contended that as per SOPs, issuance of POC in respect of Indians, Afghanis and list-B countries was subject to security clearance and since minors were the daughters of Afghan citizen, therefore, their case was to be referred for security clearance and in view of non-issuance of security clearance, POC were declined. Added that as per the provisions of rule-13 of the Rules, any person who is otherwise eligible for registration and issuance of card, may be refused registration or issuance of card if in the opinion of authority, the registration or issuance of the card to such person is prejudicial to the integrity, sovereignty, security or defence of Pakistan. It was concluded that petitioner's request was rightly declined by the respondents and has also payed for dismissal of instant petition.

5. Heard. Record perused.

6. Undeniably, petitioner who is real mother of the minors, is a Pakistani citizen and minors by virtue of the provisions of section 5 of the Act are also Pakistani citizens. Provisions of section 5 are reproduced hereunder for the facility of ready reference: -

> *"**5. Citizenship by descent.**- Subject to the provisions of section, a person born after the commencement of this Act, shall be a citizen of Pakistan by descent if his [parent] is a citizen of Pakistan at the time of his birth.*

Provided that if the [parent] of such person is a citizen of Pakistan by descent only, that person shall not be a citizen of Pakistan by virtue of this section unless-

(a) that person's birth having occurred in a country outside Pakistan, the birth is registered at a Pakistan Consulate or Mission in that country, or where there is no Pakistan Consulate or Mission in that country [at the prescribed Consulate or Mission or] at a Pakistan Consulate or Mission in the country nearest to that country; or

(b) *that person's [parent] is, at the time of the birth, in the service of any Government in Pakistan".*

Bare reading of above suggests that a person who is born after the commencement of the Act, shall be citizen of Pakistan if his parent is citizen of Pakistan at the time of his birth. Both the minors who have been born to petitioner and a foreign national father after 18.04.2000, would be considered and treated as citizens of Pakistan. Prior to this date, the word 'father' was mentioned in section 5 of the Act and after substitution of word 'father' by the word 'parent', the minors who were born to petitioner on 22nd September, 2013 and 12th April, 2015, respectively, were Pakistani citizens and in this way, they were entitled to the grant of POC. Learned Law Officer utterly remained unable to furnish any justifiable reason for non-issuance of POC to the minors who by operation of provisions of law are Pakistani citizens. He also remained fail to satisfy this Court as to how issuance of POC to the minors who

admittedly are Pakistani citizens, would be prejudicial to the sovereignty, integrity, security or defence of Pakistan or would be against public interest in any manner whatsoever. It is also an established principle of law where a discretion is conferred upon any authority, the same has to be exercised judiciously and fairly. In the instant matter, discretion, on the face of it, has been exercised without any lawful justification. It may further be shown that no SOP can be made or given effect that is inconsistent with the parent statute. Any SOP or even rules framed under statute cannot go beyond the scope of Act. Reliance in this regard may safely be placed on case reported as *"Suo Moto Case No.11 of 2011"* **(PLD 2014 Supreme Court 389**), *"Khawaja Ahmad Hassaan v. Government of Punjab and others"* **(2005 SCMR 186)**, *"Messrs. Mehraj Flour Mills and others v. Provincial Government and others"* **(2001 SCMR 1806)** and *"Muhammad Uneeb Ahmed v. Federation of Pakistan through Secretary, Ministry of Science and Technology, Islamabad and others"* **(2019 MLD 1347)**. In Mehraj Flour Mills case supra, it was held as under;

> *"There is no cavil with the proposition that the rule shall always be consistent with the Act and no rule shall militate or render the provisions of the Act ineffective. The test of consistency is whether the provisions of the act and that of rule can stand together. Main object of rule is to implement the provisions of the Act and in case of conflict between them the rule must give way to the provisions of the act. In any case, the rules shall not be repugnant to the enactment under which they are made".*

7. So far as argument of learned Assistant Attorney General that in view of the provisions of rule-13 of the Rules,

any person who is otherwise eligible for registration and issuance of the card, may be refused registration or issuance of card if in the opinion of Authority, registration or issuance of card to such person is prejudicial to the integrity, sovereignty, security or defence of Pakistan and request of petitioner was rightly declined by the respondents on that ground, is concerned, it may be shown that public functionaries have to perform their functions in accordance with law and must use their discretionary powers honestly, fairly, justly and transparently without any element of arbitrariness and caprice. The provisions of section 24-A as inserted in General Clauses (Amendment) Act, 1997 contemplate that 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 purpose of the enactment. In the instant case, discretion exercised by the respondents, on the face of it, appears to be unreasonable for the simple reason that minors, by operation of provisions of section 5 of the Act, are citizens of Pakistan and cannot be held disentitled to receive POC merely on the basis of some subjective apprehensions on the part of respondents particularly when the same are based on the reports of agencies. Indeed, in the instant matter discretion conferred upon the respondents has not been exercised fairly and transparently, the same rather has been exercised by militating against the provisions of section 5 of the Act. Admittedly, the provisions of any law, in no way envisage arbitrary discretion being conferred on any State functionary or the holder of a Public Office and where discretion has been conferred, the same has to be exercised justly, fairly, honestly and transparently. Guidance is sought from the dicta laid down by august

Supreme Court of Pakistan in cases reported as *"Malik Munsif Awan, Advocate, Chairman, Pakistan Justice Party, Lahore v. Federation of Pakistan through Secretary, Law and Justice, Islamabad and others"* **(PLD 2021 Supreme Court 379)**, *"Suo Moto Case No.18 of 2010: In the matter of (Violation of Public Procurement Rules, 2004)"* **(PLD 2011 Supreme Court 927)** and *"Tariq Aziz-ud-Din and others"* **(2010 SCMR 1301)**.

8. The upshot of above discussion is that petition in hand is allowed and respondents are directed to issue POC to the minors in accordance with law.

(SHAKIL AHMAD)
JUDGE

2023 LHC 5215

Criminal Appeal No.36092 of 2019

Niaz Abbas alias Muhammad Nawaz, etc Versus The State, etc

Murder Reference No.150 of 2019

The State Versus Muhammad Asif, etc

Date of hearing **03.10.2023**

Appellants represented by:	Syed Shahid Hussain Sherazi, Advocate.
The State by:	Rana Muhammad Imran Anjum, Deputy Prosecutor General.
The complainant by:	M/s Abid Hussain Saqi and Mudassar Farooq, Advocates.
Research assistance by:	Mr. Muhammad Waqas Sana, Civil Judge, Research Centre, Lahore High Court, Lahore.

SHAKIL AHMAD, J. By filing Criminal Appeal No.36092 of 2019, appellants Niaz Abbas alias Muhammad Nawaz, Muhammad Asif, Muhammad Aslam alias Mehnga and Muhammad Zahoor Ahmad have challenged their convictions and sentences. They were indicted and tried by learned Additional Sessions Judge, Shahpur on the charge under Sections 302, 324, 337-A(i), 337-D, 337-F(ii), 337-F(iii), 337-F(vi), 337-L(2), 109, 148, 149, P.P.C. in case F.I.R. No.148 of 2015 dated 30.10.2015, registered at Police Station Shahpur City, Sargodha. Learned trial court, on conclusion of

trial, vide judgment dated 17.05.2019 (impugned judgment) convicted the appellants and sentenced them as under:-

i. *Under section 302(b)/34 P.P.C. to death each on three counts (for causing triple murder of Muhammad Ashraf, Muhammad Sher and Tahir Mehmood) with payment of Rs.3,00,000/- each to the legal heirs of deceased, in default whereof to further undergo simple imprisonment for six months.*

ii. *Under section 324/34 P.P.C. to seven years R.I. each for attempting to commit qatl-i-amd of the injured persons Mubasher Rehman and Khadim Hussain with fine of Rs.20,000/- each, in default whereof to further undergo simple imprisonment for two months.*

iii. *Under section 337-A(i)/34 P.P.C. to two years R.I. each for causing injuries to Mubashar Rehman and Khadim Hussain with fine of Rs.5,000/- each to the injured.*

iv. *Under section 337-F(iii)/34 P.P.C. to three years R.I. each*

with daman of Rs.5,000/- each to injured Mubashar Rehman.

v. *Under section 337-F(vi)/34 P.P.C. to seven years R.I. each with daman of Rs.5,000/- each to injured Khadim Hussain.*

Benefit of section 382-B, Cr.P.C. was extended to the convicts.

The learned trial court, however, vide same judgment acquitted Fazal Abbas, Muhammad Amjad, Muhammad Aslam son of Muhammad Iqbal, Muhammad Iqbal, Habib, Rabnawaz, Muhammad Zafar and Usman by extending them benefit of doubt. Crl. Appeal No.36090 of 2019 filed by complainant against acquittal of aforementioned accused persons before this Court has already been dismissed for non-prosecution vide order dated 24.05.2022. It may not be out of context to mention here that one of the accused persons namely Raja Ijaz Ahmed who was assigned resorting to first fire shot that landed on the forehead of Muhammad Ashraf (deceased) was indicted and tried separately and at the end of trial earned acquittal and PSLA No.63729 of 2020 filed by the complainant was dismissed as having been withdrawn vide order dated 08.06.2023.

Murder Reference No.150 of 2019 has been sent by learned trial court under section 374 Cr.P.C. for confirmation of death sentence awarded to appellants. Since all the matters have originated from the impugned judgment dated 17.05.2019, the same are being decided through this single consolidated judgment.

It is pertinent to mention here that being dissatisfied with the investigation of instant case F.I.R, the complainant Qadir

Bakhsh filed private complainant under section 302, 324, 337-F(ii), 337-F(vi), 337-L(2), 148, 149, P.P.C. against same set of accused which was dismissed vide order dated 14.02.2019.

2. Qadir Bakhsh, complainant got recorded his statement at police station and on the basis of that statement F.I.R. (Exh.PV) was lodged. As per contents of Exh.PV complainant was resident of Ichar and on 31.10.2015 at about 04:30 p.m. Muhammad Ashraf, Tahir Mahmood, Mubashar Rehman, Khadim Hussain, Muhammad Sher, Muhammad Sajid were on their way to home situated in Mouza Ichar on a white coloured car bearing registration No.LEA/1540 after being relieved from their personal work and complainant along with Haq Nawaz and Muhammad Altaf who was behind them at a little distance on his car; that when Muhammad Ashraf and others reached at Adda Ichar Muhammad Ejaz, Fazal Abbas, Muhammad Aslam all armed with Kalashnikov, Amjad, Muhammad Asif both armed with gun 12-bore repeater, Muhammad Aslam alias Mehnga armed with gun 12-bore double barrel, Muhammad Iqbal armed with pistol 30-bore, Habib armed with 12-bore double barrel, Rab Nawaz armed with pistol 30-bore, Muhammad Zafar armed with 12-bore repeater, Muhammad Usman armed with gun 12-bore, Niaz Abbas armed with pistol 30-bore and Muhammad Zahoor armed with gun 12-bore who were lying perdue suddenly came in front of them and got stopped the car of Muhammad Ashraf etc whereafter Muhammad Ejaz exhorted that Muhammad Ashraf etc should not be left alive and in the meanwhile complainant along with Haq Nawaz and Muhammad Altaf reached at Adda Ichar at a slight distance from behind when Muhammad Ejaz made a straight fire shot with his Kalashnikov in order to kill Muhammad Ashraf that landed on his forehead; second fire shot was made by Fazal Abbas with his Kalashnikov that landed on right side

of chest of Tahir Mahmood; Muhammad Aslam made a fire shot with his Kalashnikov hitting on left side of head of Muhammad Sher; Amjad made a fire shot with his 12-bore repeater hitting on the left side of chest of Tahir Mahmood; Muhammad Asif fired a shot with gun 12-bore repeater hitting on the left side of head of Khadam Hussain and they fell down in the car thereafter all accused persons with their respective weapons resorted to indiscriminate firing on the car of Muhammad Ashraf in the result of which Tahir Mahmood received injuries on his left shoulder near the neck, middle of the back, on the left wrist and left armpit in the middle of back and Muhammad Sher received injuries on his left side of back, Muhammad Ashraf sustained injuries on the index finger and thumb of his right hand and on the right side of ear and right side of neck, Mubashar Rehman received on his right flank, right and left elbow of both arms; Khadam Hussain received injuries on his left arm, face and middle of left eye, right shoulder and right arm. According to complainant he along with Haq Nawaz and Muhammad Altaf remained present there by taking the shelter of walls and witnessed the whole occurrence. As per him, when Muhammad Ejaz etc got themselves satisfied that Muhammad Ashraf has been done away with they all managed their escape good from the spot by resorting to firing and brandishing their respective weapons and he along with Haq Nawaz and Muhammad Altaf attended injured and found that Muhammad Ashraf, Tahir Mahmood and Muhammad Sher had succumbed to the injuries at the spot whereas Mubashar Rehman, Khadam Hussain and Muhammad Sajid became seriously wounded.

Motive according to complainant was that they had previous enmity over the murders, therefore, all the accused persons murdered Tahir Mahmood, Muhammad Sher and Muhammad Ashraf

and injured Mubarshar Rehman, Khadam Hussain and Muhammad Sajid. According to him, he by leaving Haq Nawaz and Muhammad Altaf to guard the dead bodies had come to report the matter, therefore, proceedings be initiated.

3. Imtiaz Ahmad, SI (PW.-17) who was posted at police station Shah Pur City claimed to have recorded the statement of complainant Qadir Bakhsh and on his direction F.I.R. (Exh.PV) was registered which was duly signed by him. After registration of FIR, investigation was conducted by Imtiaz Ahmad S.I (PW.17), who proceeded to place of occurrence along with other police officials where, according to him, dead bodies of Muhammad Ashraf, Muhammad Sher and Tahir Mahmood were present and injured were already sent to THQ Shahpur Sadar for medical treatment. He after examining the dead bodies prepared injury statement (Exh.PD/2) of Muhammad Ashraf (deceased), injury statement (Exh.PE/2) of Muhammad Sher and injury statement (Exh.PF/2) of Tahir Mehmood (deceased). According to him, he also prepared inquest reports of deceased Muhammad Ashraf, Muhammad Sher and Tahir Mahmood as Exh.PF/2, Exh.PD/3 and Exh.PE/3, respectively. He then said to have handed over dead bodies of three deceased along with police papers to Masood Akhtar 1508/C. He also recorded statements of witnesses under section 161, Cr.P.C. He secured three parcels of blood stained soil vide recovery memos Exh.PW, Exh.PW/1 and Exh.PW/2 relating to Muhammad Ashraf, Muhammad Sher and Tahir Mehmood, respectively. Vehicle No.LEA/1540 (P.22) was also taken into possession vide recovery memo Exh.PX attested by Haq Nawaz and Muhammad Altaf. According to PW.17 he also took into possession 115 crime empties of Kalashnikov (P.23 to P.137) vide recovery memo Exh.PY, five alive bullets of Kalashnikov (P.138 to P.142) vide

recovery memo Exh.PZ, nine crime empties of pistol 30-bore (P.163 to P.171) vide recovery memo Exh.PAA, fifteen crime empties of gun 12-bore (P.142 to P.157) vide memo Exh.PBB, five cartridges of 12-bore (P.158 to P.162) vide recovery memo Exh.PCC. According to Imtiaz Ahmad (PW.17), at 11:30 p.m. Masood 1508/C after postmortem of the dead bodies handed over to him last worn clothes of deceased Muhammad Ashraf, Muhammad Sher and Tahir Mahmood which he secured vide recovery memos Exh.PM, Exh.PN and Exh.PO, respectively. On 02.11.2015, he after getting permission of Medical Officer, DHQ recorded statements of the injured under section 161, Cr.P.C. According to PW.17, he arrested Niaz Abbas, Muhammad Asif and Muhammad Aslam accused on 30.12.2015. He further stated that accused Niaz Abbas, after making disclosure, got recovered Kalashnikov (P.1) along with ten alive bullets (P.2/1-10) on 06.01.2016, which were taken into possession vide recovery memo Exh.PG and Muhammad Asif accused got recovered gun 12-bore (P.3) along with five alive cartridges (P.1/1-5), secured vide recovery memo Exh.PH. According to him, on the same day, Muhammad Aslam also got recovered 12-bore double barrel gun (P.5) along with four alive cartridges (P.6/1-4) which he secured vide recovery memo Exh.PJ. On 12.01.2016 he prepared report under section 173, Cr.P.C. to the extent of accused Niaz Abbas, Muhammad Asif and Muhammad Aslam alias Mehnga by mentioning their names in column No.3 of said report. On 16.02.2016 he claimed to have arrested eight accused persons including Muhammad Aslam, Muhammad Amjad, Muhammad Iqbal, Habib, Rabnawaz, Muhammad Zafar, Muhammad Usman and Fazal Abbas and after interrogation concluded that they were neither present at the place of occurrence nor made any firing, however, they abetted the occurrence and prepared report under section 173, Cr.P.C. to their extent on 04.03.2016 by placing their names in column No.2.

According to PW.17 accused Zahoor (already declared P.O) was arrested by Mushtaq S.I. on 18.10.2016, who during investigation after making disclosure got recovered gun 12-bore repeater (P.20) along with five alive cartridges (P.21/1-5) which he secured vide recovery memo Exh.PU. On 05.11.2016 he prepared report under section 173, Cr.P.C. by mentioning the name of accused Zahoor in column No.3. Appellants along with acquitted accused were indicted for the offences under sections 302, 324, 337-A(i), 337-D, 337-F(ii), 337-F(iii), 337-F(vi), 337-L(2), 109, 148, 149, P.P.C. They pleaded not guilty and the trial commenced.

4. At trial, eighteen PWs were got examined whereas Masood Akhtar 1508/C, Muhammad Altaf, Haji Abdul Rauf, Hassan Sher, Muhammad Iftikhar, Mumtaz 871/C and Zahid Abbas, 803/C were given up being unnecessary.

5. Ocular account in this case was furnished by Qadir Bakhsh (PW.12), Mubashar Rehman (PW.13), Khadam Hussain (PW.14) and Haq Nawaz (PW.15). Parvez Ahmad 1853/C (PW.5) was witness of recoveries got effected from accused Imran alias Mani and Arif alias Haji. Sadaqat Ali (PW.6) is witness of recovery got effected by accused Rab Nawaz.

6. Medical evidence in this case was furnished by Dr. Shahid Akhtar (PW.1) and Dr. Muhammad Yousaf Siddiqui (PW.18). on 31.10.2015 Dr. Shahid Akhtar medically examined Mubashar Rehman injured and noted the following injuries on his person:-

i. A multiple firearm wound on top of head average size is about 0.5 x 0.5 cm.

ii. *A lacerated firearm wound of entry measuring 2.5 x 1 c.m. on upper part of right hip bone. Bone not exposed. No would of exit.*

iii. *Lacerated firearm wound of entry 0.5 x 0.5 c.m. on back of right forearm. There is no wound of exit. No Burning.*

According to PW.1, probable duration of injuries was about half hour and all the injuries were kept under observation for C.T. Scan, X-ray and ultra sound. He opined that there was no possibility of fabrication and all the above said injuries were by firearm weapon. Exh.PA is correct carbon copy of the Medico Legal Certificate and Exh.PA/1 is that of pictorial sketch.

On the same day at 06:00 p.m. he also medically examined Khadam Hussain and noted following injuries:-

i. *Incised wound measuring 1cm x 0.5 cm on front of head.*

ii. *Crushed wounds due to firearm burst on lower left forearm. Both radius and ulna were severly crushed and fractured. There was slight burning on wound.*

iii. *Incised wound measuring 1.5 x 1 cm near left eyebrow.*

iv. *Swelling measuring 4cm x 3cm on upper part of right shoulder and lower arm.*

In his opinion, injuries No.1 and 2 were declared as Shajjah Khafifa and injuries No.2 and 4 were kept under observation for x-rays of left forearm and right shoulder. Probable duration of injuries was about half hour. Exh.PB was carbon copy of Medico Legal Report and ExhPB/Z was pictorial diagram which bears his signature and seal.

Muhammad Sajid, injured was also medically examined by Dr. Shahid Akhtar (PW.1) on 31.10.2015 at 06:15 p.m. who noted following injuries:

i. *Firearm wound of entry 0.5 x 0.5 cm on upper part of right back. No burning tattooing.*
ii. *Incised wound measuring 3 cm x 1 cm on right upper back.*

Injuries were kept under observation for x-rays of chest. According to doctor, probable duration of injuries was about half hour and there was no possibility of fabrication. Exh.PC was carbon copy of Medico Legal Report and Exh.PC/1 was that of pictorial diagram.

Postmortem examination of Muhammad Ashraf (deceased) was conducted by Dr. Shahid Akhtar (PW.1) on 31.10.2015 at 10.15 p.m who noted following injuries on his person:

i. *Lacerated wound 4cm x 3cm on index finger of right hand. It was also fractured.*
ii. *Lacerated wound 3 cm x 1cm on base of right thumb. Bone ix exposed.*

iii. *Lacerated wound 4cm x 4cm on outer side of right hand. Bones were fractured.*

iv. *Lacerated firearm wound measuring 6.3 cm x 1cm on right side of outer part of chest with burning and tattooing. Bleeding profusely and ribs were fractured. Right lung was severely damaged. No wound of exit.*

v. *4cm x 1cm lacerated wound on right side of outer part of chest. Ribs were fractures.*

vi. *Lacerated firearm wound 1.5 x1.5cm on upper part of right side of chest with blackening and tattooing.*

vii. *Lacerated firearm wound 10cm x 2cm on right side of neck and face with burning and tattooing present.*

viii. *Lacerated wound 6cm x 4cm on right side of face including right ear+pinna was badly damaged. Facial bones and right mandible were fractured.*

ix. *Lacerated wound 10cm x 6cm on back of left forearm. Radius and ulna were fractured.*

x. *Lacerated wound of firearm measuring 0.5x0.5cm on upper part of left forearm with blackening and tattooing.*

xi. *Lacerated firearm wound of entry measuring 0.5x0.5cm on front of left thigh but no wound of exit. A metallic foreign body was recovered from site of injury No.4.*

In his opinion, injuries No.3, 4, 5, 6, 7 and 8 were cause of death due to excessive blood loss shock and cardiopulmonary arrest. These injuries were ante mortem in nature and were sufficient to cause death in ordinary course of life. Probable duration between the injuries and death was immediate and between death and postmortem was about 5 hours. Exh.PD was correct carbon copy of postmortem report and Exh.PD/1(1-2) was that of pictorial diagram.

Dr. Shahid Akhtar (PW.1) also conducted postmortem examination on the dead body of Muhammad Sher and noted following injuries:

i. *A lacerated wound measuring 8cm x 2cm on right side of heard. 9cm from right ear. Skull bones were fractured and on dissection meanings of brain and brain matter was badly damaged. Metallic foreign body was recovered from skull.*

ii. *Lacerated firearm wound of entry measuring 0.5cm x 0.5 cm on lower part of right shoulder with burning and tattooing.*

iii. *Lacerated wound of exit measuring 1cm x 1cm on upper part of right shoulder.*

iv. *Lacerated wound measuring 3cm x 1cm on ring finger of left hand. Fracture of ring finger of left hand.*

v. *Lacerated wound measuring 2cm x 1cm on right back bleeding profusely.*

vi. *Lacerated wound measuring 4cm x 2cm on right back. Bleeding profusely.*

According to doctor injury No.1 was the main cause of death due to head injury damaged the membranes and brain matter. These injuries were ante-mortem in nature and sufficient to cause death in ordinary course of life due to cardiopulmonary arrest and death. Probable duration between injury and death was immediate and between death and postmortem was about 6 hours. Exh.PE was correct carbon copy of postmortem report and Exh.PE/1(1-2) was that of pictorial diagram which bears his signature and seal.

According to Dr. Shahid Akhar (PW.1) he also conducted autopsy on the dead body of Tahir Abbas (deceased) on the same date at 11:45 p.m. and noted following injuries:

i. *Lacerated firearm wound of entry 1.5 cm x 0.5 cm on left side of chest near left nipple at level of heart with burning.*

ii. *Lacerated firearm wound of exit measuring 5cm x 4cm near left side of neck.*

iii. *Lacerated wound of entry measuring 0.5cm x 0.5cm in the middle of chest with burning.*

iv. *Lacerated wound 2cm x 1cm in the inner side of left forearm.*

v. *Lacerated wound of entry 0.5cm x 0.5cm on left shoulder with burning.*

vi. *Lacerated wound 3cm x 2cm in the middle of back bleeding profusely (exit wound of injury No.3).*

vii. *Lacerated wound measuring 1cm x 1cm on right back (wound of entry).*

viii. *Lacerated wound of exit 4cm x 2cm on left back. (exit wound of injury No.7).*

ix. *Lacerated wound 6cm x 2cm on the back of neck. Cervical Vertebra is broken.*

Opinion of Dr. Shahid Akhtar (PW.1) was as under:

"In my opinion, injuries No.2, 3, 6, 8 and 9 are main cause of death. Injury No.3 was at heart level badly damaged heart. There was profession of blood from these injuries. This led to shock and cardiopulmonary arrest and death. These injuries were ante-mortem in nature and sufficient to cause death in ordinary course of nature.

Probable time that elapsed between injury and death was immediate and between death and postmortem was about 7 hours.

Probable time that elapsed between injury and death was immediate and between death and postmortem was about 7 hours."

7. Muhammad Ashraf, A.S.I. (PW.2) was witness of recovery got effected from the appellants. Muhammad Khalid 344/MHC (PW.3) being Moharar received case property for safe custody in Maalkhana. Nasar Hayat (PW.4) identified the dead body of Tahir Abbas deceased. Muhammad Hafeez, Draftsman (PW.5) prepared scaled site plan Exh.PL and Exh.PL/1. Saji Ullah (PW.6) collected mobile data of 8 accused persons and handed over to Masood Akhtar 1508/C. Masood Akhtar (PW.7) escorted dead bodies of deceased persons to hospital. Arshad Hussain, A.S.I. (PW.9) deposited three sealed parcels of blood stained earth in the office of Punjab Forensic Science Agency, intact. Nasar Hayat (PW.10) identified dead body of Muhammad Sher deceased. Muhammad Razzaq, A.S.I.

(PW.11) deposited in the office of Punjab Forensic Science Agency sealed parcel of repeater 12-bore along with five alive cartridges. Mushtaq Ahmad, S.I. (PW.16) arrested accused Zahoor on 18.10.2016. Rest of the witnesses are formal in nature.

8. Learned Deputy District Public Prosecutor after tendering in evidence reports of Punjab Forensic Science Agency regarding firearms (Exh.PHH) and (Exh.PJJ), closed prosecution evidence.

9. Statements of appellants and the accused who were acquitted were recorded under section 342, Cr.P.C on 09.05.2019. All of them controverted and denied the allegations of facts so put to them from the evidence of PWs and mainly professed their innocence. The appellants did not opt to appear as their own witness under section 340(2) Cr.P.C., however, some of them opted to produce defence evidence and learned defence counsel by producing copy of application by the complainant to DPO, Sargodha for recovery of two repeaters, bags, sixty cartridges and a license as Mark-A, copy of statement of Muhammad Ashraf s/o Haji Abdul Rehman as Mark-B, copy of complaint under section 324, 148, 149, Police Station Shahpur City as Mark-B/1, copy of report No.17 dated 24.08.2014 of Police Station Shahpur City as Mark-B/2, copy of F.I.R. dated 24.08.2014 u/s 324, 148, 149, P.P.C., Police Station Shahpur City, mark-B/3, certified copy of F.I.R. dated 03.02.1973 under section 307, 34, P.P.C. Police Station Shahpur Sadar, Esh.DD, certified copy of F.I.R. No.62 dated 19.03.1973 u/s 307, 320, 34, P.P.C. , Police Station Shahpur Sadar as Exh.DE, certified copy of F.I.R. No.130 dated 18.07.2005, under section 302, 324, 148, 149, 109, P.P.C., Police Station Shahpur Sadar Exh.DF, certified copy of F.I.R. No111 dated 05.09.2004, under section 302, 324, 34, P.P.C., Police Station Shahpur City Exh.DG,

certified copy of complaint titled Qadir Bakhsh v. Muhammad Ijaz and others under section 302, 324, 148, 149, P.P.C., Police Station Shahpur City as Exh.DH, certified copy of application under section 22-A and 22-B Cr.P.C. for registration of case Exh.DI, certified copy of report of RESCUE 1122 with regard to the occurrence dated 31.10.2015 as Exh.DJ closed defence evidence vide his statement recorded on 13.05.2019. In answer to the question "Why this case against you and why the PWs deposed against you", all the appellants replied as under:-

> *"I have been falsely implicated in this case and the PWs have deposed against me being close relative of one Allah bakhsh since dead, head of his party and main opponent and rival of Qadir Bakhsh complainant. Detailed answer had been given in response to question No.2.*"

10. On conclusion of trial, appellants were convicted and sentenced as detailed in the opening paragraph of this judgment.

11. We have heard learned counsel for the parties, learned Deputy Prosecutor General and gone through the record with their able assistance.

12. The tragic incident in which three persons lost their lives and three became seriously wounded as per prosecution case took place on 31.10.2015 at about 04:30 p.m. and F.I.R. was shown to be lodged at 05:00 p.m. on the same day on the statement of Qadir Bakhsh and after registration of case Imtiaz Ahmad S.I. (PW.17) said to have proceeded to the spot along with other officials and on his arrival he found three dead bodies lying at the spot whereas Mubashar Rehman,

Khadim Hussain and Muhammad Sajid injured were already sent to THQ Hospital Shahpur Saddar for medical treatment. Haq Nawaz (PW.15), however, during the course of his examination-in-chief stated that they took the injured from the car and then police reached at the place of occurrence and police took the injured to hospital on rickshaws. Qadir Bakhsh (PW.12), in his examination-in-chief stated that after the occurrence when accused persons managed their escape good from the spot, he along with Haq Nawaz and Muhammad Altaf attended the injured and deceased. According to him, Sajid Butt, Khadim Hussain and Mubashar Rehman when were attended by them, they were in serious injured condition and shifted to hospital for medical treatment. According to PW-12, he after leaving Haq Nawaz and Muhammad Altaf with the dead bodies went to police station to report the matter. This PW, during the course of his cross-examination contradicted his own stance qua shifting of injured to hospital for treatment in the way that during the course of cross-examination, he deposed that police reached at the place of occurrence at about 5:00 P.M and when police reached at the place of occurrence, the injured were there in senses and crying and they were transported through a rickshaw to hospital in the company of police. If it was so, then non-recording of any statement of the witnesses including three injured persons at the spot would indeed be fatal to the prosecution story qua the presence of complainant and PWs at the spot. One of the injured witnesses namely Mubashar Rehman when appeared as PW-13, he in his examination-in-chief merely gave a vague statement qua the shifting of injured witnesses including himself to hospital for medical treatment; he did not state at all the mode, manner and the persons who shifted them to hospital. He, however, during the course of his cross-examination stated that having received injuries, he remained conscious, however, could not tell as to when police reached at the

spot. According to him, they were immediately shifted to hospital on two rickshaws with the help of Haq Nawaz, Altaf and Qadir Bukhsh. This stance of injured PW-13 is totally different from deposition of complainant PW-12 that was brought on the record during the course of cross-examination. He further stated in his cross-examination that after reaching the hospital, police came there and met them and his statement was recorded on 02.11.2015 on the third day of occurrence in DHQ hospital, Sargodha. Statement of another injured witness Khadim Hussain who appeared as PW-14 is also discrepant and in conflict with the deposition of other witnesses qua their shifting to hospital. He during the course of his cross-examination made certain improvements and same were duly got confronted from his previous statement and the same will be dealt with in upcoming paragraphs. According to PW-14, all three injured witnesses were shifted to hospital after the occurrence. He too did not furnish the details qua mode and manner of their shifting from the spot to hospital. He during the course of cross-examination stated that after receipt of injuries, he was well oriented and conscious and they reached hospital at 5:30 P.M. According to him, they were shifted to hospital on a rickshaw. He further deposed that just after his arrival at hospital, police reached at hospital and he was still conscious. Haq Nawaz PW-15, in his examination-in-chief stated that they took injured from the car and then police reached at the place of occurrence and police took the injured on the rickshaws. Either Investigating Officer was lying or injured witnesses of ocular account and PW-15 were concealing the real facts qua the shifting of injured persons to the hospital. Even evidence of ocular witnesses in this regard, as hinted earlier, was discrepant. We have further noticed that according to PW-12 it was he who along with Haq Nawaz and Muhammad Altaf shifted the injured on the rickshaw and the clothes of Haq Nawaz and Muhammad Altaf were stained with

blood and they produced their clothes before the Investigating Officer, however, no such clothes ever were taken into possession by the Investigating Officer or produced before the Court at trial. Had such clothes been taken into possession and dispatched to laboratory for grouping with the blood stained clothes of the deceased, the same would have lent strongest corroboration to the evidence of Haq Nawaz PW-15 showing his presence at the spot. Said omission also struck at the roots of the case of prosecution. Guidance in this regard has been sought from the dicta laid down in case reported as **"***Azhar Abbas and another v The State and others)* **(2019 MLD 1808 Lahore).**

13. According to the Investigator Imtiaz Ahmad SI PW.17, a private vehicle was arranged and dead bodies of three deceased were handed over to Masood Akhtar 1508/C along with relevant papers for autopsy. According to him, he recorded the statements of witnesses of ocular account and also interrogated complainant. He further deposed that it was on 02.11.2015 when he recorded statements of injured PWs under section 161 of the Cr.P.C. after getting permission from Medical Officer, DHQ Hospital, Sargodha. According to Dr. Shahid Akhtar (PW.1), Mubashar Rehman, Khadim Hussain and Muhammad Sajid were medically examined at 05:45 p.m., 06:00 p.m. and 06:15 p.m. Injury statements of all the three injured witnesses were shown to be prepared by the Investigating Officer at THQ Hospital Shahpur Saddar, however, Investigating Officer did not record the statements of injured witnesses. As per Dr. Shahid Akhtar (PW.1) two injuries i.e injuries No.1 and 3 on the person of Khadim Hussain injured were found to be incised wounds. Similarly injury No.2 on the person of Muhammad Sajid PW was also an incised wound. Muhammad Sajid injured PW was given up being won-over by the other side and Khadim Hussain (PW.14) in the whole of his examination-in-chief could not

justify that how he received incised wounds on his person. He merely deposed that he was injured by fire shots made by Muhammad Asif hitting on his right arm and face. Statement of Khadim Hussain PW qua injuries present on his person could not be substantiated from the medical evidence as PW-1 noticed injuries No.1 & 3 and describe the same as incised wounds and only injury No.2 was shown to be caused by fire arm, whereas 4th injury present on the person of Khadim Hussain (PW.-14) was a swelling on the upper part of right shoulder and lower arm. During the course of his cross-examination this PW stated that they were shifted to hospital on a rickshaw. It is simply incomprehensible that when complainant was shown to be present on his car at the spot and witnessed the occurrence why the injured PWs were not immediately shifted to hospital on his car to provide them medical treatment in order to save their lives. This fact gives rise to strong presumption that neither complainant nor the witnesses Haq Nawaz and Muhammad Altaf were present at the spot at relevant time. According to Khadim Hussain (PW.14) when police reached at the hospital he was conscious but his statement was not recorded by the Investigating Officer at that time and his statement was recorded on 02.11.2015. According to investigator Imtiaz Ahmad SI (PW.17), it was on 02.11.2015, when he moved an application to Medical Officer D.H.Q. Hospital Sargodha seeking permission to record statements of injured under section 161 Cr.P.C and after getting permission recorded their statements. No plausible justification, however, was furnished qua belated recording of statements of injured PWs despite the fact that they were conscious when their injury statements were prepared by the Investigating Officer at T.H.Q. Hospital Shahpur Saddar. The belated recording of the statements of injured PWs would reduce their value to nil and no explicit reliance can be placed on such statements particularly where no reason was forthcoming justifying recording of

their statements belatedly. Reliance in this regard may safely be placed on case titled "*Bashir Muhammad Khan vs. The State"***(2022 SCMR 986).**

14. Mubashar Rehman injured witness when appeared as PW.13 he besides giving narration of the witnesses of ocular account deposed that he received injuries on his right flank and arm in the result of indiscriminate firing made by all the accused persons. According to him he remained conscious after receiving firearm injuries. According to this PW, they were shifted to the hospital on two rickshaws with the help of Haq Nawaz, Muhammad Altaf and Qadir Bakhsh. Still at the cost of repetition the question that if Qadir Bakhsh was present at the spot on his car then why the injured persons were not shifted to the hospital for medical treatment on the said car remained unanswered throughout. This circumstance too creates doubt qua the presence of Qadir Bakhsh and two other PWs at the spot particularly where PW.12 Qadir Bakhsh during the course of his cross-examination stated in categorical terms that till the arrival of police the car used by him remained in his possession. Qadir Bakhsh who is complainant of this case during the course of his examination in chief stated that he along with Altaf and Haq Nawaz saved their lives by taking shelter of wall and witnessed the occurrence. He during the course of his examination in chief admitted it correct and enmity between the parties started in the year 1972 and he was head of his group whereas other party was headed by Allah Bakhsh father of accused Ejaz. According to him accused did not see him at the place of occurrence. It is simply unbelievable that the head of complainant party was present at the spot and also claimed to have witnessed the occurrence and in the wake of previous enmity he would have been the main target being head of the group but he was spared by his opponents. Had complainant been

present at the spot as claimed by him, he would have been the prime target of his opponents and there would have been no question of leaving him alive so that he may become a witness of ocular account against the persons belonging to his fast foe particularly when Haq Nawaz PW-15 in his cross-examination stated that when the firing started Qadir Bakhsh and accused were facing each other. We have further observed that presence of complainant along with witnesses has also been reflected in site plan very close to the deceased as well as complainant and very much within the firing range of as many as thirteen duly armed assailants belonging to the rival group. There is no explanation on the record as to why deceased and injured witnesses from the complainant's side alone were targeted by the accused when their main target i.e. complainant was also available at the place of occurrence. Such conduct of assailants and even complainant negates the prosecution story as set up in Exh:PV qua the presence of complainant at the spot. Guidance has been sought from the case *Zahir Yousaf and another v. The State and another* **(2017 SCMR 2002)**.

15. There is yet another important aspect of the matter that needs to be considered at this juncture. Haq Nawaz PW-15 during the course of his examination-in-chief only named out Ijaz Ahmad, Fazal Abbas, Muhammad Aslam and Amjad (since all acquitted) by ascribing them specific role of making fire shots hitting on the persons of deceased. He then deposed in a vague term by stating in his examination-in-chief that accused persons started indiscriminate firing. He in the whole of his examination in chief did not name out any of the accused except four accused persons as referred in the preceding lines. He simply omitted to name out any of the appellants. Evidence of this PW, therefore, can conveniently be put aside and in no way be made basis for the conviction of appellant. We, therefore,

are of the considered view that evidence of ocular account is neither trustworthy nor confidence inspiring to maintain the conviction of appellants on the capital charge. So far as submission of learned counsel for the complainant that injured PWs namely Mubashar Rehman (PW.13) and Khadam Hussain (PW.14) had sustained injuries on their persons, therefore, their evidence cannot be brushed aside as their presence cannot be doubted at the spot, is concerned, it may be observed that mere stamp of injuries on their persons does not make them truthful witnesses. It is, in fact the intrinsic worth of a witness which is evaluated by a court of law. It is by now a settled principle that injuries on the person of PWs may merely indicate qua their presence at the spot but same in no way can be counted as affirmative proof of their credibility and truth. Even in case "*Amin Ali and another vs. The State"* (**2011 SCMR 323)** it was observed by the apex Court that presence of injured witnesses cannot be doubted at the place of incident but the question was whether they were truthful witnesses or otherwise because merely the injuries on their person would not imprint them as truthful witnesses. In the instant case, two eye witnesses namely Mubashar Rehman (PW.13) and Khadam Hussain (PW.14) are the injured and injuries on their persons indicate that they may be present on the spot, however, this fact by itself, in view of the aforementioned circumstances, would hardly show that they were telling the true picture of the incident. As hinted earlier, injuries on the person of Khadim Hussain (PW.14) even are contradicted with the evidence of ocular account including his own evidence. It has been settled by the apex Court in case "*Qaisar Mehmood and another vs. The State"* (**2021 SCMR 662)** that direct evidence furnished even by the injured witnesses that apparently have no axe to grind, still can be dismissed if the same otherwise is found lacking the ring of truth. In

the instant matter, we are of the considered view that evidence of even injured witness hardly rings true.

16. It may further be noticed that Khadim Hussain (PW.14), during his examination-in-chief made certain improvements which can very conveniently be considered as dishonest improvements causing serious aspersions on the veracity of deposition made by this injured PW. He during the course of his examination-in-chief stated that from *Ahmad Da Lok* they were coming to their village; that firing continued for 6/7 minutes; that after the occurrence Niaz Abbas checked them and after being satisfied he took away their two guns; that people of the locality gathered there; that they were shifted to hospital. All these assertions were duly confronted to this PW during the course of cross-examination. Stance qua taking away guns belonging to complainant side by the assailants was even not supported by evidence of recovery from any of the appellants. Similarly, PW-15 Haq Nawaz, in his examination-in-chief narrated certain facts which were not mentioned in his statement recorded under section 161 of Cr.P.C and he was duly got confronted from his previous statement made before the police under section 161 of Cr.PC during the course of cross-examination. According to PW-15, on the fateful day he along with Muhammad Ashraf, Khadim Hussain, Mubashar, Tahir, Muhammad Sher, Qadir Bakhsh and Altaf had gone to *Ahmad Da Lok* for *Faateha Khawni*; that on return when they reached *Roda Tibba*, Sajid injured PW was standing on the road and stopped the car of Ashraf and boarded the same; Sajid was driving the car; that when they reached at a distance to 2/3 feet from *Ichar Adda*, the accused persons waylaid them; that accused persons already arranged *Tharra* on the road; that Amjad fired with repeater which hit at the right arm and near eye of Khadim Hussain; that after making satisfaction accused persons

while brandishing their weapons go to their home; that Qadir Bakhsh, Altaf and he were at a short distance and rushed at the place of occurrence, came near the car, opened the doors of car; that they took injured from the car and police reached at the place of occurrence; that injured Mubashar, Sajid and Khadim were taken to hospital for treatment by Rauf and Masood and that police took dead bodies in their possession. All these depositions were also got confronted with Exh:DC wherein same were not recorded. These improvements indeed were dishonest improvements reacting against the truthfulness of the witnesses of ocular account. It is by now settled principle of law that if improvements are found to be deliberate and dishonest, same would cast doubt on the veracity of the testimony of such witness of ocular account and no reliance can be placed on such testimony for conviction on a charge entailing death penalty for the simple reason that when a witness makes dishonest improvements while deposing before the court, he simply exposes himself to his own dishonesty that *ipso facto* is sufficient to discard his evidence by counting him a dishonest person. Reliance in this regard may safely be placed on *"Fida Hussain and another v. The State and another"* **(2021 P Cr. L J 174).**

17. We have also noticed that Fazal Abbas, Amjad Iqbal and Muhammad Aslam were assigned a specific role in Exh:PV and all the witnesses of ocular account have deposed accordingly at trial, however, all the said accused persons were acquitted by learned trial court and their acquittal has not been assailed by filing any appeal. So the findings of learned trial court qua disbelieving the witnesses of ocular account to the extent of above said co-accused had attained finality. Even otherwise, we are tempted to observe that witnesses of ocular account have given very minute details of the occurrence which can hardly be given by a human particularly when they were under

sudden murderous assault by their opponents. Injured PWs in the instant case have also opted to give the minute details qua the occurrence by specifically assigning firearm injuries to Muhammad Ejaz, Fazal Abbas, Muhammad Aslam, Amjad and Muhammad Asif of whom Fazal Abbas, Amjad and Muhammad Aslam were acquitted. Photographic narration of the occurrence by assigning specific roles to each accused including appellants, in such precise terms and with accuracy, was highly improbable rather beyond the feat of human intellect, particularly in a situation as portrayed by complainant himself qua the occurrence. When whole of the prosecution evidence is seen and assessed in the above backdrop, possibility cannot be ruled out that complainant might have thrown the noose wide enough to implicate as many as thirteen persons of his opponents. In such situation, principle of safe administration of criminal justice requires extending of benefit of doubt to the appellants particularly where majority of co-accused persons was acquitted on the same set of witnesses who did not come up with the whole truth, as such their evidence could not be used for convicting some of the accused keeping in view the principle as enshrined in maxim '*falsus in uno falsus in omnibus'* and most importantly in a case where truth was mixed very heavily with something which was untrue and the prosecution witnesses did not disclose true and real facts. In these circumstances, it would become almost impossible to separate the truth from the heap of falsehood, leaving the Court with no other option but to acquit the remaining accused persons by extending them benefit of doubt. Reliance in this regard may safely be placed on case *"Rajmeer Khan and another vs. Noor-ul-Haq and others*" **(2019 SCMR 1949).** It may not be out of context to observe here that as per saying of the Holy Prophet (Peace Be Upon Him), the mistake in releasing a criminal is better than punishing an innocent person. Same principle was also

followed by the Hon'ble Supreme Court of Pakistan in the case of "*Ayub Masih v. The State"* **(PLD 2002 SC 1048)**, wherein apex Court was pleased to observe that prosecution was obligated to prove its case against accused and if prosecution fails then accused was entitled to get benefit of doubt as a right and Apex Court quoted the saying of Holy Prophet that ***'mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing in innocent'***, and making reference to the maxim of relating jurisprudence, that ***'it is better that ten guilty persons be acquitted rather than one innocent person be convicted'.***

18. So far as recovery of firearm and positive report of Punjab Forensic Science Agency is concerned same is simply inconsequential in view of the fact that crime empties were shown to be recovered from the spot on 31.10.2015, however, the same were shown to be dispatched to the office of Punjab Forensic Science Agency on 18.01.2016 after the arrest of appellants namely Niaz Abbas, Muhammad Asif and Muhammad Aslam on 30.12.2015. Positive report, if any, qua these three appellants, therefore, was of no avail to prosecution. Reliance in this respect may safely be placed on case *Muhammad Amin v. The State and another* **(2019 SCMR 2057)**. Even otherwise, evidence of recovery is always considered as a supportive and corroborative evidence and where evidence of ocular account has been disbelieved even positive report of Punjab Forensic Science Agency would lend no support to the prosecution case as no one can be convicted merely on the basis of positive report qua matching of fire arms with the crime empties.

19. As regards motive, admittedly it is always considered a double edged weapon which cuts both ways. It can be used by the accused to take revenge and at the same time can be a tool used by the

complainant for false charge as well. Although it was not necessary for prosecution to set up motive, yet once it is alleged, it becomes the duty of the prosecution to prove the same and in case of failure to prove the same that will adversely affect case of the prosecution. It may further be observed that when evidence of ocular account has been disbelieved, no reliance even can be placed on the evidence of motive, even if proved for the simple reason that proving of motive alone is not sufficient to provide a justifiable basis for the conviction of an accused on a capital charge.

20. We now advert to the very crucial aspect of the matter which vividly demonstrates irresponsible, inefficient and casual behavior of the Investigator of this case that also contributed in spoiling of the whole prosecution case. There is no denial to a settled principle of law that the sole purpose of the First Information Report is to put the machinery of criminal law into motion without any loss of time and it is equally an accepted principle of law that FIR is not substantive piece of evidence unless it is used as dying declaration. FIR is a document that discloses facts qua the occurrence as initially known to the informant and it lays foundation of the case so as to provide clue for investigation by the police. It does not require to contain all minute details about the occurrence as same is not an exhaustive document so as to contain each and every minor details of an incident. There is hardly any need to furnish a photographic version in the FIR with a computer like exactitude for the simple reason that same cannot be expected to be given by a human. Main purpose of the contents of FIR is that investigation be commenced by the police after incorporating the said report in the relevant register if same discloses commission of a cognizable offence under section 154 of the Cr.P.C. After registration of an FIR it is the bounden duty of Investigating Officer to find out the

truth of the matter. The true import and object of the investigation is to discover the actual facts of the case and to round up the real offenders and bring them to justice in accordance with law. The powers and duties of the investigator indeed are exercised as a trust by the State and investigator who has vast powers so as to unearth the truth of the matter is required to perform his duties honestly, vigilantly and impartially by collecting evidence and to arrest the real culprits. There is also no cavil with the proposition that fair, impartial and transparent investigation is mandatory even in view of the concept of fair trial as guaranteed by the provisions of Article 10(A) of the Constitution of Islamic Republic of Pakistan, 1973. Guidance in this regard may be sought from the case of "*Bank of Punjab and another v. Haris Steel Industries (Pvt.) Ltd. and others*" (**PLD 2010 SC 1109**) wherein it was observed as under:-

> *"30. ……..Needless to say that it is evidence and evidence alone which could lead a court of law to a just and fair conclusion about the guilt or innocence of an accused person. It is, therefore, only an honest investigation which could guarantee a fair trial and conceiving a fair trial in the absence of an impartial and a just investigation would be a mere illusion and a mirage. It is, hence, only a fair investigation which could assure a fair trial and thus any act which ensures a clean investigation which is above board, is an act in aid of securing the said guaranteed right and not in derogation thereof....."*

Investigating Officer during the course of investigation is required to collect all relevant evidence irrespective of the fact that any evidence favours either prosecution or accused. He in all circumstances is under statutory duty to collect the evidence honestly and fairly so as to bring the truth on the record so that court after recording evidence may reach at a just and fair conclusion. In case investigation is not conducted honestly and fairly, it would indeed militate against the concept of fair trial as guaranteed by Article 10(A) of the Constitution. It may not be out of context to refer here rule 25.2 of the Police Rules, 1934 (hereinafter referred to as Police Rules) that deals with the powers and privileges of police officer carrying out investigation and same is reproduced hereunder for the facility of ready reference:-

> "25.2 Power of investigating officer.---
> (1) The powers and privileges of an police officer making an investigation are detailed in section 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."

Duties of the police qua investigation have further been defined in section 4 of the Police Order, 2002 (hereinafter referred to as Police Order) and according to same subject to law it shall be the duty of every police officer to detect and bring offenders to justice besides apprehending all persons whom he is legally authorized to apprehend and for whose apprehension sufficient grounds exist. Whereas in the instant case investigator Imtiaz Ahmad, S.I. while appearing as PW.17 during the course of his cross examination admitted it correct that as per his investigation Sharafat Hussain Faqir, Junaid alias Joni and Muhammad Younas were accused of the incident but the complainant and PWs were not ready to depose against them or to make statements against them. Justification so put forth by the investigator qua non-arrest of these three persons reflects incompetency of the investigator. He according to the provisions of Police Order and Police Rules in no way was bound by the statements of complainant and PWs and if he during the course of investigation came to the conclusion that real culprits were some other persons, he was fully competent to round them up, collect evidence and bring them to justice. The investigator in the instant case instead of rounding up the real culprits responsible for taking three precious lives proceeded to submit report under section 173 of Cr.PC merely on the wishes of the complainant and finally eight of the accused persons earned acquittal from the learned trial court and four are going to be acquitted by this Court. The investigator during the course of his examination in chief deposed that according to his findings accused Muhammad Aslam, Muhammad Amjad, Muhammad Iqbal, Habib, Rab Nawaz, Muhammad Zafar, Muhammad Usman and Fazal Abbas were neither present at the place of occurrence nor they made any firing. According to him they abetted the occurrence and facilitated the main accused in commission of alleged occurrence and according to him he submitted report under section 173 of the Cr.P.C.

by placing the names of above referred accused persons in column No.3 of the challan. He during the course of cross examination, however, admitted it correct that no evidence with regard to date, time and place qua abetment of the above hinted accused was either produced before him or he could collect the same during the course of investigation. On one hand the investigator failed to collect some tangible evidence against Muhammad Aslam, Muhammad Amjad, Muhammad Iqbal, Habib, Rab Nawaz, Muhammad Zafar, Muhammad Usman and Fazal Abbas qua their involvement only to the extent of abetment and on the other, failed to apprehend the culprits namely Sharafat Hussain, Faqir, Junaid alias Joni and Muhammad Younas who according to him were the accused of the occurrence. It was the duty of investigator to have discovered the actual facts, collected the evidence and even arrested the real culprits but investigator in the instant case seems to have failed to discharge his duties as required under the provisions of Police Rules and Police Order. It may not be out of context to further mention here that Investigating Officer is not a formal witness. He is very important witness not only for the prosecution but also for the defence. Similarly, being a neutral authority the duty of investigator is to uncover the real truth of the matter. In the instant case, deposition so made by the investigator indeed was fatal to prosecution case but still he was not declared hostile and was not cross examined to assess the truthfulness of his deposition that was made before Court when he was under oath.

21. So far as submission of learned counsel for the complainant that instant was a heinous crime in the result of which three persons lost their lives and three others were injured is concerned it may be observed that mere heinousness of the crime cannot detract the court of law in any manner from the due course to judge and make

the appraisal of evidence as per accepted principles of appreciation of evidence so propounded by the Superior Courts. Heinousness of crime alone in absence of confidence inspiring evidence to prove the charge against accused beyond any shadow of doubt, would hardly be sufficient for making the same a lawful basis for conviction of accused if charge has not been proved through the produced evidence beyond the shadow of reasonable doubt. Guidance has been sought from case law titled "*Najaf Ali Shah vs. The State"* **(2021 SCMR 736)**.

22. Prosecution case, in view of above discussion, is replete with many doubts, benefit of the same would be extended to the appellants not as a matter of grace but as a matter of right. In case of *Abdul Jabbar v The State* **(2019 SCMR 129)**, august Supreme Court held as under:-

> *".....It is the settled principle of law that once a single loophole is observed in a case presented by the prosecution much less glaring conflict in the ocular account and medical evidence or for that matter where presence of eye-witnesses is not free from doubt, the benefit of such loophole/lacuna in the prosecution case automatically goes in favour of an accused. . . . ."*

23. The upshot of above discussion is that prosecution hopelessly failed to prove its case against appellants. Findings of conviction recorded against appellants by learned Additional Sessions Judge, Sargodha in the impugned judgment are not sustainable, which are hereby set aside allowing Criminal Appeals No.36092 of 2019. Consequently, appellants Niaz Abbas alias Muhammad Nawaz,

Muhammad Asif, Muhammad Aslam alias Mehnga and Muhammad Zahoor are acquitted of the charge extending benefit of doubt to them. Appellants are in jail. They are ordered to be released forthwith if not required to be detained in any other case.

24. **Murder Reference No.150 of 2019** is answered in **NEGATIVE** and the Death Sentence awarded to appellants Niaz Abbas alias Muhammad Nawaz, Muhammad Asif, Muhammad Aslam alias Mehnga and Muhammad Zahoor is **not confirmed**.

25. Before parting with the judgment, we are constrained to observe with a level of concern that standard of investigation in the instant case was on its lowest ebb. The purpose of promulgating Police Order was to reconstruct and regulate the police but same has yet to see the day of light. Matter qua defective, faulty and dishonest investigation is required to be dealt with vigorously as per the provisions of relevant law. We are, therefore, constraint to direct Inspector General of Police, Punjab to pass necessary direction to the Investigators to adhere to the relevant provisions of law as contained in Police Order and Police Rules in respect of conducting investigation and in case of any dereliction from the same to initiate proceedings against them in accordance with law so as to made them an example for others in the police force in order to ensure non-recurrence of any lapse while conducting investigation. Inspector General of Police, Punjab is further directed to initiate appropriate proceedings against the delinquent investigator of the instant case, in accordance with law. Keeping in view the peculiar facts and circumstances of the instant case, we are also constrained to direct Regional Police Officer, Sargodha to depute an upright, competent and honest officer not below the rank of DSP so as to reach the bottom of the truth and to book the real culprits responsible for the murder of three persons so that the

confidence of public may not be shaken and justice delivery apparatus is strengthened and submit fresh report under section 173 of Cr.PC, if sufficient evidence is collected during the course of investigation in accordance with law against Sharafat Hussain, Faqir, Junaid alias Joni and Muhammad Younas who according to I.O were the real perpetrators of the crime, under the supervision of District Police Officer, Sargodha. Office is directed to transmit copy of this judgment to Inspector General of Police, Punjab, Lahore and Regional Police Officer, Sargodha, for compliance and necessary action.

26. We also acknowledge the valuable contribution made by Mr. Muhammad Waqas Sana, Civil Judge/Research Associate at Lahore High Court Research Centre.

(SYED SHAHBAZ ALI RIZVI)
JUDGE

(SHAKIL AHMAD)
JUDGE

2023 LHC 5417

Case No. **Crl. Misc. No. 21405-B of 2023**

Muhammad Yar alias Mumna **Versus** *The State and another*

Sr. No. of order/ Proceedings	Date of order/ Proceedings	Order with signatures of Judge, and that of parties or counsel, where necessary.

21.09.2023 Rai Muhammad Nawaz Kharal, Advocate with petitioner.

Ch. Muhammad Mustafa, Deputy Prosecutor General with Ashraf, ASI.

After dismissal of his pre-arrest bail petition by learned Additional Sessions Judge, Tandlianwala *vide* order dated 31.01.2023, instant petition has been filed under section 498 of the Code of Criminal Procedure, 1898 (Cr.P.C.) by Muhammad Yar *alias* Mumna petitioner seeking pre-arrest bail in case F.I.R. No.429 of 2022 dated 30.07.2022 registered at Police Station Sadar Tandlianwala District Faisalabad for the offence under section 379 of the Pakistan Penal Code, 1860 (PPC).

2. Prosecution story, in precise terms, as per the contents of F.I.R. is that on 24.05.2022 ox valuing Rs.3,00,000/- belonging to the complainant was found to be stolen from his cattle shed and on uproar of the complainant, Muhammad Aslam and Bashir Ahmad along with many others came at the spot and they noticed and tracked footprints of three persons that stood vanished on the metalled road. He, however, kept searching and suspicion arose against petitioner and another who after reluctance admitted in presence of PWs to have

committed the theft and promised to return the ox but subsequently refused.

3. Having heard learned counsel for the petitioner, learned Deputy Prosecutor General and upon tentative assessment of the record, it has been noticed that incident of larceny of ox belonging to complainant that took place on 24.05.2022 was unwitnessed and subsequently suspicion was raised against petitioner along with Shabal alias Shabli. According to contents of F.I.R. present petitioner and his co-accused after some reluctance confessed to have committed theft and promised to return the stolen ox but subsequently refused, where-after F.I.R. was lodged on 30.07.2022 after more than two months and this inordinate delay remained unexplained. Learned Deputy Prosecutor General argued that since petitioner is named in the F.I.R. and recovery of ox is to be effected from him, he is not entitled to the grant of extraordinary relief of pre-arrest bail. However, on query by this Court, learned DPG remained unable to point out any admissible and legal evidence collected by the Investigator during investigation to connect the petitioner with the commission of alleged crime. According to him, there is no possibility of availability of any direct evidence in such like cases and there is likelihood of recovery of stolen cattle from petitioner during investigation which may connect the petitioner with the commission of alleged crime. The argument of learned DPG that allegation of theft can hardly be proved through direct evidence in most of the cases appears to be tenable, however, it does not mean that prosecution would stand absolved from its duty of proving allegation of theft through other incriminating material. Therefore, remaining stance of learned DPG is not tenable in view of peculiar facts and circumstances of the instant case insofar as no direct or indirect evidence whatsoever is available with the prosecution to link the petitioner with the alleged crime. Person of an

accused cannot be given in the custody of police for effecting any recovery where in the first place no positive, tangible either direct or indirect evidence is available with the investigator to connect the accused with the commission of crime falling within the purview of section 379 of PPC. Reliance in this regard may safely be placed on case *"Aamir Bashir and another v. The State and others"* (**2017 SCMR 2060**) wherein somewhat similar sort of objection raised by Advocate General was repelled by the apex Court with the following observations: -

> *"The plea of the Advocate General that the investigating agency has been deprived to interrogate both the petitioners for the recovery of the crime pistol and to collect further evidence after getting their custody, is not acceptable in the circumstances of the case. Moreover, this Court time and again has held that this could not be a ground for refusal of pre-arrest bail because the police has to use proper skills of investigation while interrogation inside the lockup of the police station or inside the police station would make a very little difference".*

Mere bald allegation of theft is not sufficient for holding the petitioner liable for the commission of alleged crime. In case of non-availability of direct evidence, the investigator is required to have collected even some circumstantial or indirect evidence during the investigation to justify arrest of the petitioner in the instant case. No details whatsoever have been given by the complainant that how and under what circumstances he gathered suspicion against the petitioner. Mere allegation of theft in the incident that admittedly was unwitnessed, without disclosing the source and the details on the basis of which complainant gathered the suspicion that it was the petitioner who committed the theft, would not be sufficient to connect the petitioner with

the commission of alleged crime. There is no cavil with the proposition that a police officer under the provisions of section 54 of the Cr. P.C. possesses the power to arrest a person who has been involved in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned. At the moment, there exists only a suspicion that too in the mind of complainant against the petitioner. Assertion of complainant that petitioner along with his co-accused confessed to have committed theft of ox and promised to return the same, even cannot be considered to be extra judicial confession by the accused. In case *"Mst. Sughran Bibi v. The State"* (**PLD 2018 SC 595)**, the august Supreme Court of Pakistan observed that a suspect is not to be arrested straightway unless situation on the ground so warrants and the arrest is to be deferred till sufficient material or evidence becomes available on record of investigation *prima face* satisfying the Investigating Officer regarding correctness of allegation leveled against such suspect or regarding his involvement in the crime in issue. In another case titled "*Shahzada Qaiser Arfat alias Qaiser v. The State and another"* **(PLD 2021 SC 708),** the apex Court observed that having a power to arrest is one thing but the justification for exercising such power is quite another and police cannot make arrest of a person only because it has powers to do so. Since section 54, Cr.P.C. confers a wide power and, therefore, such power has to be construed, interpreted and defined strictly. Check and limitation placed upon the powers of police officer under the provisions of section 54 of Cr. P.C. still can be inferred through the existence of reasonability and credibility of information or complaint made before the police officer. It is hard to give a precise or general definition of what constitutes "reasonableness" in a complaint or suspicion and the credibility of the information; rather, it must depend on the presence of

concrete legal evidence in the police officer's cognizance, and he must determine whether it is sufficient to establish the reasonableness and credibility of the charge, information, or suspicion. Guidance has been sought from the case reported as *'Abdul Qayyum v. S.H.O., Police Station Shalimar, Lahore'* **(1993 PCr.LJ 91)**. Mere information *per se* does not fulfill the requirement of the provisions of section 54 of Cr. P.C. The words 'credible' and 'reasonable' used in section 54 of Cr. P.C. clearly denote that it must be at least founded on some definite fact tending to cast suspicion on the person required to be arrested and not vague and sketchy information. Assessing the information as contained in F.I.R. in the instant case on the touchstone of above, it can very conveniently be resolved that information so provided by the complainant on the basis of which F.I.R. has been lodged can hardly be termed as reasonable complaint, credible information or even reasonable suspicion. Learned DPG in all fairness submitted that no tangible evidence or material has been collected by the investigator so far to connect the petitioner with the commission of alleged crime. At the moment, apart from suspicion there is no tangible material available with the prosecution showing that there exist reasonable grounds to connect the petitioner with the commission of alleged crime. By now it has been settled that suspicion alone howsoever strong it may be, cannot be a substitute for admissible and legal evidence. While referring to judgment *"Khizer Hayat and others v. Inspector-General of Police (Punjab), Lahore and others"* **(PLD 2005 Lahore 470)**, this Court in case *"Bashir Ahmad v. District Police Officer etc."* **(PLJ 2021 Cr.C 1553)** held that even where a person is accused of a cognizable offence, the police should not arrest him unless there is some incriminating evidence available with the police against him. In the instant case, undeniably, no incriminating material is available with the prosecution to connect the petitioner with the commission of alleged

crime, despite that insistence of I.O to arrest the petitioner depicts his malice. This type of malice is 'malice in law' which is distinct from 'malice of fact'. Malice in law is considered as implied malice that means to say the malice inferred from a person's conduct. In case "*Said Zaman Khan and others v. Federation of Pakistan through Secretary Ministry of Defence and others"* **(2017 SCMR 1249),** the apex Court referred the observation of House of lords made in its judgment reported as "*Shearer and another v. Shields"* **(1914 A.C. 808)** and same reads: -

> *"Between malice in fact and malice in law there is a broad distinction which is not peculiar to any particular system of jurisprudence. A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far as the state of his mind is concerned, he acts ignorantly, and in that sense innocently."*

While dealing the element of malice, the apex Court in case "*Shahzada Qaiser Arfat alias Qaiser v. The State and another"* **(PLD 2021 SC 708)** observed as under: -

> *6. The power of the High Courts and the Courts of Sessions to grant pre-arrest bail, first and foremost, must be examined in the constitutional context of liberty, dignity, due process and fair trial. Pre-arrest bail is in the nature of a check on the police power to arrest a person. The non-availability of incriminating material against the accused or non-existence of a sufficient ground including a valid purpose for making arrest of the accused person in a case by the investigating officer would as a corollary be a ground for admitting the accused to pre-arrest bail, and vice versa. Reluctance of the courts in admitting the*

accused persons to pre-arrest bail by treating such a relief as an extraordinary one without examining whether there is sufficient incriminating material available on record to connect the accused with the commission of the alleged offence and for what purpose his arrest and detention is required during investigation or trial of the case, and their insistence only on showing mala fide on part of the complainant or the Police for granting pre-arrest bail does not appear to be correct, especially after recognition of the right to fair trial as a fundamental right under Article 10A of Constitution of Pakistan, 1973. Protection against arbitrary arrest and detention is part of the right to liberty and fair trial. This Court has, in many cases, granted pre-arrest bail to accused persons after finding that there are no reasonable grounds for believing their involvement in the commission of the alleged offences and has not required independent proof of mala fide on part of the Police or the complainant before granting such relief. Despite non-availability of the incriminating material against the accused, his implication by the complainant and the insistence of the Police to arrest him are the circumstances which by themselves indicate the mala fide on the part of the complainant and the Police, and the accused need not lead any other evidence to prove mala fide on their part.

In the instant case, as has been hinted earlier, no incriminating material is available with the prosecution to connect the petitioner with the commission of alleged crime. Where petitioner has been involved in this case on the basis of suspicion and still Investigating Officer is bent upon to arrest him without having any admissible evidence against the petitioner, possibility of false implication of the petitioner in this case on

the basis of malice and ulterior motive on the part of the complainant and police as well cannot be ruled out.

4. The upshot of the above discussion is that petition in hand is **allowed** and *ad interim* pre-arrest bail already granted to the petitioner by this Court is confirmed subject to his furnishing of fresh bail bonds in the sum of Rs.50,000/- with one surety in the like amount to the satisfaction of learned trial court.

The research assistance provided by Mr. Muhammad Waqas Sana, Civil Judge/Research Officer, LHCRC is appreciated.

(Shakil Ahmad)
Judge

2024 LHC 322

Writ Petition No.826 of 2022

Muhammad Shoaib

Versus

ADJ, Lodhran, etc.

JUDGMENT

Date of hearing	22.01.2024
Petitioner by:	Mr. Akbar Fayyaz Arain, Advocate.
Respondent by:	Mr. Amjad Parvez, Advocate.

SHAKIL AHMAD, J.: This petition has been filed under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 ("the Constitution") by Muhammad Shoaib *(petitioner herein)* to assail consolidated judgment & decree dated 28.10.2021 and judgment & decree dated 12.01.2022, respectively passed by learned Senior Civil Judge (Family Division), Lodhran and District Judge, Lodhran, whereby suit for recovery of dower, etc. filed by Sadia Bibi *(hereinafter referred to as the 'respondent')* was partially decreed, whereas appeal filed by petitioner against decree of trial court was dismissed.

2. Facts, in brief, giving rise to the filing of instant petition are that the respondent instituted a suit against the petitioner on 16.05.2020 seeking dissolution of marriage besides seeking recovery of dower consisting of 05-Marla plot, a constructed house valuing Rs.5,00,000/- and 02-Marla commercial plot falling in Khewat No.1717, Khatooni Nos.91 to 217/218 valuing Rs.15,00,000/- as detailed in column No.16 of the *Nikahnama*, precisely on the ground that her marriage was solemnized with petitioner on 05.09.2015, however, no *rukhsati* took place and that she had developed strong

aversion against the petitioner as he was a person of bad character besides being a drunkard and she would rather prefer to die than joining the petitioner. Matter was contested by petitioner by way of filing written statement raising therein some preliminary objections as well as allegation of forgery and interpolation in the entries of *Nikahnama* qua dower consisting of landed property. In the meanwhile, petitioner also preferred to file separate suit seeking cancellation of entries as stipulated in column Nos.15 & 16 of the *Nikahnama* on the ground that same were the result of forgery. Both the suits were consolidated and after framing consolidated issues by the learned Judge Family Court, both the parties produced their respective evidence. Learned Judge Family Court after hearing learned counsel for the parties proceeded to dismiss the suit filed by petitioner, whereas suit filed by respondent was partially decreed vide consolidated judgment & decree dated 28.10.2021, whereby respondent was held entitled to get half of the dower as mentioned in the *Nikahnama*. Petitioner's appeal filed before learned District Judge, Lodhran, however, was dismissed vide judgment & decree dated 12.01.2022, hence this petition.

3. Heard learned counsel for the parties. Record perused.

4. In view of pleadings of the parties and evidence adduced at trial facts that petitioner's *Nikah* was solemnized with respondent on 05.09.2015 and no *rukhsati* took place till the dissolution of marriage vide decree dated 29.10.2020 passed in terms of section 10(4)(5) of the Family Courts Act, 1964 ("Act 1964") have attained the status of admitted facts between the parties. In the face of these admitted facts, question that whether respondent is entitled to dower as decreed by learned Judge Family Court and maintained by learned Appellate Court or not needs to be answered in the instant petition. A factual controversy qua fixation of dower amount as hinted in the *Nikahnama*, however, needs to be taken up in the first place prior to dilating upon and answering above hinted query. The fact qua fixation of dower, as claimed by the respondent in her plaint is disputed by the petitioner in his written statement in addition to challenging the same through filing of separate suit.

As per stance taken by the respondent, 05-Marla plot, a constructed house valuing Rs.5,00,000/- and 02-Marla commercial plot valuing Rs.15,00,000/- was fixed as dower and this fact was duly incorporated in Nikah Nama whereas according to petitioner, at the time of Nikah, only Haq-ul-Maher to the extent of 02-Marlas land was settled and same was incorporated in *Nikahnama* but subsequently same was changed in the Nikah Nama as the digit '4' was superimposed on digit '2' in the first Nikah Pert and in second Nikah Pert entry qua 05-Marlas land was the result of forgery. Both the courts below while resolving this controversy preferred to accept the stance of respondent by rejecting the version of the petitioner by observing that petitioner failed to prove any forgery and tempering in *Nikahnama* through any positive and cogent evidence. The findings of facts recorded by both the courts below having jurisdiction to decide the matter can hardly be revisited while invoking the constitutional jurisdiction of this Court. In case *"Shajar Islam v. Muhammad Siddique"* **(PLD 2007 SC 45)**, the Supreme Court of Pakistan observed that this Court should not interfere with the finding on controversial questions of facts based on evidence even if those findings were erroneous. While explaining the scope of judicial review under Article 199 of the Constitution, it was further observed in the said esteemed judgment as under: -

> *"…that the scope of judicial review under Article 199 of the Constitution in such cases was limited to instances of misreading or non-reading of evidence or when the finding was based on no evidence, leading to miscarriage of justice and that the high court should not disturb findings of fact through a reappraisal of evidence in its constitutional jurisdiction or use this jurisdiction as a substitute for a revision or appeal and that an interference with the lower courts' findings of fact was beyond the scope of the high court's jurisdiction under Article 199 of the Constitution. …"*
>
> (Underlining is to supply emphasis).

Subsequently, in case "*Mst. Tayyeba Ambareen and another v. Shafqat Ali Kiyani and another"* **(2023 SCMR 246),** it was further resolved by the Supreme Court of Pakistan that the objective of exercising jurisdiction under Article 199 of the Constitution is to foster justice, preserve rights and to correct the wrong. It was further observed that appraisal of evidence is primarily the function of the Trial Court. Learned counsel for petitioner remained unable to point out any instance of misreading or non-reading of evidence by the learned courts below, therefore, findings of facts qua mentioning of dower in *Nikahnama* as claimed by the respondent cannot be taken to any exception particularly when petitioner has not opted to impugn judgments of both the learned courts below whereby his suit for cancellation of entries in *Nikahnama* was dismissed as in the instant petition he has prayed only for dismissal of the suit filed by the respondent. Even findings of both the learned courts below on this factual controversy have not been seriously objected to by learned counsel for the petitioner who by placing reliance on case *"Ajmal Khan and another v. Mst. Falak Negar Bibi and 2 others"* **(PLD 2019 Peshawar 218)** merely focused his arguments on the point that since no *Rukhsti* had taken place and marriage stood dissolved at the instance of the respondent, she would not be entitled to receive any dower.

5. Reverting to the moot point so formulated in the opening lines of preceding paragraph, it may be seen that according to learned counsel for the petitioner, respondent was not entitled to any amount of dower in view of admitted facts of this case. Learned counsel for the respondent controverted the said plea and argued that where marriage between the parties was dissolved prior to valid retirement *(khalwat-e-sahiha),* respondent would become entitled to half of the dower and according to him both the courts below rightly proceeded to award half of the dower through the impugned judgments and decrees. It is by now settled proposition of Islamic law that if marriage between the parties has either been consummated or there was a valid retirement *(khalwat-e-sahiha)* before pronouncement of divorce by the husband, the whole of the unpaid dower whether prompt or deferred, becomes

immediately payable by the husband to the wife and is enforceable/recoverable like any other debt, however, if there was no consummation of marriage or a valid retirement *(khalwat-e-sahiha)* before pronouncement of divorce by the husband, the wife would be entitled to get half of the dower so fixed in view of the command of Allah as ordained in Ayat No.237 of Surah Al-Baqarah, English translation[1] of which reads as follows: -

> *"If ye divorce them before ye have touched them, and have already settled a dower on them, ye shall pay them one-half of what ye have settled."* ***(Surah Al-Baqarah Ayat 237).***

Undeniably, in the instant case, petitioner did not pronounce divorce upon the respondent and respondent obtained the decree for the dissolution of marriage in terms of section 10(4)(5) of the Act, 1964 before consummation of marriage or valid retirement. In the instant case, it was the respondent who herself approached the court seeking dissolution of marriage on the basis of Khula by asserting that she would rather die than joining the petitioner as his wife. Since in the instant matter, petitioner did not dissolve the marriage by pronouncing divorce upon respondent prior to consummation of marriage or valid retirement, respondent would not become entitled to receive even half of her dower as decreed by the learned Judge Family Court and maintained by the learned Appellate Court. In view of para No.289-F of the Principles of Muhammadan Law by D.F. Mulla[2], dower becomes confirmed by consummation of marriage; or by valid retirement *(khalwat-e-sahiha)*; or by death of either husband or wife and in case husband pronounces divorce upon his wife before consummation of marriage or valid retirement *(khalwat-e-sahiha)*, wife would become entitled to receive half of the dower. In this case, however, it is not the case that the marriage between the parties was dissolved

[1] HEDAYA or guide: a commentary on the MUSSULMAN LAWS by Charles Hamilton, Second Edition Vol.I (page No.44)

[2] Pakistan Edition (Revised Edition 2015) published by PLD Publishers, Nabha Road, Lahore

by pronouncing divorce by the petitioner and it was respondent who obtained decree for the dissolution of marriage in terms of section 10(4)(5) of the Act, 1964. Where marriage was not dissolved by way of pronouncing *talaq* by the husband on a wife and marriage was not consummated or there was no valid retirement, wife would not be entitled to any amount of dower so fixed if dissolution of marriage had taken place at her wish or instance. Reference in this regard may be made to Para No. 78(4) of Anglo-Muhammadan Law[3] and same is reproduced hereunder for the facility of ready reference: -

> *"78. The consequences indicated in the first five sub-clauses of this section follow from the completion of a valid (*bain) divorce by any of the above-mentioned methods.
>
> *(1)* ...
>
> *(2)* ...
>
> *(3)* ...
>
> *(4)* *If the marriage had been consummated before the divorce, the whole of the unpaid dower, whether prompt or deferred, becomes immediately payable by the husband to the wife, and is enforceable like any other debt.*
>
> *If the marriage had not been consummated, and the amount of dower was specified in the contract, he is liable for half that amount; if none was specified, he must give the divorced wife a present (mut'at), consisting of three articles of dress suitable to her rank, or their value. <u>But the wife has no right to anything if the divorce before consummation took place by her wish, or in consequence of any disqualification on her side-e.g. her apostasy.</u>*
>
> (Underlining is to supply emphasis).

[3] By SIR ROLAND KNYVET WILSON (Fifth Edition). Published in 1921 by CALCUTTA AND SIMLA, THACKER, SPINK & CO, LONDON: W.THACKER & CO., 2, CREED LANE, E.C.

Same view has been taken by Dr. Tanzeel-ur-Rehman at para-72 of his celebrated work titled "مجموعہ قوانین اسلام"[4] in the following terms:-

خلوت صحیحہ کے بغیر طلاق یا فسخ نکاح کی صورت میں مرد کے ذمہ نصف مہر واجب ہو گا۔

توضیح: (الف) اگر کوئی مہر مقرر نہ ہوا ہو تو عورت کو صرف کپڑوں کاایک جوڑا دیا جائے گا۔

(ب) اگر فسخ نکاح کی ذمہ داری عورت پر ہو تو وہ کچھ مہر پانے کی مستحق نہ ہو گی۔

Learned author further elaborated above referred point in the note given by him at page No.290 of the said book that reads as under:-

مہر مسمی کی صورت میں نکاح فسخ ہونے پر نصف مہر واجب ہوگا لیکن اگرخلوت صحیحہ سے قبل مابین زوجین تفریق واقع ہو جائے جس کی ذمہ داری عورت پر ہو تو عورت کچھ مہر پانے کی مستحق نہ ہو گی۔

(Underlining is to supply emphasis).

In the instant case, separation between the parties that undeniably happened prior to either consummation of marriage or any valid retirement, was not by way of pronouncing divorce by the petitioner rather the marriage was dissolved on the basis of *Khula* in terms of section 10(4)(5) of the Act, 1964 vide decree dated 29.10.2020 passed by learned Judge Family Court as respondent was not willing to join the petitioner in any manner and came up with the assertion that she would rather die than joining the petitioner as his wife. In such eventuality, respondent No.3 was not entitled to any amount of dower, however, both the courts below have passed the impugned judgments and decrees by remaining altogether oblivious to the above hinted legal aspect of the matter. In view of admitted facts and circumstances of the instant case, respondent was not at all entitled to receive any dower whatsoever. While

[4] جلد اول، قانون ازدواج،ناشر "ادارہ تحقیقات اسلامی، الجامعہ الاسلامیہ العالمیہ"

passing impugned judgments & decrees, both the courts below have committed jurisdictional error and exceeded their jurisdiction. Instant case is a fit case for interfering in impugned judgments & decrees in view of the guidelines given in Mst. Tayyeba Ambareen's[5] case by invoking the provisions of Article 199 of the Constitution for the reason that objective of Article 199 of the Constitution is to foster justice, protect rights and to correct the wrong. In the instant case wrong committed by both the courts below needs to be corrected by invoking the jurisdiction under the provisions of Article 199 of the Constitution in order to foster justice and protect the rights of petitioner. Findings of both the courts below to the extent of holding respondent entitled to get half of the dower are not sustainable.

6. The upshot of above discussion is that petition in hand is allowed, impugned consolidated judgment & decree dated 28.10.2021 passed by learned Senior Civil Judge (Family Division), Lodhran and judgment & decree dated 12.01.2022 passed by learned Additional District Judge, Lodhran to the extent of holding respondent entitled to get half of the dower are set aside and in consequence whereof, suit for recovery of dower filed by respondent No.3 stands dismissed.

(SHAKIL AHMAD)
JUDGE

Approved for reporting.

JUDGE

[5] Mst. Tayyeba Ambareen and another v. Shafqat Ali Kiyani and another (2023 SCMR 246)

2024 LHC 560

(i) ***Civil Revision No.390 of 2020***

Ghulam Mustafa *Versus* *Muhammad Mushtaq, etc.*

(ii) ***Civil Revision No.479 of 2020***

Muhammad Ashraf *Versus* *Muhammad Mushtaq, etc.*

(iii) ***Civil Revision No.480 of 2020***

Muhammad Amin *Versus* *Muhammad Mushtaq, etc.*

(iv) ***Crl. Org. No.11 of 2021***

Ghulam Mustafa *Versus* *Muhammad Mushtaq, etc.*

JUDGMENT

Date of hearing	**29.01.2024**
Petitioner in the instant petition & Crl. Org. No.11 of 2021 and respondent No.5 in C.R No.479 of 2020 & 480 of 2020 by:	Miss Samina Qureshi, Advocate.
Petitioner in C.R No.479 of 2020 and respondent No.2 in C.R No.390 of 2020 and C.R No.480 of 2020 by:	Mr. Amir Bin Aslam, Advocate.
Petitioner in C.R No.480 of 2020, Respondent No.3 in C.R No.390 of 2020 and respondent No.2 in C.R No.479 of 2020 by:	Mr. Ghayyour Tasneem, Advocate.
Respondents No.4 and 5 in the instant petition, respondents No.8 and 9 in Crl.Orig.No.11-W of 2021, respondents No.3	Rai Mazhar Hussain Kharal, Assistant Advocate General.

and 4 in Civil Revision No.479 and 480 of 2020 by:	
Respondent No.1 in all above hinted petitions by:	Mr. Muhammad Sarwar, Advocate.

SHAKIL AHMAD, J.: Instant petition essentially requires to be decided along with connected Civil Revision Nos. 479 & 480 of 2020 for the reason that facts forming background for the filing of all three petitions under section 115 of Code of Civil Procedure, 1908 **("CPC")** are same besides the same are to impugn order dated 20.07.2019 and judgment dated 04.09.2020 passed by learned Civil Judge 1st Class, Hasilpur and learned Additional District Judge, Hasilpur, respectively, whereby objection petition filed by Muhammad Mushtaq *(hereinafter referred to as respondent No.1)* was allowed, and appeals filed by Ghulam Mustafa, Muhammad Ashraf and Muhammad Amin *(hereinafter Muhammad Ashraf and Muhammad Amin would be referred to as petitioners)* challenging order dated 20.07.2019 were dismissed. Similarly, Crl. Org. No.11-W of 2021 in Civil Revision No.390 of 2020 filed by petitioner Ghulam Mustafa is also being decided through this single judgment.

2. Necessary facts, relevant for the decision of above hinted petitions, in brief, are that Mst. Suraiya Bibi instituted suit seeking declaration to the effect that she being legal heir of Ali Muhammad was owner in possession to the extent of her share over land measuring 12-Kanal falling in Khewat No.40, Khatooni Nos.241 to 246 and had been receiving share of produce from her brothers. As per contents of plaint, Mst. Suraiya Bibi was minor when her brothers got sanctioned inheritance mutation No.169 dated 14.11.1958 fraudulently, thereby depriving her and her mother of their legal shares from the legacy of her father, hence inheritance mutation No.169 dated 14.11.1958

and subsequent mutations No.407 dated 09.05.1990, 395 dated 27.02.1989 and 403 dated 10.04.1990 were ineffective upon her rights and were liable to be corrected. Respondent No.1 and one Faqir Muhammad appeared and contested the suit by way of filing separate written statements. In view of divergent pleadings of the parties, learned trial court farmed as many as eight issues including that of relief. Both the parties led their respective oral as well as documentary evidence and the learned trial court finally proceeded to decree the suit vide judgment & decree dated 05.05.2015. Being dissatisfied, respondent No.1 preferred appeal before learned Additional District Judge. During pendency of the appeal respondent No.1 appeared before the learned Additional District Judge and got recorded his statement on 28.10.2016 to the effect that he accepts the right of his mother Mst. Rehmat Bibi and sister Mst. Suraiya Bibi and thus raised no objection if they were given their due share in the legacy of his father. He further agreed to transfer land measuring 05-K & 01-Marla to Mst. Suraiya Bibi through gift. Mst. Suraiya Bibi accepted the offer of respondent No.1 and stated that she had no objection in case the original inheritance mutation No.169 dated 14.11.1989 regarding legacy of her father and mutations No.407 dated 09.05.1990, 315 dated 27.02.1989 and 403 dated 10.04.1990 were directed to remain intact to the extent of ½ share. Learned Additional District Judge in view of the statements of respondent No.1 and Mst. Suraiya Bibi, proceeded to dispose of the appeal vide order dated 28.10.2016 with the observation that parties would be bound by their statements. Of late, when respondent No.1 did not fulfil his undertaking, Mst. Suraiya Bibi filed contempt petition before learned Additional District Judge with the assertion that neither respondent No.1 was complying with his statement recorded on 28.10.2016 nor the concerned ADLR was sanctioning mutation in view of the decree passed in her favour. The said petition was contested by respondent No.1 and Faqir Muhammad by way of filing written

reply. Learned Additional District Judge after hearing learned counsel for the parties proceeded to dismiss the petition being not maintainable, vide order dated 08.05.2017. Thereafter, Mst. Suraiya Bibi approached ADLR, Record Center, Hasilpur who sanctioned mutation No.799 dated 14.10.2017 in her favour. Being dissatisfied, petitioners Muhammad Ashraf and Muhammad Ameen preferred appeal under section 161 of the Land Revenue Act, 1967 before Assistant Commissioner/Collector, Sub-division, Hasilpur. The appeal was allowed vide order dated 29.12.2017 with the direction to ADLR, Hasilpur to cancel mutation No.799 dated 14.10.2017 as well as mutations No.169 dated 14.11.1958 and subsequent mutations No.395 dated 27.02.1989, 403 dated 10.04.1990 and 407 dated 09.05.1990 in compliance of decree dated 05.05.2015 with the further direction that petitioners Muhammad Ashraf & Muhammad Ameen and Mst. Suraiya Bibi being legal heirs of Ali Muhammad (deceased) be given their legal shares out of land measuring 132-Kanal. In backdrop of these facts, respondent No.1 filed objection petition before learned Civil Judge 1st Class, Hasilpur with the assertion that ADLR, Hasilpur & official of Service Center, in view of decree dated 05.05.2015 were bound to transfer the land to Mst. Suraiya Bibi only to the extent of her legal share i.e. 10-Kanal & 02-Marla, however, while setting aside basic inheritance mutation No.169 dated 14.11.1958 and subsequent mutations *(whereby Muhammad Ashraf sold out his entire share of 22-Kanal to him and Muhammad Amin initially transferred 20-Kanal land in favour of Faqir Muhammad and that land was also purchased by him from said Faqir Muhammad through mutation No.403 dated 17.03.1990 and subsequently remaining 02-Kanal land was also purchased by him from Muhammad Amin and in this way he purchased total land from the share of Muhammad Amin and Muhammad Ashraf which was transferred to them in pursuance of inheritance mutation No.169)*, revenue officials entered and sanctioned

mutation No.817 dated 20.01.2018, in connivance with Muhammad Ashraf and Muhammad Amin wrongly cancelled all the mutations whereby his property was returned to his brothers namely Muhammad Ashraf and Muhammad Amin depriving him of his vested and valuable rights particularly in the backdrop of fact that both Muhammad Amin and Muhammad Ashraf or even Faqir Muhammad did not ever challenge correctness and validity of those mutations through which entire land of his brothers namely Muhamad Ashraf and Muhammad Amin was transferred to him and more particularly where suit was decreed only to the extent of the claim of Suraiya Bibi. It was further averred in the objection petition that after passing of mutation, Muhammad Ashraf transferred land measuring 04-Kanal & 06-Marla through mutation No.837 dated 18.09.2018 in favour of Ghulam Mustafa and Muhammad Amin transferred land measuring 20-Kanal & 06-Marla through mutation No.831 dated 17.08.2018 in favour of Ghulam Mustafa. As per respondent No.1, revenue authorities having been connived with Muhammad Ashraf and Muhammad Amin proceeded to implement decree against its spirit and in consequence whereof land owned by respondent No.1 was practically returned to Muhammad Ashraf and Muhammad Amin who with the mala fide intentions further transferred of some portion of land to Ghulam Mustafa against the facts and record as both Ashraf and Amin had already transferred their land through earlier mutations to respondent No.1 and they have no concern whatsoever with the said property and they never ever challenged correctness and authenticity of earlier mutations whereby they transferred their land to respondent No.1 and Faqir Muhammad. Objection petition was contested by Ghulam Mustafa, Muhammad Ashraf and Muhammad Ameen by way of filing separate written replies. Learned Civil Judge 1st Class, Hasilpur after hearing learned counsel for the parties proceeded to allow objection petition vide order dated in the following terms: -

"……The mutation No.831 is to be canceled in toto, whereas mutation No.837 is to be cancelled only to the extent of share of respondent No.3 (4-K 6-M) and allowed to remain intact to the extent of share of Mst. Suraiya (6-K 15-M) therein. Both the mutations are cancelled accordingly. The respondent No.5 may avail his legal remedy for the return of sale price alongwith damages, if so advised, against the respondents No.3 & 4.

14. Instant objection petition is hereby allowed in above terms. The revenue authorities concerned after deducting excess property from the petitioner shall restore the remaining property to him by restoring his aforesaid mutations (to the extent of remaining property) by way of Sehat Indraj accordingly…"

Petitioners Ghulam Mustafa, Muhammad Amin and Muhammad Ashraf being dissatisfied by order dated 20.07.2019 preferred three separate appeals before learned Additional District Judge, however, the same were dismissed vide judgment dated 04.09.2020, hence above hinted revision petitions. Ghulam Mustafa, one of the petitioners filed Criminal Original No.11-W of 2021 in C.R No.390 of 2020 stating therein that respondent No.1 and others in connivance with revenue officials forcibly dispossessed him, as such violated *status quo* order dated 26.10.2020 passed by this Court in C.R No.390 of 2020.

3. Heard learned counsel for the parties. Record perused.

4. Learned counsel for the petitioners have laid much stress on the point that objection petition filed by respondent No.1 was not maintainable at all as no execution petition was pending before the executing court. According to them, where decree was implemented in the revenue record and the decree was satisfied to the extent of decree holder and she did not move any application for the execution of decree, petition filed by respondent No.1 was

misconceived and in turn not maintainable. According to them, court of first instance not only wrongly entertained the petition but also committed jurisdictional error while allowing the same and learned appellate court proceeded to ditto the findings of learned trial court without adverting to the vital and legal aspect of the matter. This stance of petitioners has been opposed by learned counsel for respondent No.1. According to him, all questions relating to an execution can be resolved and decided only by the executing court in terms of section 47 of CPC. The moot point that needs to be decided initially is that whether a party to the suit which has finally been decreed can move any application before the court for resolution of a question arising out of execution of the decree where no execution petition was filed by the decree holder. Before dilating upon the point in issue, it seems appropriate to reproduce hereunder section 47 of CPC: -

> *"47.* ***Questions to be determined by the Court executing decree. -***
>
> *(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.*
>
> *(2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under the section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court-fees.*

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court."

(emphasis supplied)

In view of the provisions of section 47 of CPC all questions arising between the parties to the suit after passing of the decree relating to execution, discharge or satisfaction of decree shall be determined by the court executing the decree and not by a separate suit. Two essential prerequisites are to be satisfied so as to avail of the remedy provided under section 47 of CPC. Firstly, the question/controversy should relate to either execution, discharge or satisfaction of the decree and secondly, the conflict/question should have been arisen between the parties to the suit in which decree was passed. Provisions of section 47 of CPC enjoin that all questions relating to execution shall be resolved by the executing court. So, all questions that arise between parties or their representatives having nexus with the execution, discharge or satisfaction of the decree must be decided under section 47 of CPC. The words "all questions arising" should be read to denote as "all questions directly arising". These words only mean that the questions must be such that they relate to or affect the rights of the parties to the suit during the course of execution of decree. The expression "relating to execution" has not been defined elsewhere in the Code of Civil Procedure probably with the intention of leaving it flexible, vividly with the purpose to include any question that either hinders or affects the rights of any of the parties and it would even apply to a dispute arising in relation to execution of a decree after it had been executed as it would be a dispute relating to the execution of a decree before it had been executed. The question as to deficient or flawed execution essentially is one relating to the execution of a decree, therefore, such question must also be

answered and resolved by the executing court as per the provisions of section 47 of CPC. Similarly, the words "the court executing the decree" in no way restrict the applicability of section 47 of CPC only to the proceedings initiated by the decree holder. This section would also be applicable to the proceedings initiated by the judgment debtor in case of flawed execution of decree. Therefore, filing of an application by one of the judgment debtors even in the absence of any execution petition before the court could not be objected to on the ground that no execution petition was filed by the judgment debtor for the execution of the decree particularly when the right of judgment debtor has been affected by the wrong implementation of decree. Similar sort of objection was taken up, dealt with and resolved by the Supreme Court of Pakistan in case *Riaz Hussain and others v. Muhammad Akbar and others* **(2003 SCMR 181)** in the following terms: -

> "*6. The only question for decision in this appeal is whether an objection petition filed by a judgment-debtor under section 47, C.P.C. is maintainable when there exists no application for execution of the decree. The question was answered in the affirmative in the impugned judgment mainly on the strength of the judgment of the Supreme Court of India reported as M.P. Shreevastava v. Veena (AIR 1967 SC 1193) wherein an identical controversy was resolved in favour of the judgment-debtor with the following observations:-*
>
> > *"The principle of section 47, C.P.C. is that all questions relating to execution, discharge or satisfaction of a decree and arising between the parties to the suit in*

which the decree is passed, shall be determined in the execution proceeding, and not by a separate suit; it follows as a corollary that a question relating to execution, discharge or satisfaction of a decree may be raised by the decree holder or by the judgment-debtor in the execution department and that pendency of an application for execution by the decree-holder is not a condition of its exercise. "

7. The above view is unexceptionable and while agreeing with the rationale and reasoning thereof we would like to add that the scope of section 47, C.P.C. is very wide inasmuch as the objection petition tiled thereunder by a judgment-debtor is akin to a suit and for that very reason it contains an in-built provision empowering the Court to treat the objection petition as a suit subject to certain conditions. The view tends to advance the object of the legislature and provide an opportunity to the judgment-debtor to make an objection petition even if the decree-holder withholds the execution petition and gets the decree satisfied through some other mode. A contrary view would certainly limit the scope of section 47, C.P.C. and thus militate against the object and intention of the Legislature. It will also take the judgment-debtor to a point where he is left with no remedy and forum of e redressal of his grievance as has happened in the present

case. The respondent has been left high and dry due to non-filing of an execution petition by the decree-holder. The right to file an objection petition conferred on the judgment-debtor by the Code of Civil Procedure is a vested right which cannot be denied by blowing the expression "desires", used in Order XXI, rule 10, C.P.C. out of proportion or raising a hyper-technical ground that non-filing of an execution petition is a bar to the maintainability of an objection petition. Lastly, the view is in line with the well-known principle of interpretation of statutes that a statute should be interpreted in a manner which suppresses the mischief and advance the remedy. It is also supported by the observations made in Manager, Jammu and Kashmir State Property v. Khuda Yar (PLD 1975 SC 678) that mere technicalities unless offering any insurmountable hurdle should not be allowed to defeat the ends of justice and the logic of words should yield to the logic of realities.

8. Adverting to the leave granting order we feel no hesitation in holding that pendency of an application for execution of the decree is not condition precedent for filing of an objection petition under section 47, F C.P.C. The objection petition in question is, therefore, maintainable."

(emphasis supplied)

There is no cavil with the proposition that the spirit and object of the provisions of section 47 of CPC is to provide swift relief to the parties in a matter arising out of execution of decree. The exclusive jurisdiction of an

executing court in view of the scope of section 47 of CPC will indeed cover all matters concerned with the execution including wrong/flawed implementation of decree, discharge or satisfaction of an existing decree between the same parties. In view of underlying rather obvious spirit of the provisions of section 47 of CPC, the same must be liberally interpreted to bar suits which involve the question/controversy under the provisions of section 47 of CPC as this section has been introduced for the beneficial purpose of checking unnecessary and needless litigation, therefore, its operation should not be limited[6]. A judgment debtor, therefore, is not debarred from moving an application raising an objection qua the flawed execution of the decree by the concerned authorities in the result of which he was deprived of his legal and vested rights which even were not assailed by the decree holder. In the present case, respondent No.1 who was one of the judgment debtors, being aggrieved by the act of revenue authorities *qua* wrongly implementing of the decree by depriving him of his valuable and unquestioned rights, while invoking the provisions of section 47 of CPC rightly approached the court by moving an objection petition seeking rectification of the wrong committed by revenue authorities. Therefore, objection raised by learned counsel for petitioners qua maintainability of objection petition is without any force. It is correct that no execution petition was filed seeking implementation of decree dated 05.05.2015 passed by the learned trial court, however, it was the declaratory suit in which Mst. Suraiya Bibi sought declaration to the effect that she being legal heir of Ali Muhammad was entitled to the extent of her share in the property left by her father. Since there existed inheritance mutation No.169 dated 14.11.1958 through which she was deprived of her share, in order to give

[6] Jumaee vs. Chowdry Wahed Ali **(11 B.L.R. 149(PC)**, Ram Chand vs. Shamas Din **(A.I.R. 1938 Lahore 690)** and Prosunno Coomar Sanyal and another vs. Kasi Das Sanyal and others **(ILR 19(C) 683).**

effect qua her declaration necessary corrections were required to have been made in the revenue record in pursuance of decree dated 05.05.2015 particularly after dismissal of her contempt petition filed before learned Additional District Judge. Mst. Suraiya Bibi rightly approached the revenue authorities and they proceeded to give effect to the declaratory decree dated 05.05.2015 passed in favour of Mst. Suraiya Bibi in the revenue record and rightly proceeded to cancel inheritance mutation No.169 dated 14.11.1958. However, the revenue authorities simply erred by setting aside the remaining/ subsequent mutations that had been passed in favour of Muhammad Mushtaq who purchased entire share of petitioners, in their entirety for the reason that as per contents of plaint, declaration was sought by Mst. Suraiya Bibi in respect of setting aside of such mutations only to the extent of her share. Revenue authorities, however, proceeded to cancel those subsequent mutations in their entirety against the dictates of declaration given in decree dated 05.05.2015. Revenue authorities, thus, wrongly cancelled those mutations in toto and error committed by them in the execution of decree dated 05.05.2015 has rightly been corrected by both the courts below by safeguarding the rights of respondent No.1 which never remained under objection by the petitioners throughout. Similarly, the mutations entered and sanctioned after flawed implementation of decree having no legal effect at all were also rightly cancelled by learned courts below. Both the courts below have rightly proceeded to pass the impugned order and judgment in view of peculiar facts and circumstances of present case by taking into consideration the material available on the record in its true perspective and came to the right conclusion that decree dated 05.05.2015 was implemented against the dictates of decree. Learned counsel for the petitioners remained unable to point out even a single circumstance suggesting illegal assumption, non-exercise, or irregular exercise of jurisdiction by the learned courts below while passing the

impugned order and judgment. Where concurrent findings of both the courts below on a question of fact are based on proper appreciation of material available on the record and do not suffer from any illegality or material irregularity affecting the merits of the case, same cannot be taken to any exception at revisional stage. Reliance in this regard may safely be placed on cases reported as *"Sultan Muhammad and another v. Muhammad Qasim and others"* **(2010 SCMR 1630)** and *"Abdul Khaliq (Deceased) through L.R.s. and others Vs. Ch. Rehmat Ali (Deceased) through L.R.s. and others"* **(2012 SCMR 508)**. In the recent pronouncement in case titled *Salamat Ali and others v. Muhammad Din and others* **(PLJ 2023 SC 8)**, it has been held that the revisional court cannot substitute the findings of the courts below with its own merely for the reason that it finds its own findings more plausible than that of courts below. In the present case, impugned order and judgment rather have been passed in the consequence of correct appreciation of facts and material available on the record.

5. Taking up now the stance of Ghulam Mustafa for initiation of contempt proceedings against respondent No.1 and others on the ground that they in connivance with revenue officials violated *status quo* order dated 26.10.2020 passed by this Court in Civil Revision No.390 of 2020 as they on the intervening night of 4th and 5th of November, 2020 forcibly dispossessed him in an illegal manner as such they are liable to be penalized, it may be observed that in the event of initiating contempt proceedings in respect of violation of any injunctive order, the person wishing to initiate contempt proceedings against the contemnors is required to have provided all necessary details qua violation of the injunctive order. It was also necessary for the petitioner Ghulam Mustafa to have mentioned the time, mode and manner whereunder he was forcibly dispossessed. Petitioner Ghulam Mustafa, however, in the

instant case merely stated that respondent No.1 and others/contemnors with the help of revenue officials on the intervening night of 4th and 5th of November, 2020 forcibly dispossessed him in an illegal manner. Contempt proceedings indeed cannot be initiated on the basis of vague, sketchy and ambiguous assertions. There is no cavil with the proposition that contempt proceedings under the provisions of order *XXXIX* Rule 2(3) CPC are considered *quasi* criminal proceedings since same entail punishment of detention for a period not exceeding six months, therefore, same are to be proved upto hilt and all doubts are required to be excluded before awarding punishment in terms of Order XXXIX Rule 2(3) of CPC. Guidance has been sought from case titled *"Mian Qadiruddin and another v. Mian Ghulam Yaqoob Bandey and another"* **(1977 SCMR 475).** As per Ghulam Mustafa petitioner, he was dispossessed on the intervening night of 4th and 5th of November, 2020, however, application for initiating of contempt proceedings was filed on 10.03.2021 with the delay of more than four months and no plausible reason has been given for filing contempt petition belatedly. Ordinarily contempt petition is required to have been filed with due promptitude just after the violation of injunctive order. Belated filing of contempt petition indeed was fatal to petitioner's case particularly where no necessary details qua the happening when Ghulam Mustafa was dispossessed have been furnished in the petition which were necessarily required to have been furnished while moving application for initiation of contempt proceedings. Contempt proceedings cannot be initiated on the basis of vague, ambiguous and sketchy assertions. In such backdrop, no case of initiation of contempt proceedings against respondents at all was made out.

6. The upshot of above discussion is that all the three above hinted revision petitions and Crl. Org. No.11-W of 2021 are devoid of any merits, the same are dismissed. No order as to cost.

(SHAKIL AHMAD)
JUDGE

Approved for reporting

Judge

2024 LHC 676

W.P. No.7630 of 2018

Muhammad Ghause

Versus

Additional District Judge, Bahawalpur & 02 others

JUDGMENT

Date of hearing	06.02.2024
Petitioner by:	Malik Shah Muhammad Khokhar, Advocate.
Respondent No.3 by:	Ms. Samina Qureshi, Advocate.

SHAKIL AHMAD, J.: This is a petition that has been filed under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 to assail judgments and decrees passed by learned Judge Family Court and learned Additional District Judge, Bahawalpur, whereby suit instituted by Mst. Salma Shahzadi (*hereinafter referred to as "respondent"*) against Muhammad Ghaus *(petitioner)* for recovery of Rs.5,00,000/- as additional dower was decreed vide judgment and decree dated 23.06.2017 and same was upheld by learned Appellate Court vide judgment and decree dated 04.05.2018.

2. Precisely, facts forming background to the filing of instant petition, are that respondent filed suit against petitioner for the recovery of Rs.5,00,000/- in terms of stipulation as contained against column No.17 of Nikah Nama, whereunder, it was settled that if husband would contract second marriage or pronounce divorce upon his wife, he would be liable to pay an amount to the tune of Rs.5,00,000/- as additional dower on demand. Petitioner contested the matter by filing written statement. In answer to the claim *qua* additional dower, petitioner took the stance that stipulation contained in Nikah

Nama was the result of fraud and forgery done by the father of respondent in connivance with *Nikah Khawn*. Learned Judge Family Court, in view of divergent pleadings of the parties, framed necessary issues. Both the parties led their oral as well as documentary evidence and learned Judge Family Court finally decreed the suit, whereby respondent was held entitled to receive Rs.5,00,000/- as additional dower from the petitioner. Judgment and decree of the trial court was assailed by petitioner by way of filing appeal, the same was dismissed by learned Additional District Judge, Bahawalpur vide judgment and decree dated 04.05.2018, hence this petition.

3. Heard learned counsel for the parties and record so annexed with the petition perused.

4. Petitioner's marriage with respondent was solemnized on 29.09.2013 and after *Rukhsti* the spouses started living together. Matrimonial life, as per contents of plaint, did not remain peaceful and happy owing to insistence of petitioner to respondent qua demand of Rs.20,00,000/-from her parents and on her refusal to accede to such demand, matter culminated in expulsion of respondent by the petitioner from his home that prompted the respondent to file suit for recovery of dower, maintenance and dowry articles and same was finally decreed. Subsequent to the passing of that decree, petitioner divorced the respondent on 24.06.2015. On facts, petitioner contested the matter admitting the fact qua pronouncing of divorce upon respondent with the explanation that actually he pronounced divorce on the insistence of respondent. Factual controversy with regard to insertion of additional dower in case of divorce or contracting of second marriage, has been resolved by the courts below after considering the evidence produced by the parties at trial. Undeniably, petitioner who is signatory of Nikah Nama, did not himself enter

in the witness box to depose his stance taken in the written statement that the stipulation was subsequently added in the Nikah Nama at the behest of respondent's father being in league with the *Nikah Khawn*. Even no proceedings whatsoever, were initiated either against *Nikah Khwan* or any other person in respect of any wrong entry made in the Nikah Nama. Had it been the stance of petitioner that the entry in respect of additional dower was the result of fraud and forgery, petitioner should have approached the controlling authority i.e. Deputy Commissioner concerned seeking correction in the entries of Nikah Nama besides initiation of appropriate proceedings against the wrongdoers. However, no such effort whatsoever was made either by petitioner or any other person on his behalf. Both the courts below, thus rightly brushed aside the stance taken by the petitioner. The findings over factual controversy recorded by both the courts below having jurisdiction to decide the matter can hardly be reviewed while invoking the extraordinary constitutional jurisdiction of this Court. In case *"Shajar Islam v. Muhammad Siddique"* **(PLD 2007 SC 45)**, the Supreme Court observed that this Court should not interfere with the findings on controversial questions of facts based on evidence even if those findings were erroneous. While elucidating the scope of judicial review under Article 199 of the Constitution, it was observed as under: -

> *"…that the scope of judicial review under Article 199 of the Constitution in such cases was limited to instances of misreading or non-reading of evidence or when the finding was based on no evidence, leading to miscarriage of justice and that the high court should not disturb findings of fact through a reappraisal of evidence in its constitutional jurisdiction or use this*

jurisdiction as a substitute for a revision or appeal and that an interference with the lower courts' findings of fact was beyond the scope of the high court's jurisdiction under Article 199 of the Constitution. …"

(Underlining is to supply emphasis).

Recently, in case "*Mst. Tayyeba Ambareen and another v. Shafqat Ali Kiyani and another"* **(2023 SCMR 246),** it was further observed by the apex Court that the objective of exercising jurisdiction under Article 199 of the Constitution is to foster justice, preserve rights and to correct the wrong. Learned counsel for petitioner remained unable to point out any jurisdictional defect or blatant illegality committed by both the courts below while resolving the factual controversy qua additional dower as mentioned in Nikah Nama. Findings of both the courts below to that extent, therefore, cannot be taken to any exception.

5. Adverting to the submission of learned counsel for petitioner that if stipulation hinted against column No.17 of the Nikah Nama is believed to have been incorporated with consent of the petitioner, even then respondent was not entitled to the grant of decree as the said stipulation is against the injunctions of Islam for the reason that the same created impediment to exercise the right of pronouncing divorce and contracting second marriage which even otherwise was available to petitioner in accordance with the injunctions of Islam. Before dilating upon the proposition, it seems apt to reproduce hereunder the stipulation as hinted against column No.17 of Nikah Nama: -

اگر دوسری شادی کرے گا یا طلاق دے گا تو مبلغ پانچ لاکھ کرے گا۔ اگر دلہن کی " "روپے اضافی مہر عندالطلب ادا طرف سے طلاق کا مطالبہ ہوا تو تمام شرائط ختم ہوں گی

From the bare perusal of above, it transpires that both the parties agreed upon the stipulation qua payment of additional dower in the event of contracting second marriage by the petitioner or pronouncing divorce upon respondent by the petitioner. It has further been stipulated that if divorce is demanded at the behest of bride then these stipulations would be deemed to have been cancelled. Narration given against column No.17 of Nikah Nama qua the additional dower can legitimately be counted as deferred dower that was to become payable on happening of any of the events so mentioned therein. In the instant case since petitioner himself divorced the respondent, the latter was entitled to the decree for the additional dower to the tune of Rs.500,000/-. Needless to observe that the stipulation agreed between the parties qua payment of certain amount by petitioner to the respondent on the event of divorce or contracting of second marriage, in no way curtail the right of husband to pronounce divorce or even to contract second marriage. Any stipulation or condition agreed between the parties mutually and with their free consent cannot be considered as an absolute bar to either pronounce divorce or to contract second marriage. In case *"Ghulam Shabbir v. Mst. Abbas Bibi and others"* **(2022 CLC 963)** the moot point, whether any condition incorporated in the Nikah Nama qua payment of compensation to wife in case of divorce was contrary to the law and Islamic injunctions or not, was taken up and resolved in the following terms: -

> *"3…… The vires and constitutionality of the Muslim Family Law, Ordinance, 1961 and schedule thereto, which included to Nikah Nama, were variously subjected to challenge successfully. Clause*

19 forms part of Nikah Nama - Form-II, added in terms of Rules 8, 10, 11 and 12 of the W.P. Rules under the Muslims Family Law Ordinance, 1961.

4. Clause 19 of Nikah Nama in this case is grossly misconstrued. The financial benefits agreed mutually are in the nature of reasonable financial support for setting her free. There is no cavil that terms of Nikah Nama constitutes a civil contract between the parties, both of which are at liberty to agree to the terms of arrangement. Clause-19, as available in Nikah Nama, is not in the nature of absolute bar qua right to divorce. It is not disputed that petitioner had divorced the wife - which manifest that no bar to divorce was imposed.

5. As far as contractual obligation in column 19 is concerned, it was agreed and factum of Nikah Nama is not disputed. The amount agreed in terms of clause-19 of Nikah Nama is spousal support - having all the attributes of alimony - wherein reasonable benefits were offered to enable ex-wife to have dignified and comfortable life. There is no restriction that husband cannot agree to arrange for maintenance or agree to extend fiscal advantage to the wife, even after the divorce. This nature of the benefit / advantage, which is not in any manner is restricting right of divorce, is in fact an act of bestowing benefit or gift upon wife to support her, hence, cannot be termed as illegal or contrary to the spirit of ISLAM and teachings of Quran.''

An agreement for dower was nonetheless binding on the petitioner as the same was made at the time of solemnization of marriage[7]. Even as per para 336(2) of the Principles of Muhammadan Law by D.F. Mulla, if the marriage was consummated, the wife becomes entitled to immediate payment of whole of the unpaid dower both prompt and deferred.

6. Dower is a sum of money or other property which wife is entitled to receive from husband in consideration of marriage. The word 'consideration', however, cannot be deemed at par with the sense in which the word is used under the provisions of the Contract Act, 1872. A marriage is valid although no mention be made of the dower by the contracting parties as the term Nikah in its literal sense signifies a contract of union which is fully accomplished by the bond of a man and woman. Moreover, payment of dower is enjoined merely as a token of respect, therefore, the mention of it is not absolutely essential to the validity of marriage[8]. The command of Allah the Almighty as to giving of dower to woman as ordained in *Surah Al-Nisa* verse No.4 reads: -

> *4. "And give unto the women (whom ye marry) free gift of their marriage portions. But if they of their own accord remit unto you a part thereof, then ye are welcome to absorb it (in your wealth)[9]".*

In *Sura Al-Maida* Verse No.5 it has further been enjoined qua due *mahr* in the following terms: -

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7 Para 45 Anglo-Muhammadan Law By SIR ROLAND KNYVET WILSON (Fifth Edition). Published in 1921 by CALCUTTA AND SIMLA, THACKER, SPINK & CO, LONDON: W.THACKER & CO., 2, CREED LANE, E.C. **AND** Book 2 Chapter 3 of Second Edition of THE HEDAYA OR GUIDE A COMMENTARY on the MUSLIM LAWS by Charles Hamilton.

8 Second Edition of THE HEDAYA OR GUIDE A COMMENTARY on the MUSLIM LAWS by Charles Hamilton

9 Translation of the Holy Quran by Marmaduke Pickthall

"This day are (all) good things made lawful for you. And the food of those who have received the Scripture is lawful for you, and your food is lawful for them; and so are the virtuous women of the believers and the virtuous women of those who received the Scripture before you (lawful for you) when ye give them their dowries and take (them) in marriage, not in fornication, nor taking them as secret concubines. And whose denieth the faith, his work is vain and he will be among the losers in the Hereafter[10]".

No classification of dower either as prompt or deferred has been found to be given in the Holy Quran. Even, in case "*Dr. Sabira Sultana v. Maqsood Sulari, Additional District and Sessions Judge, Rawalpindi and 2 others"* **(2000 CLC 1384)**, this Court went on to observe that there being no classification of the dower as prompt and deferred in the Holy Quran and Sunnah, the deferment of payment of dower for an indefinite period with the consent of the wife was not prohibited. Relevant excerpt reads as under: -

"There being no classification of the dower as prompt and deferred in the Holy Qur'an and Sunnah, the deferment of the payment of dower for an indefinite period with the consent of the wife is not prohibited, but if a wife makes demand of its payment, the husband being under an obligation to make payment of the same, cannot further defer it on any excuse. The provisions of section 6(5) of the Muslim Family Laws Ordinance, 1961

[10] Translation of the Holy Quran by Marmaduke Pickthall

being not in conflict with Islam, it is mandatory for a husband to pay entire amount of dower, whether prompt or deferred, in case of entering into contract of second marriage in presence of first wife without her permission."

Any amount/property agreed to be paid by the husband to wife on the happening of some future event, by all intents and purposes be counted as a deferred dower to be paid by the husband on the happening of such event. While discussing the scope and nature of prompt and deferred dower, Syed Ameer Ali, a prominent jurist of his age, in his celebrated compilation Mohammedan Law (Volume II) that was published in 1965 by All Pakistan Legal Decisions, Lahore while defining prompt and the deferred dower observed as under: -

*"**Prompt and deferred dower.***

As there is nothing in the Koran or in the traditions tending to show that the integral payment of the dower prior to consummation is obligatory in law, the later jurisconsults have held that a portion of the mahr should be considered payable at once or on demand, and the remainder on the dissolution of the contract, whether by divorce or the death of either of the parties. The portion which is payable immediately is called the mahr-i-mu'ajjal, "prompt" or "exigible"; and a wife can refuse to enter the conjugal domicile until the payment of the prompt portion of the dower. The other portion is called mahr-i-muwajjal "deferred dower" which does not

become due until the dissolution of the contract. It is customary in India to fix half the dower as prompt and the remaining moiety as deferred or "postponed:" but the parties are entitled to make any other stipulation they choose. For example, they may allow the whole amount to remain unpaid until the death of either of the husband or the wife. Generally speaking, among the Musulmans of India, the deferred dower is a penal sum, which is allowed to remain unpaid with the object of compelling the husband to fulfill the terms of the marriage-contract in their entirety."

(Underlining is to supply emphasis).

In case *"Sultan Begum v. Sarajuddin"* **(AIR 1936 Lahore 183)** while discussing the spirit and importance of the dower it was observed as under: -

"Dower has important uses which affect the domestic life of the Muhammedans. The law giver of Islam was anxious to safeguard the wife against the arbitrary exercise of the right of divorce by the husband. If she survived her husband and his other heirs illtreated her, she could not be thrown into street but would be able, apart from her legal share, to enforce against them her claim for dower which must be paid out of the heritage before the assets of the husband are distributed among the heirs. This is the keystone of the Muhammedan Law of dower in its purity."

Faiz Badruddin Tyabji in para 98 of his famous work 'Muhammadan Law'[11], defined the terms prompt and deferred dower in the following words: -

> *"Mahr may be (a) either prompt, or exigible (in Arabic mu'ajjal) i.e., payable immediately on marriage if demanded by the wife or (b) deferred (in Arabic muwajjal) i.e., payable on the dissolution of marriage, or the happening of some specified event".*
>
> *(emphasis supplied)*

In view of above, it can very conveniently be resolved that where no specific or definite period is settled for the payment of deferred dower, wife would become entitled to dower at the event of dissolution of marriage or on the death of any of the spouses. If deferred dower is agreed to be paid on the happening of some specified event, the same would become payable on the occurrence of that specified event. In the instant case, there was a specific stipulation in the Nikah Nama that in case of contracting of second marriage or divorcing the respondent, petitioner would pay an additional dower to the tune of Rs.500,000/-. Undeniably, petitioner has divorced the respondent, therefore, respondent was entitled to the dower to the tune of Rs.500,000/-as stipulated in Nikah Nama. It would not be out of context to mention here that initially petitioner did not admit the insertion of additional dower in Nikah Nama, therefore, he cannot argue that divorce was given by him on the asking of respondent and her father. Since it has been resolved by the courts below that the entry qua additional dower was a genuine entry, the

[11] third edition published by N.M. Tripathi & Co., Bombay 1940

same would be construed strictly and as a whole, therefore, stance taken by petitioner in his written statement that he pronounced divorce on the asking of respondent and her father needs to be taken up and resolved in view of evidence adduced by petitioner at trial. Petitioner simply failed to substantiate his stance as taken in his written statement in reply to paragraph No.5 of the plaint qua pronouncing of divorce upon respondent on her insistence. Neither Muhammad Akhtar nor Muhammad Amjad who were claimed to be the witnesses of the happening whereby respondent and her father insisted the petitioner for giving divorce to respondent, have been produced to substantiate the said version. Muhammad Ashiq DW-2 even did not say anything about demand allegedly made by respondent or her father for pronouncing divorce upon the respondent. In this view of the matter, it can conveniently and legitimately be resolved that petitioner at his own divorced the respondent and the sentence qua divorcing respondent on her asking as mentioned in the written statement was an afterthought tale presumably added by a design to counter in anticipation the stipulation mentioned against column No.17 of the Nikah Nama.

7 Last but not the least, this Court in its extraordinary constitutional jurisdiction would not take any exception to the judgments passed by the courts having jurisdiction and lawful authority to decide the matter on merits unless some jurisdictional error or blatant illegality has been shown to be committed causing miscarriage of justice. It has been observed by the Supreme Court of Pakistan in case titled *"M. Hamad Hassan v. Mst. Isma Bukhari and 2 others"* **(Civil Petition No.1418 of 2023)** that once a matter has been adjudicated upon on facts by the trial and the appellate courts, this Court in its constitutional jurisdiction cannot exceed its powers by reevaluating the facts or substituting the appellate courts' opinion with its own.

It has further been observed by the Supreme Court of Pakistan that the acceptance of finality of the appellate courts' findings is essential for achieving closure in legal proceedings conclusively resolving disputes, preventing unnecessary litigation, and upholding the legislature's intent to provide a definitive resolution through existing appeal mechanisms. In case *"Arif Fareed v. Bibi Sara and others"* **(2023 SCMR 413)**, the Supreme Court of Pakistan observed as under:-

> *"7. ... The legislature intended to place a full stop on the family litigation after it was decided by the appellate court. However, we regretfully observe that the High Courts routinely exercise their extraordinary jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 as a substitute of appeal or revision and more often the purpose of the statute i.e., expeditious disposal of the cases is compromised and defied. No doubt, there may be certain cases where the intervention could be justified but a great number falls outside this exception. Therefore, it would be high time that the High Courts prioritize the disposal of family cases by constituting special family benches for this purpose."*

Learned counsel for the petitioner failed to point out even a single circumstance of any patent illegality or jurisdictional error in the impugned judgments and decrees. No case warranting any interference in the impugned judgments & decrees at all is made out.

8. The upshot of above discussion is that petition in hand is devoid of any merits, the same is dismissed.

(SHAKIL AHMAD)
JUDGE

Approved for reporting.

Judge

2024 LHC 1745

Writ Petition No.1333 of 2024

Rana Muhammad Faraz Noon vs Election Commission of Pakistan,

Date of hearing:	**05.03.2024**
Petitioner by:	M/s Mughees Aslam Malik and Rana Muhammad Iqbal Noon, Advocates.
Respondent No.1 by:	Ms. Riffat Yasmeen, Assistant Attorney General. Mr. Zafar Iqbal Awan, Additional Advocate General. Mr. Muhammad Jaffar, Assistant Director (Law) ECP.
Respondent No.2 in person with:	Malik Muhammad Altaf Nawaz, Advocate.
Respondent No.3 by:	Mr. Muhammad Nawazish Ali Pirzada, Hafiz Muhammad Akhtar Bhatti and Ms. Sadia Hanif, Advocates.

Shakil Ahmad, J. This is a petition that has been filed under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 ("the Constitution"), by Rana Muhammad Faraz Noon *(hereinafter referred to as 'petitioner')* with the following prayer: -

> *"……this petition may kindly be accepted and the impugned order dated 22.02.2024 passed by respondent No.1 and impugned notice dated 25.02.2024 issued by respondent No.2 may kindly be set aside by declaring the same as illegal, without jurisdiction and without lawful authority against the law and facts of the matter."*

2. Facts, in brief, relevant for the decision of instant petition are that the petitioner participated in General Elections, 2024 and contested for

the seat of National Assembly (NA-154 Lohdran-I) for which following candidates besides petitioner also contested the election: -

1. *Mr. Imdad Ullah Abbasi*
2. *Rana Muhammad Afzal Noon*
3. *Mr. Zafar Iqbal*
4. *Mr. Abdul Rehman Khan Kanju*
5. *Mr. Irfan Ahmad*
6. *Mst. Asmat Bibi*
7. *Mr. Muhammad Ajmal Kanju*
8. *Mr. Muhammad Akhtar Khan Kanju*
9. *Mr. Muhammad Zubair*

As per petitioner's stance he secured 1,34,937/- votes and Abdul Rehman Khan Kanju *(respondent No.3 herein)* secured second highest votes i.e. 1,28,438/- and after consolidation of results Form-47 was issued. Subsequently consolidation proceedings were finalized in the presence of contesting candidates and on the basis of consolidated result of all polling stations, Form-49 was issued by the Returning Officer, NA-154 Lodhran-I *(respondent No.2 herein)* declaring the petitioner as returned candidate and subsequently on the basis of consolidation proceedings Notification No.F.2(5)/2024-Cord(1) dated 16.02.2024 was issued by Election Commission of Pakistan *(hereinafter referred to as the 'Commission')* under section 98 sub section 1 of the Elections Act, 2017 (Act No.XXXIII of 2017) *(hereinafter referred to as the 'Elections Act')* by declaring petitioner as returned candidate. According to petitioner, it was on 25.02.2024 when respondent No.2 issued letter No.51/RO/ADC(F&P)/LD requiring the petitioner and others to attend the process of recounting of votes qua constituency No.NA-154 Lodhran-I, which was scheduled to be held on 26.02.2024 at 10:30 AM and petitioner came to know that the Commission

passed order dated 22.02.2024 (impugned order) directing respondent No.2 to carry out recounting of votes of constituency NA-154 Lodhran-I within a period of week and communicate final result to the Commission for further proceedings and fixed next date of hearing as 04.03.2024, hence this petition.

3. Learned counsel for the petitioner argued that after declaring the petitioner as returned candidate in view of Notification No.F.2(5)/2024-Cord(1) dated 16.02.2024, the Commission had become *functus officio* and impugned order dated 22.02.2024 has been passed without any lawful authority more particularly where Election Tribunal was constituted by the Commission vide Notification No.F.23(8)/2024-O/o-DD-Law dated 20.02.2024. It has further been argued that before passing the impugned order for recounting of votes particularly after declaring the petitioner as returned candidate vide Notification No.F.2(5)/2024-Cord(1) dated 16.02.2024, no notice whatsoever was served to petitioner, as such the principle of natural justice as enshrined in the maxim *audi alteram partem* was violated. According to learned counsel for petitioner, impugned order was totally illegal and without lawful authority. It has been further added that review petition filed before the Commission has already been withdrawn as petitioner availed the efficacious remedy by filing instant petition.

4. As against that, learned counsel appearing on behalf of respondent No.3 argued that petitioner has deliberately concealed the fact qua filing of an application by respondent No.3 before respondent No.2 even prior to the consolidation of results requiring recounting of votes in view of provisions of section 95 (5) of the Elections Act, that however was not decided by respondent No.2 owing to the deteriorating law and order situation created by the supporters of petitioner. According to him, petitioner also concealed the fact that respondent No.3 approached the Commission for recounting of votes

of all polling stations of the constituency NA-154 Lodhran-I and on that application reports were obtained from the concerned quarters and after obtaining the reports the Commission passed impugned order dated 22.02.2024. Learned counsel for respondent No.3 further elaborated that since petitioner has filed instant petition by concealing certain facts, he is not entitled for the equitable and discretionary relief. Learned counsel for respondent No.3 further added that vide impugned order respondent No.2 was merely required to have recounted the votes of the whole constituency in the presence of the parties and then to submit complete report and matter was fixed for 04.03.2024. Added that petitioner since availed of remedy of filing review petition before the Commission, therefore, instant petition is not maintainable. Further explained that no final order so far has been passed by the Commission, therefore, instant petition is not maintainable particularly in view of the provisions of section 9 (5) of the Elections Act. According to him, since no declaration has been made by the Commission, instant petition is liable to be dismissed for want of jurisdiction as even after passing of declaration by the Commission any aggrieved person could have filed appeal before the Supreme Court of Pakistan within a period of thirty days. According to him, petitioner cannot invoke the jurisdiction of this Court under Article 199 of the Constitution.

5. Learned Law Officers appearing on behalf of the Commission argued almost in the same lines as argued by learned counsel for respondent No.3 by adding that the Commission has the concurrent jurisdiction in terms of section 9 of Elections Act and even after issuance of notification of the returned candidates, the Commission can pass orders in view of section 9 of Elections Act till the period of sixty days. According to them, even after the constitution of Election Tribunal, the Commission can pass appropriate order

as it may deem necessary so as to ensure that the election was conducted honestly, justly, fairly and in accordance with law.

6. Heard learned counsel for the parties, learned Law Officers and perused the record.

7. Before dilating upon the objection raised by learned counsel for respondent No.3 and learned Law Officers qua maintainability of instant petition particularly in view of provisions contained in section 9 (5) of Elections Act, it would be appropriate to have a glance over relevant provisions regarding constitution of the Commission, its functions & duties, election of National & Provincial Assemblies and resolution of disputes arising out of election process as contained in the Constitution and Elections Act. Article 218 of the Constitution provides constitution of a permanent Commission for the purpose of election of both Houses of Parliament, Provincial Assemblies and for the election to such other public offices as may be specified by the law. As per Clause 2 of Article 218 of the Constitution, the Commission shall consist of the Commissioner, who shall be the Chairman of the Commission and four members. The primary duty of the Commission has been contemplated under Clause (3) according to which the Commission has to organize and conduct the election and to make such arrangements as are necessary to ensure that the election is conducted honestly, justly, fairly and in accordance with law and corrupt practices are guarded against. Article 219 of the Constitution prescribes the duties of the Commission. Article 222 of the Constitution mandates the promulgation of laws subject to the Constitution in respect of following matters: -

> *"(a) the allocation of seats in the National Assembly as required by clauses (3) and (4) of Article 51;*

(b) the delimitation of constituencies by the Election Commission [including delimitation of constituencies of local governments];
(c) the preparation of electoral rolls, the requirements as to residence in a constituency, the determination of objections pertaining to and the commencement of electoral rolls;

(d) the conduct of elections and election petitions; the decision of doubts and disputes arising in connection with elections;

(e) matters relating to corrupt practices and other offences in connection with elections; and

(f) all other matters necessary for the due constitution of the two Houses, the Provincial Assemblies [and local governments]"

Provisions of Article 225 of the Constitution are couched in negative language as it starts with word 'no' and contemplate that no election to a House or a Provincial Assembly shall be called into question except by an election petition presented to the tribunal and in such manner as may be determined by Act of Majlis-e-Shoora (Parliament). The Elections Act is an Act to amend, consolidate and unify laws relating to the conduct of elections. Chapter-II of the Elections Act describes the procedure and powers of the Commission so as to ensure holding of fair elections. Chapter V of the Elections Act mainly deals with the appointments of District Returning Officers, Returning Officers, Presiding Officers and describes duties of election officials for the conduct of elections to an Assembly. Chapter IX of the Elections Act provides the procedure qua the resolution of election disputes through filing of election petitions before Election Tribunals constituted under Article 225 of the Constitution. Having a bird's eye view of the relevant provisions of the Constitution and Elections Act in respect of election process and resolution of controversies between the contesting parties, now I revert to the objection qua

maintainability of instant petition as hinted in the opening lines of this paragraph. According to learned counsel for respondent No.3 and learned Law Officers, instant petition is not maintainable in view of provisions of section 9 of the Elections Act. Provisions of section 9 of the Elections Act are reproduced hereunder for the facility of ready reference: -

> *9. Power of the Commission to declare a poll void.—(1) Notwithstanding anything contained in this Act, if, from facts apparent on the face of the record and after such enquiry as it may deem necessary, the Commission is satisfied that by reason of grave illegalities or such violations of the provisions of this Act or the Rules as have materially affected the result of the poll at one or more polling stations or in the whole constituency including implementation of an agreement restraining women from casting their votes, it shall make a declaration accordingly and call upon the voters in the concerned polling station or stations or in the whole constituency as the case may be, to recast their votes in the manner provided for bye-elections.*
>
> *Explanation.—If the turnout of women voters is less than ten percent of the total votes polled in a constituency, the Commission may presume that the women voters have been restrained through an agreement from casting their votes and may declare, polling at one or more polling stations or election in the whole constituency, void.*
>
> *(2) Notwithstanding the powers conferred on it by sub-section (1), the Commission may order filing of complaint under this Act before a court of competent jurisdiction against persons who entered into the agreement referred to in sub-section (1).*
>
> *(3) Notwithstanding the publication of the name of a returned candidate under section 98, the Commission may exercise the powers conferred on it by sub-section (1) before the expiration of sixty days after such publication; and, where the Commission does*

> *not finally dispose of a case within the said period, the election of the returned candidate shall be deemed to have become final, subject to the decision of an Election Tribunal on an election petition, if any.*
>
> *(4) While exercising the powers conferred on it by sub-section (1), the Commission shall be deemed to be an Election Tribunal to which an election petition has been presented and shall, notwithstanding anything contained in Chapter IX, regulate its own procedure.*
>
> *(5) Any person aggrieved by a declaration of the Commission under this section may, within thirty days of the declaration, prefer an appeal to the Supreme Court.*

From plain reading of the above, it can very conveniently be resolved that powers conferred upon the Commission are constricted only to the issuance of declaration with regard to declaration of poll as void and repolling in respect of one or more polling stations or even in the whole constituency when Commission is satisfied that by reason of grave illegalities or violations of the provisions of the Elections Act or Rules that materially affected the result of the poll at one or more polling stations or in the whole constituency including implementation of an agreement restraining women from casting their votes, repolling and recasting of the votes was necessary. The provisions referred above when are seen in their entirety, same do not confer any power upon the Commission to pass an order for recounting of votes in terms of section 95 of the Elections Act while invoking the provisions of section 9 of the Elections Act. Concurrent jurisdiction of the Commission in view of sub section 3 of section 9 of the Elections Act is confined qua the powers as conferred upon the Commission under sub section 1 of section 9 of the Elections Act that in turn are confined only for issuance of a declaration by calling upon voters in the concerned polling station or stations or in the whole constituency as the

case may be to recast their votes in the manner provided for bye-elections in view of some grave illegalities or violations of the provisions of the Elections Act and that have materially affected the result of the poll at one or more polling stations or in the whole constituency. Right of appeal to the Supreme Court given to an aggrieved person under section 9(5) of the Elections Act only is confined regarding the matter qua declaration of a poll to be held as void and calling upon voters to recast their votes in the manner provided for bye-elections. In case *"Zulfiqar Ali Bhatti v. Election Commission of Pakistan and others"* **(Civil Appeal No.142 of 2019, Civil Petition No.1369 of 2019)** while expounding the scope of section 9 of Elections Act, the Supreme Court held as under: -

> *"…The opening expression used in Section 9(1), "Notwithstanding anything contained in this Act", shows that the jurisdiction of the Election Commission under this Section has an overriding effect against any other provision of the Elections Act. Thus, the Election Commission is competent to exercise its jurisdiction under this Section, notwithstanding the availability of the remedy of the election petition under Section 139 read with Section 142 and the jurisdiction of the Election Tribunal to grant the same relief under Section 154(1)(b)(i) of the Elections Act. To the extent of the grounds specified in Section 9(1) upon which the Election Commission can exercise its power to order a re-poll, the jurisdiction of the Election Commission and the Election Tribunal is, therefore, concurrent. The Election Commission can exercise its jurisdiction under Section 9(1) of the Elections Act, to order a re-poll if:*
>
> *i. There have been grave illegalities or violations of the provisions of the Elections Act or the Rules made thereunder;*

ii. Such illegalities or violations are evident from facts apparent on the face of the record; and

iii. Such illegalities or violations have materially affected the result of the poll at one or more polling stations or in the whole constituency

Although the ground of grave illegalities or violations of the provisions of the Elections Act or the Rules made thereunder in the election process is common for the exercise of their respective jurisdictions by the Election Commission and the Election Tribunal, the difference lies in the nature of proof of those illegalities and violations, and in the scope of enquiry.

26. The words "from facts apparent on the face of the record" used in Section 9(1) are of vital importance in this regard. They restrict the jurisdiction of the Election Commission to such grave illegalities or violations of the Elections Act or the Rules which are evident "from the facts apparent on the face of the record". The Election Commission can, therefore, exercise its jurisdiction under Section 9(1) only when the allegation or issue of grave illegalities or violations of the Elections Act does not require a full-fledged trial and recording of pro and contra evidence of the contesting parties, which can only be undertaken by the Election Tribunal."

Instant matter indeed relates only to the recounting of votes under section 95 of Elections Act, therefore, objection raised by learned counsel for respondent No.3 and learned Law Officers qua non-maintainability of instant petition in view of section 9(5) of Elections Act is misconceived. In present case, respondent No.3 moved an application under section 95(5) of the Elections Act and all other enabling provisions of the Act *ibid* before the Commission seeking recount of votes mainly on the ground that margin of votes between him and the returned candidate was less than 8000 votes and also less than 5 % of total number of votes polled. According to learned counsel for respondent

No.3 an application was filed by respondent No.3 before respondent No.2 for the same relief but the application was not decided, therefore, petition was filed before the Commission for obtaining the order for recounting under section 95 of the Elections Act. From the bare perusal of copy of the application annexed at page 12 of C.M No.1087 of 2024, it transpires that no such application was narrated to have been moved before respondent No.2 under section 95 of the Elections Act. To better appreciate the submission of learned counsel for respondent No.3 that Commission was empowered to pass an order of recounting even after the consolidation of results under section 95 of the Election Act, it would be advantageous to reproduce hereunder section 95 of the Elections Act: -

> *95. Consolidation of results.—(1) Immediately after announcement of provisional results, the Returning Officer shall give the contesting candidates and their election agents a notice in writing of the day, time and place fixed for the consolidation of the results, and, in the presence of such of the contesting candidates and election agents as may be present, consolidate in the prescribed manner the Results of the Count furnished by the Presiding Officers, including therein the postal ballots received by him before the time fixed for the consolidation of results*
> *[: Provided that presence of not more than one agent of each candidate shall be allowed.]*
>
> *(2) Before consolidating the Results of the Count, the Returning Officer shall examine the ballot papers excluded from the count by the Presiding Officer and, if he finds that any such ballot paper should not have been so excluded, count it as a ballot paper cast in favour of the contesting candidate for whom the vote has been cast.*
>
> *(3) The Returning Officer shall also count the ballot papers received by him by post in such manner as may be prescribed and include the votes cast in favour of*

each contesting candidate in the Consolidated Statement except those which he may reject on any of the grounds mentioned in section 90.

(4) The ballot papers rejected by the Returning Officer under subsection (3) shall be mentioned separately in the consolidated statement.

[(5) Before commencement of the proceedings, the Returning Officer shall recount the ballot papers of one or more polling stations if a request or challenge in writing is made to that effect by a contesting candidate or his election agent and—

(a) the margin of victory between returned and runner up candidates is less than five percent of the total votes polled in the constituency or eight thousand votes in case of National Assembly constituency and four thousand votes in case of a Provincial Assembly constituency, as the case may be, whichever is less; or

(b) the number of votes excluded from the count by the Presiding Officer are equal to or more than the margin of victory: Provided that the Returning Officer shall recount only once.]

(6) The Commission may, before conclusion of the consolidation proceedings [and after notice to the contesting candidates], for reasons to be recorded, direct the Returning Officer to recount the ballot papers of one or more polling stations.

(7) If there is a difference between the Results of the Count received from the Presiding Officers and the results of the recount, the Returning Officer shall record the difference and details thereof:

Provided that where the Returning Officer has recounted the votes under sub-section (5) or sub-section (6), the consolidation proceedings shall be completed [within—

(a) seven days after the polling day in the case of elections to the National Assembly; and

(b) five days after the polling day in the case of elections to a Provincial Assembly.]

(8) The Returning Officer shall, within twenty four hours after the consolidation proceedings, send to the Commission signed copies of the Consolidated Statement of the Results of the Count and Final Consolidated Result together with Results of the Count and the Ballot Paper Account, as received from the Presiding Officers, and shall retain copies of these documents for record.

(9) After consolidation of results, the Returning Officer shall give to such contesting candidates and their election agents [and accredited observers] as are present during the consolidation proceedings a copy of the Consolidated Statement of the Results of the Count and the Final Consolidated Result sent to the Commission against proper receipt.

(10) On receipt of documents under sub-section (8), the Commission shall, within fourteen days from the date of the poll, publish the documents on its website.

(Underlining is to supply emphasis)

Bare reading of above particularly sub section (6) of Section 95 of Elections Act vividly reveals that the Commission may before the conclusion of consolidation proceedings, after giving notice to contesting candidates and for reasons to be recorded, direct the Returning Officer to recount the ballot papers of one or more polling stations. The powers conferred upon the Commission with regard to passing an order for recounting of the ballot papers are limited and same can be exercised only before the conclusion of consolidation proceedings subject to notice to the contesting candidates. In the instant case, the final consolidated result was prepared and submitted to the Commission by respondent No.2 under section 98 (1) of the Elections Act on Form-49 and after receiving final consolidated result from respondent No.2, the Commission also proceeded to publish Notification No.F.2(5)/2024-Cord(1)

dated 16.02.2024 in terms of sub section (1) of Section 98 of the Elections Act in the official gazette showing the name of contesting candidate who received highest number of votes and stood elected whereby petitioner was declared to have been elected. The Commission, therefore, had no authority or power to pass an order for recounting in terms of section 95 (6) of the Elections Act when consolidation proceedings stood completed and even notification under section 98(1) of the Elections Act declaring petitioner as returned candidate was issued. It may further be seen that order qua recounting of votes under section 95 (6) of the Elections Act can only be passed after putting the contesting candidates to notice by also giving the reasons justifying order of recounting. In the instant case, undeniably, no notice whatsoever was served to the petitioner before passing an order of recount of ballot papers. Assistant Director (Law) of the Commission upon Court query that whether any notice was issued to petitioner before passing order for recounting, frankly and fairly stated that no notice was served upon petitioner before passing the impugned order. Where law itself provides issuing of notice to a candidate before passing any order for recounting of ballots, same is required to be construed strictly. It is settled principle of law that when a thing is required to be done in a particular manner that must be done in that particular manner and not otherwise. The Commission had failed to follow the dictates of provisions of section 95 (6) of the Elections Act and passed the impugned order even in disregard of norms of judicial procedure that requires issuance of notice to a person whose rights are likely to be affected adversely by the impugned order. In case "*Rahim Shah v. The Chief Election Commissioner of Pakistan and another"* **(PLD 1973 SC 24)**, it was held by the Supreme Court as under: -

> *"……..No notice was given to the Jamaat either before or after these orders were made. It was held that the orders were vitiated being violative of the*

> *principles of natural justice that no man shall be condemned unheard. In support of this decision Cornelius. C. J. cited the cases of Ex parte: Ramshay (1852) 18 Q B 173) and Osgood v. Nelson (L R 1972 A C 636)."*

In case *"The University of Dacca through its Vice Chancellor, etc. v. Zakir Ahmed"* **(PLD 1965 SC 90)**, it was laid down that in all proceedings by whomsoever held, whether judicial or administrative, the principles of natural justice have to be observed if the proceedings might result in consequences affecting the right of parties concerned. As regards arguments of learned counsel for respondent No.3 and learned Law Officers that order passed by the Commission was not amenable to constitutional jurisdiction of this Court under Article 199 of the Constitution, same carries little substance for the reason that where the action in question suffers from *mala fides* and is without jurisdiction or is *coram non judice*, this Court got the jurisdiction to go into and test the validity of such an action. Reliance in this regard may safely be placed on case *"Muhammad Azhar Siddique and another v. Government of Punjab through Chief Secretary, Lahore and 8 others"* **(PLD 2010 Lahore 138)**, wherein while dealing with the moot point it was resolved as under: -

> *7. The second jurisdictional objection asserts the immunity of the orders passed by the Honourable CEC from judicial scrutiny. In the judgments noted above learned Courts have proceeded to examine the merits of the challenges made by executive authorities to orders passed by the Honourable CEC with respect to the announcement of schedules of elections. Therefore, the present objection of justiciability has been surmounted before. However, to put the matter at rest it must be observed that the constitutional jurisprudence in Pakistan does not recognize non-justiciability of any action taken or done by a constitutional functionary of the State. The thresh-hold for attracting judicial review may differ based upon relevant criteria but complete immunity from judicial review is a misnomer. However, strong may be a constitutional*

provision for ouster of jurisdiction of the superior Courts in a matter, there are three criteria upon which a superior Court shall always have jurisdiction to examine any action by a constitutional functionary. Where the action in question suffers from mala fides, is without jurisdiction or is coram non judice, a superior Court shall have jurisdiction to scrutinize and test the validity of such an action. This principle was laid down with great clarity in the case of Federation of Pakistan v. Ghulam Mustafa Khar PLD 1989 SC 26. It has been reiterated subsequently by the Honourable Supreme Court without modification. With utmost respect therefore, the actions taken by the Honourable CEC in the discharge of his functions and duties do not enjoy absolute immunity. Therefore, the discretion of the Honourable CEC in directing the issuance of schedule of elections or bye-elections cannot be absolute but is fettered by such constrains that are imposed under the law. The ambit of his discretion may vary depending on the nature of a case; it would be limited in the exercise of judicial functions by the Honourable CEC as laid down in Raheem Shah v. The Chief Election Commissioner of Pakistan PLD 1973 SC 24. However, such discretion would be much wider where his autonomy to apply his mind to his constitutional function is involved. In this context his discretion as a constitutional functionary shall be exercisable, reasonably, fairly and in terms of the statute. The satisfaction of the said tests shall suffice to avoid interference in judicial review. Reference in this behalf may be made to Federation of Pakistan v. Haji Muhammad Saif Ullah Khan PLD 1989 SC 166. Under Article 225 of the Constitution, Dr. Farooq Hassan, Advocate, pressed another limb of the objection to justiciability of the actions taken by Honourable CEC. That provision bars challenge to an election to the National Assembly or a Provincial Assembly except by an election petition presented before an Election Tribunal. An election is deemed to commence from the date of commencement of its election schedule. In the present case the election schedule commenced with the issuance of public notice by the Returning Officer on 24-9-2009. This petition was filed on 29-9-2009 one day prior to the filing of nomination papers by candidates in the bye-elections. Accordingly, learned counsel for the appellant contended that the election schedule having commenced, the bye-election could not be challenged other than before the Election Tribunal appointed for the purpose. On this point two authorities may be

referred briefly and relevantly to note that an election petition provides a remedy to the contesting candidates and not a third party like the Provincial Government. Consequently, Article 225 of the Constitution is not a hurdle in the filing of the present petition on the principles recognized by the Honourable Supreme Court in Ghulam Mustafa Jatoi's case 1994 SCMR 1299 and Aftab Shahban Mirani's case 1998 SCMR 1863. Consequently, with due deference to the wide amplitude of the discretion vesting in the Honourable CEC, the present objection claiming non justiciability of the exercise thereof, is without legal foundation.

(Emphasis supplied)

In the present case, impugned order has been passed by the Commission against the dictates of provisions of section 95 of the Elections Act, therefore, same can conveniently be described to have been passed without jurisdiction in the matter. Even, no remedy whatsoever has been provided elsewhere in the Elections Act to impugn an order passed by the Commission with regard to recounting of ballot papers after the consolidation of results of the count, therefore, petitioner cannot be allowed to remain remediless, as such he was well within his right to challenge the impugned order while invoking the provisions of Article 199 of the Constitution. Submission of learned counsel for respondent No.3 that since petitioner availed of the remedy of filing review petition therefore instant petition is not competent, is without any substance for the simple reason that no remedy of review of an order passed by the Commission itself has been provided elsewhere in the Elections Act. As per section 8(b) of the Elections Act, the Commission only has the power to review an order passed by an Officer under the Elections Act or Rules including rejection of ballot papers. No power of review has been conferred upon the Commission to review its own order. Where no remedy is provided elsewhere to challenge the impugn order qua recounting of votes, this Court has got the jurisdiction under Article 199 of the Constitution to entertain a petition

involving question of law or interpretation of law in respect of an election dispute. In case "*Syed Nayyar Hussain Bukhari v. District Returning Officer, NA-49, Islamabad and others"* **(PLD 2008 SC 487)**, while dealing with the question of maintainability of petition under Article 199 of Constitution, Supreme Court of Pakistan observed as under: -

> *"5. The general law is that the High Court should not interfere in the election disputes in its constitutional jurisdiction and this Court in Javed Hashmi's case supra has emphasized that in view of the bar contained in Article 225 of the Constitution, the High Court is not supposed to exercise its jurisdiction under Article 199 of the Constitution in election matters. The same view was expressed in Ghulam Mustafa Jatoi v. Additional District and Sessions Judge 1994 SCMR 1299 with the observation that in exceptional cases the jurisdiction of the High Court under Article 199 of the Constitution can be invoked and same principle was followed in Ayatullah Dr. Imran Liaquat Hussain v. Election Commission of Pakistan PLD 2005 SC 52 but we may point out that the concept of absolute bar of jurisdiction of the High Court in election matters is based on misconception of law. The power of judicial review of the High Court is certainly not available as an alternate remedy in the election matter but if the aggrieved person has no other remedy, the bar of jurisdiction contained in Article 225 of the Constitution, may not affect the jurisdiction of the High Court to entertain a petition involving question of law or interpretation of law in respect of an election dispute."*
>
> ***(Emphasis supplied)***

In Case *"Ghulam Mustafa Jatoi v. Additional District and Sessions Judge"* **(1994 SCMR 1299)** the Supreme Court held as under: -

> *"Generally in an election process the High Court cannot interfere by invoking its Constitutional jurisdiction in view of Article 225 of the Constitution.*

However, this is subject to an exception that where no legal remedy is available to an aggrieved party during the process of election or after its completion, against an order of an election functionary which is patently illegal/without jurisdiction and the effect of which is to defranchise a candidate, he can press into service Constitutional jurisdiction of the High Court."

(Emphasis supplied)

Impugned order passed by the Commission issuing direction to respondent No.2 for recounting after the completion of consolidation proceedings cannot remain unnoticed by this Court while exercising jurisdiction under the provisions of Article 199 of Constitution particularly in view of the fact that the impugned order was passed after issuance of Notification No.F.2(5)/2024-Cord(1) dated 16.02.2024 and more particularly after the establishment of Election Tribunal through Notification No.F.23(8)/2024-O/o-DD-Law dated 20.02.2024 inasmuch as the moment when Commission issued notification qua the establishment of Election Tribunal so as to decide the election disputes, no authority or jurisdiction was left with the Commission to pass an order qua the recounting of the ballot papers under section 95 of the Elections Act. So far as submission of learned counsel for respondent No.3 that petitioner concealed facts qua filing of petition by respondent No.3 before the Commission and reports requisitioned by Commission from the R.O, therefore, he is not entitled to discretionary relief, is concerned, same is of little avail to the respondent No.3 for the simple reason that undeniably petitioner was never put on notice prior to the passing of the impugned order, therefore, there was no question of narrating those facts in his petition which presumably were not in the know of petitioner. Article 225 of the Constitution mandates decision of election disputes by the Election Tribunal and the

provisions of Section 140 of the Elections Act deal with the appointment of Election Tribunals by the Commission for swift disposal of election petitions.

8. The upshot of above discussion is that petition in hand is allowed. As a result, impugned order dated 22.02.2024 and notice dated 25.02.2024 are declared to have been passed without jurisdiction and lawful authority, therefore, the same are set aside and as a natural corollary to that, any proceedings carried out by respondent No.2 in pursuance of the impugned order and notice would be considered to have been vitiated.

9. Since main petition has been allowed, C.M. Nos.1070, 1071, 1087 & 1088 of 2024 stand disposed of accordingly.

(SHAKIL AHMAD)
JUDGE

2024 LHC 2933

Writ Petition No.12218 of 2022

Muhammad Arif Malik vs Additional District Judge & two others

Date of Hearing:	**08.05.2024**
Petitioner By:	Ch. Muhammad Ishaq Khokhar and Malik Nisar Ahmad, Advocates.
Respondent No.3 By:	Mr. Muhammad Javed Butt, Advocate.

Shakil Ahmad, J. Muhammad Arif Malik **("petitioner")** has filed the instant petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 **("the Constitution")** to call into question the validity of order dated 17.03.2021 and judgments dated 19.02.2022 passed by learned Special Judge Rent, Lahore and learned Additional District Judge, Lahore, respectively, whereby ejectment petition filed by Iftikhar Ahmad Butt (**"respondent")** was accepted by learned Special Judge Rent, Lahore, however, the respondent was held entitled only to receive arrears of rent from the date of filing ejectment petition i.e. 29.06.2017 at the rate of Rs.9000/- per month till vacation of demised premises, and appeals filed by both the parties were decided by dismissing the appeal filed by petitioner and partially allowing the appeal filed by respondent.

2. Necessary facts, leading to the filing of instant petition are that the respondent filed a petition under section 15 of the Punjab Rented Premises Act, 2009 (**"the Act, 2009"**) seeking eviction of the petitioner from the property bearing No.SWV-3-S-12/A measuring 03-Marlas & 112 Sq-Ft situated at Kamal Street Sanda Khurd, Lahore (**"subject property"**), precisely on the ground that Muhammad Rasheed, predecessor-in-interest of the petitioner **("mortgagor")** being owner of the same agreed to mortgage the

subject property with the respondent on 19.06.2000 for a consideration of Rs.200,000/- and in pursuance whereof an agreement regarding condition of mortgage was also reduced into writing wherein it was specifically mentioned that the mortgagor would not occupy the subject property because the possession had been transferred to the respondent after the payment of mortgage amount of Rs.2,00,000/-; however, the respondent signified his desire to rent out the subject property, whereupon mortgagor requested to obtain the mortgaged property on rent @ Rs.9000/- per month and tenancy agreement was made part of the said agreement regarding condition of mortgage. As per respondent's version, after demise of mortgagor, petitioner being legal heir of mortgagor remained in possession of subject property, however, he did not pay any rent despite repeated demands, hence, the eviction petition.

3. Petitioner, in response to notice, filed application seeking permission to appear and defend the matter by initially raising the objection that there existed no tenancy agreement between him and the respondent. He mainly came up with the assertion that he was owner-in-possession of the subject property since 1992 when his real father, through gift deed No.3401, Book No.1, Volume No.1586 dated 11.04.1992 transferred the subject property in his favour. This application was contested by the respondent by filing written reply, however, the application filed by the petitioner was finally allowed vide order dated 05.09.2018 and in view of divergent pleadings of the parties, learned Special Judge Rent, Lahore framed as many as four issues including that of relief and after recording evidence of either of the sides, proceeded to accept the ejectment petition by also entitling respondent to receive arrears of rent only from the date of filing ejectment petition i.e. 29.06.2017 at the rate of Rs.9000/- per month till vacation of demised premises. Both the parties filed

their respective appeals, appeal filed by the petitioner was dismissed, whereas appeal filed by respondent was partially allowed by entitling him to recover arrears of rent for the period of three years at the rate of Rs.9000/- per month prior to the institution of ejectment petition, hence this petition.

4. Learned counsel for the petitioner argued that the impugned order and judgments have been passed against the facts and law. To explain the same, he argued that no title document ever existed in the name of mortgagor; as such there existed no question of his entering into any agreement with the respondent. Further adds that as a matter of fact, subject property was owned by petitioner's father, who through a registered document transferred the same in the name of petitioner as back in the year 1992 and since then petitioner is in possession of the same as the sole owner. Further submits that document PT-I is never considered as proof of ownership but unnecessary importance was given to the said document in preference with the registered document through which subject property was transferred to petitioner by the real owner, i.e., father of the petitioner. Learned counsel went on arguing that two transactions, one pertaining to mortgage deal and the other relating to agreement to rent out the subject property, were made through single document only to recover interest on the money advanced through mortgage, as such there was no relationship of landlord and tenant between mortgagor and the respondent and the lawful relationship between the parties, even as per the contents of mortgage deed, would be that of mortgagor and mortgagee, therefore, the petition filed under the provisions of the Act, 2009 was not at all made out. Learned counsel for the petitioner placed his reliance on cases titled *"Mst. Maqbool and others v. Samandar Khan"* **(PLD 1969 Peshawar 216)**, *"Syed Jamal-ud-Din v. Syed Mobashar Hussain Shah"* **(PLD 1976 Lahore 187)** and *"Samandar Khan v. Mst. Maqbool and others"* **(1974 SCMR 388).**

5. As against that, learned counsel for the respondent argued that as a matter of fact, the subject property was owned and possessed by the mortgagor who died issueless and in fact mortgagor obtained loan from the respondent and not only executed a pronote but simultaneously a rent deed was also reduced into writing through a single document, whereafter possession of the subject property was handed over to the respondent and subsequently respondent let out the subject property to mortgagor on rent who paid rent for a certain period of time and then stopped paying the rent. Learned counsel for respondent went on arguing that the respondent has also filed a suit for recovery under the provisions of Order XXVII Rule 1 & 2 CPC and in that proceeding, it was admitted by the contesting side including petitioner that loan was obtained by mortgagor and that there exists tenancy relationship between mortgagor and the respondent. Learned counsel further emphasized that record of PT-I for the year 1991-92 clearly shows ownership of the subject property with mortgagor by negating the argument that the subject property was in fact owned by Muhammad Hussain, father of mortgagor and the petitioner. Learned counsel for the respondent further argued that both courts below have rightly decided the matter. It has further been argued that concurrent findings of courts below on facts and law cannot be called into question in extra constitutional jurisdiction of this Court and therefore requested that petition in hand be dismissed with cost throughout.

6. Heard learned counsel for the parties. Record so annexed with the petition and the case laws submitted have been perused.

7. Having seen the record annexed with the petition, it reveals that petitioner and mortgagor are sons of Muhammad Hussain Malik, who passed away on 09.11.2007 whereas mortgagor died on 05.02.2002. Document titled as ‘Agreement regarding condition of mortgage’ Exh:A1 claimed to have been

executed by mortgagor on 19.06.2000, is the document on the basis of which respondent filed the Ejectment Petition under section 19 read with section 15 of the Act 2009, precisely, on the ground that mortgagor agreed to mortgage the subject property in lieu of Rs.200,000/- for a period of two years and it was further stipulated in the said document that mortgagor obtained the subject property on rent @ Rs.9000/- per month. From the contents of document Exh:A1, it transpires that both the parties were bound to get registered proper mortgage deed. It was further stipulated in Exh:A1 that if mortgagor fails to pay rent in time, he would be bound to hand over the possession of the subject property to mortgagee. From the perusal of contents of Exh:A1, it further transpires that the same can merely be counted as an agreement to mortgage whereby an amount to the tune of Rs.200,000/- was advanced by the respondent. The contents of Exh:A1 when are seen in their entirety, the same cannot be considered as a mortgage deed and therefore can hardly be considered as either a valid transaction of mortgage within the meaning of section 58 of the Act, 1882 or a charge upon property in terms of section 100 of the Act 1882. The contents of agreement Exh:A1 when are taken on their face value, the same merely deal with a right for the respondent to obtain another document, i.e, a mortgage deed regarding the subject property to be executed by mortgagor. In case titled "*Patelkhana Venkataramasami and another v. Imperial Bank of India Rajahmundry and others"* **(A.I.R. 1938 MADRAS 889),** while dealing with the moot point, it was observed that an agreement to mortgage does not create charge. Similar view was taken in case titled "*Hukamchand Kasliwal and another v. Radha Kishen Moti Lal Chamaria and others"* **(A.I.R. 1930 Privy Council 76)**, wherein it was observed that in view of sections 58 and 100 of the Act 1882, an agreement to mortgage cannot be considered mortgage or charge. A mortgage, as per provisions of section 58 of the Act 1882 is the transfer of an interest in specific

immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan. Mortgage, therefore, is merely a charge and not ownership for the reason that mortgage is transfer of interest in the property for the purpose of securing the payment of money advanced. Transaction/deal between respondent and mortgagor even in view of contents of Exh.A1 cannot be categorized as a complete mortgage deal conferring any right whatsoever upon the respondent to further rent out the subject property to the actual owner of the property. It will also not be out of context to mention here that possession of subject property was never handed over to the respondent and similarly no mortgage deed as stipulated in Exh.A1 was ever drawn or executed. Having seen the contents of document Exh.A1 and pleadings of the respondent, it can very safely be resolved that the mortgage deal can hardly be categorized as usufructuary mortgage. A usufructuary mortgage is considered as a contract whereunder the mortgagor transfers possession and usage rights of subject property to the mortgagee while retaining its ownership. The mortgagee is only granted the right to enjoy the income or produce generated by the property during the mortgage period. In the instant case even it is not the case of the respondent that possession of subject property was ever handed over to him in pursuance of any mortgage deal. It is also matter of record that ejectment petition has been filed with the delay of seventeen years.

8. Looking the matter from a different angle, it may be seen that as per contents of Exh:A1, mortgagor claimed himself to be the owner of the subject property on the basis of record of Excise Department. As per the narration of document Exh:A1, the subject property was shown to be ancestral property, however, no detail whatsoever has been given in the said document that as to how and under which mode the ownership of ancestral property

devolved upon the mortgagor particularly in the backdrop of the fact that father of mortgagor namely Muhammad Hussain died after the demise of mortgagor. As per record annexed with the instant petition, Muhammad Hussain passed away on 09.11.2007 whereas mortgagor died on 05.02.2002. If the subject property was ancestral property as mentioned in Exh.A1, the same was supposed to be devolved upon the legal heirs of Muhammad Hussain after his demise. Even otherwise, it is by now a settled principle of law that entries in the record pertaining to PT-I in no way confer ownership rights. Reliance may safely be placed on case titled "*Muzaffar Khan v. Sanchi Khan and another"* **(2007 SCMR 181),** wherein while dealing with the authenticity of PT-1 it was observed by the Apex Court that any entry in PT-1 maintained by Excise & Taxation Office would not confer any ownership right over the property and such document merely speaks about the right of possession. Mortgagor since was not owner of the subject property, he was not competent to enter into any agreement of mortgage. It is almost a settled principle of law that no one can transfer a better title than what he himself possesses as expressed by the maxim *"nemo dat quod non habet"*. There is no cavil with the proposition that no mortgage can legitimately be created in respect of property, the title/ownership whereof does not vest in the mortgagor as the mortgagor does not have any explicit authority to create charge upon such property. Reliance in this regard can safely be placed on cases titled *"V.E.R.. M.A.R Chettyar Firm v. Ma Joo Teen and others"* **(AIR 1933 Rang 299),** *"Messrs Bolan Bank Limited through Attorney v. Messrs Al-Aslam International through Proprietor and another"* **(2002 CLD 702)** and *"Australasia Bank Ltd v. Faruaui House Building Corporation Ltd. and 2 others"* **(PLD 1975 Karachi 870).**

9. In the backdrop of above discussion, now the moot point that needs to be determined by this Court is that whether there existed relationship

of landlord and tenant between the respondent and the petitioner within of provisions of the Act 2009. When the contents of document Exh:A1 are seen in their entirety, the relationship between the respondent and mortgagor at the most becomes that of mortgagor and mortgagee and the same can hardly be considered as relationship between them that of landlord and tenant. As per the provisions of section 2(d) of the Act 2009, term 'landlord' has been defined as owner of the premises and includes a person for the time being entitled or authorized to receive rent in respect of the premises. The term 'tenant' has been defined under the provisions of section 2(l) of the Act 2009 whereby tenant means a person who undertakes or is bound to pay rent as consideration for the occupation of a premises by him or by any other person on his behalf and include a person who continues to be in occupation of the premises after the termination of his tenancy for the purpose of a proceeding under the Act 2009. Undeniably, agreements i.e. one to mortgage the property and second to lease out the property are mentioned in one and the same document Exh:A1. Irresistible and vivid conclusion that can be drawn from the contents of document Exh.A1 would be that lease deal as mentioned in Exh.A1 was coined merely for the purpose of realizing the interest due on mortgage money, therefore, the amount agreed to be paid as a rent can hardly be counted and considered as a rent payable by the tenant to the landlord. As the amount that was shown to be received by the respondent was a certain sum of amount to be received for the consideration of amount to the tune of Rs.200,000/- that was lent to mortgagor, therefore, said amount can hardly be considered as rent amount to be paid by the mortgagor to the mortgagee for the simple reason that the mortgagor still was the owner of the property. A person cannot be the owner and the tenant at the same time. In case *"Kareem Bakhsh and others v. Noor Muhammad and others"* **(PLD 2011 Lahore 249)**, it was observed that it is established principle of law that mortgage is a charge and not ownership.

Reliance may further be placed on case reported as *"Muhammad Abdullah v. Abdul Jabbar"* **(PLD 1967 Lahore 1000)**, wherein while dealing with almost similar moot point it was resolved as under:-

> *"It is true that the rent deed in this case provides for payment of Rs. 90 per month as rent but considering the true relationship between the parties which was that of mortgagor and a mortgagee and the two transactions of mortgage and lease being in substance one and the lease being in the nature of a machinery for the purpose of realising the interest due on the mortgage, I am unable to hold that the amount made payable by the appellant to the landlord can be termed as rent payable by tenant to a landlord. What the respondent was to receive was a certain sum of money and the consideration for this payment was, the fact that he had lent a sum of Rs. 15,000 to the appellant] otherwise the appellant still remained the owner of the property He could not be an owner and a tenant at the same time. A similar question was considered by the Patna High Court in the Indian jurisdiction in the case of Baijnath v. Jung Bahadur (A I R1955 Pat, 357). In that case also the mortgagor had taken back a lease of the mortgaged property by executing a kerayanama in favour of the mortgagee. It was held that the so-called rent payable under the kerayanama in fact represented the interest payable on the mortgaged money and not rent for use and occupation. That being so, it was held that the mortgagor could not be deemed to be a tenant of the mortgagee so as to be evicted upon an application by the mortgagee under*

section 11 of the Bihar Buildings Control Act, 1947. In that Act also a tenant was defined to mean any person by whom or on whose account rent was payable for a building."

Simultaneous execution of mortgage and lease by the mortgagor shall be justifiably considered as mechanism/mode for the purposes of realizing due interest on the mortgage money and in such eventuality no relationship of landlord and tenant would come into existence as the lease deed in fact was a device to recover interest on loan. Same proposition when was under consideration before the Apex Court in case titled "*Samandar Khan v. Mst. Maqbool and others"* **(1974 SCMR 388),** it was observed as under:-

> *"On examining the terms and conditions of the mortgage and the lease deed executed by the respondents on 8-4-51 we concur in the view formed by the learned Judge that the so-called lease deed was in fact a device under which the appellant was enabled to recover interest on the loan advanced by him to the respondents at the unconscionable rate of 80 per annum. As such relationship of landlord and tenant did not exist between the parties within the purview of the West Pakistan Urban Rent Restriction Ordinance, 1959."*

It was further observed by the Apex Court that in dealing with the cases of that nature it should be kept in view that a lease deed executed simultaneously with the mortgage deed in fact provides a machinery under which the mortgagee has to receive interest on the principal amount advanced

as loan to the mortgagor whereafter more than one legal incidents flow from that situation. It was finally resolved by the Apex Court that relationship of landlord and tenant would not thereby come into force in the sense in which those terms were ordinarily understood. The instant matter when is seen in its entirety and even the contents of Exh.P.1 are taken on their face value, an amount to the tune of Rs.9000/- was seemed to have been agreed to be paid as interest of loan of Rs.2,00,000/- and the so called rent of Rs.9000/- per month was not to be paid as rent more particularly when respondent was not landlord and the neither mortgagor nor the petitioner (being legal heir of mortgagor) was tenant as per the provisions of the Act 2009. Looking the matter from any angle no relationship of landlord and tenant existed between respondent and the mortgagor. Therefore, respondents No.1 and 2 had got no jurisdiction to either proceed in the matter or pass impugned order and judgments.

10. Indeed this Court while invoking the provisions of Article 199 of the Constitution do not ordinarily interfere with the concurrent findings of fact given by the courts below, however, it is settled principle of law that where the orders passed by the courts below suffer from some legal error or jurisdictional defect, this Court can conveniently invoke the jurisdiction under the provisions of Article 199 and to set aside the impugned order and decrees as being passed in exercise of jurisdiction not vested in the courts below. Reliance in this regard may safely be placed on case *"United Bank Limited (UBL) through its President and others v. Jamil Ahmed and others"* **(2024 SCMR 164),** wherein it was resolved that as a corrective measure in order to satisfy and reassure whether the impugned decision is within the domain of law or not and if such decision suffers from jurisdictional defect, this Court being impressed or influenced by the fact that matter reached it under constitutional jurisdiction in pursuit of the concurrent findings recorded

below, can cure and rectify the defect while invoking the provisions of Article 199 of the Constitution. In the instant matter, since no relationship of landlord and tenant existed between the parties, learned courts below had got no jurisdiction to pass the impugned order and judgment, which are required to be quashed.

11. The **s**equel of above discussion is that instant petition is **allowed**. Impugned order and judgments are set aside and as a consequence, ejectment petition filed by respondent stands dismissed.

(SHAKIL AHMAD)
JUDGE

Approved for reporting
Judge

2024 LHC 2955

Criminal Appeal No.24464-J of 2021

Muhammad Arshad & others Versus The State

Date of Hearing	**06.06.2024**
Appellant Muhammad Arshad by:	M/s Rashid Javed Lodhi, Ali Hussain, Muhammad Adnan Malik and Hafiz Sami-ur-Rehman, Advocates.
Appellants Maqsood Ahmad and Mudassar in person and by	Mr. Khurshid Anwar Bhindar, Advocate.
Complainant by:	Nemo.
State by:	Ms. Samra Irshad, Assistant District Public Prosecutor.

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Shakil Ahmad, J. Muhammad Arshad, Mudassar and Maqsood Ahmad appellants have preferred the instant Criminal Appeal through jail authorities, to challenge their conviction and sentences. They were indicted and tried by the learned Additional Sessions Judge, Depalpur along with co-accused Muhammad Din, Akram and Haq Nawaz on the charge under sections 302, 364, 109, 148, 149 PPC in private complaint titled *Muhammad Hussain vs. Muhammad Arshad and 05-others* relating to case FIR No.279 of 2014 dated 12.08.2014 registered at Police Station Mandi Ahmadabad, District Okara. Learned trial court, on conclusion of trial vide judgment dated 27.03.2021 (impugned judgment) convicted the appellants and sentenced them as under: -

Appellant Muhammad Arshad: -

(i) *Convicted under Section **302(b) PPC** and sentenced to undergo imprisonment for life and to pay compensation under section 544-A Cr.P.C. to the tune of Rs.4,00,000/- to legal heirs of the deceased and in case of default, to further undergo simple imprisonment for six months.*

(ii) *Convicted under Section **364 PPC** and sentenced to undergo rigorous imprisonment for ten years and to pay fine of Rs.100,000/- and in case of default, to further undergo simple imprisonment for three months.*

Appellant Muhammad Maqsood Ahmad:-

*Convicted under Section **364 PPC** and sentenced to undergo rigorous imprisonment for ten years and to pay fine of Rs.100,000/- and in case of default, to further undergo simple imprisonment for three months.*

Appellant Mudassar:-

*Convicted under Section **364 PPC** and sentenced to undergo rigorous imprisonment for ten years and to pay fine of Rs.100,000/- and in case of default, to further undergo simple imprisonment for three months.*

Co-accused Muhammad Din, Akram and Haq Nawaz were acquitted of the charge vide impugned judgment. Acquittal order of the said co-

accused has not been challenged by the complainant and the same has attained finality.

2. Muhammad Hussain (PW-1) moved an application (Exh:PA) on 12.08.2014 before Station House Officer, Police Station Mandi Ahmadabad stating therein that he was cultivator by profession and his son Muhammad Amjad was doing labour in Lahore; that on 07.08.2014 at night time his son Muhammad Amjad reached at Mandi Ahmadabad after returning from Lahore and owing to his inability to find any conveyance from Mandi Ahmadabad due to his late arrival, he proceeded by foot towards the house of his sister situated at *Chah Doney-wala* and when his son reached near Head *Doney-wala*, accused persons namely Muhammad Arshad, Maqsood Ahmad, Mudassar along with two unknown persons while armed with firearm weapons riding on motorcycles came there and encircled his son; that his son Muhammad Amjad, in order to save his life, raised hue and cry, on which, Muhammad Ameer son of Muhammad Yar, Mubashar Ali son of Muhammad Zubair, Wattoo by caste and residents of *Chah Doney-wala* attracted there while having torches in their hands and accused persons abducted Muhammad Amjad with intention to kill him and took him on a motorcycle towards Attari and the witnesses, above said, informed the complainant, whereupon the complainant convened a *Punchayat* for recovery of his son from the accused persons but they delayed the matter and did not return Muhammad Amjad; that on 12.08.2014, complainant gained a clue that his son Muhammad Amjad was confined in the house of Haq Nawaz accused whereupon complainant along with Nawab Ali son of Wali Muhammad and Muhammad Zubair son of Jan Muhammad, residents of the village, reached at *Fajar* time at the house of accused Haq Nawaz situated at *Sufaid Chowki in the area of Saddar Bala* and saw that Maqsood

Ahmad, Mudassar, Haq Nawaz and two unknown accused were torturing his son by holding him from legs and arms whereas accused Arshad with *Safa* had tied *phanda* around the neck of complainant's son and pressed his neck; that on seeing the complainant and witnesses, accused persons fled away from the spot considering complainant's son as dead; that complainant and witnesses rescued his son but he succumbed to the injuries; that complainant and witnesses had witnessed the occurrence. Motive of the occurrence was stated to be previous enmity. It was further alleged that the occurrence was committed by the accused persons on the instigation of Muhammad Din and Muhammad Akram.

3. After registration of case, investigation was conducted by Maqbool Hussain Inspector (CW-5) who claimed to have reached at

Attari Patan where dead body of Muhammad Amjad was lying on a cot; he inspected the dead body, prepared the injury statement Exh.CW-5/A, inquest report Exh.CW-5/B and application for post mortem Exh.CW-5/C and sent the dead body for autopsy through Muhammad Amin 177/C. CW-5 claimed to have inspected the place of occurrence on the pointation of complainant and PWs, recorded statements of PWs u/s 161 Cr.P.C, prepared unscaled site plan of place of abduction of Muhammad Amjad Exh.CW-5/D and on the same day he also proceeded towards the residence of Rehmat Ali father of Haq Nawaz accused and prepared unscaled site plan of place of occurrence Exh.CW-5/E. CW-6 stated to have took into possession last worn clothes of deceased vide recovery memo Exh.CW-1/A. The Investigator claimed to have made red notes on scaled site plan Exh.CW-4/A and Exh.CW-4/B. After transfer of this Investigator from the Police Station, investigation of the case was entrusted to

Muhammad Munir S.I (CW-6) who claimed to have joined into investigation the accused persons Muhammad Akram and Haq Nawaz and held in abeyance their arrest. The second investigator claimed to have received Call Data Record of phone number of deceased Muhammad Amjad and conducted investigation on this point. CW-6 was of the opinion that accused persons Muhammad Arshad, Mudassar, Maqsood Ahmad, Haq Nawaz, Muhammad Din and Muhammad Akram were found not involved in the occurrence.

4. Being dissatisfied by the result of investigation, complainant filed private complaint Exh:PB asserting therein the version narrated in application Exh.PA regarding whole occurrence. After recording of cursory statements of PWs, accused were summoned to face trial. Appellants along with co-accused were indicted. They pleaded not guilty, thus trial commenced.

5. In order to prove the charge, complainant examined as many as six PWs whereas six witnesses were examined as CWs. Muhammad Hussain **(PW-1)** is complainant of the case. Muhammad Ameer **(PW-2)** and Mubashar Ali **(PW-3)** are witnesses of alleged abduction. Muhammad Zubair **(PW-4)** and **Nawab Ali (PW-5)** are witnesses of ocular account. Sarfraz **(CW-1)** claimed to have got conducted post mortem examination of the deceased and handed over the last worn clothes to the Investigator. Muhammad Nawaz 190/HC **(CW-2)**, Khursheed Alam ASI **(CW-3)** are formal witnesses. Muhammad Ishaq Nasir Draftsman **(CW-4)** claimed to have prepared scaled site plan. Maqbool Hussain Inspector **(CW-5)** and Muhammad Munir S.I **(CW-6)** are investigators of the case.

Medical evidence was furnished by Dr. Saad Ali Khan **(PW-6)**, who conducted postmortem examination on the dead body of

Muhammad Amjad on 12.08.2014 at 10:00 P.M and observed following injuries on the dead body: -

1. *Contusion 6 x 2 cm at right side of the neck.*

2. *Contusion 4 x 3 cm at left eye.*

3. *Abrasion 2 x 1 cm at back of right elbow joint.*

4. *Abrasion 1 x 1 cm at back of left elbow joint.*

5. *Contusion 3 x 1 cm at right upper gums just above the right canine teeth.*

6. *Contusion 1 x1 cm at bridge of nose.*

Opinion*. According to PW-6, cause of death was asphyxia resulting from strangulation due to injury No.1 which was sufficient to cause death in an ordinary course of nature. Probable time between injuries and death was kept under observation whereas between death and postmortem was within 18 to 20 hours.*

6. Witness Muhammad Nawaz was given up being unnecessary and complainant's evidence was closed. Thereafter, statements of appellants and co-accused were recorded under Section 342 Cr.P.C. They controverted and denied the allegations of facts came on the record in the evidence of prosecution witnesses and professed their innocence. Appellants did not opt to appear in the witness box as per Section 340(2) Cr.P.C and except appellant Muhammad Arshad, also not opted to produce defence evidence. Appellant Muhammad Arshad has produced some documents in his defence.

7. On conclusion of trial, appellants were convicted and sentenced whereas co-accused Muhammad Din, Akram and Haq Nawaz were

acquitted of the charge as detailed in the opening paragraph of this judgment, hence this appeal.

8. I have heard learned counsel for the appellants and learned Assistant District Public Prosecutor and have gone through the record with their able assistance.

9. Prosecution has introduced two different episodes of incidents that ultimately resulted in murder of complainant's son Muhammad Amjad. First incidence is alleging abduction of Muhammad Amjad by Muhammad Arshad, Maqsood, Mudassar and two unknown persons at 09:00 P.M on 07.08.2014 when he was going to *Chah Doney-wala*. The second episode presents the happening that culminated in the murder of Muhammad Amjad by accused persons namely Maqsood Ahmad, Mudassar, Haq Nawaz, Muhammad Arshad and two unknown persons. The second episode was claimed to have been witnessed by complainant Muhammad Hussain (PW-1) along with Nawab Ali and Muhammad Zubair PWs. Before entering into the appraisal of prosecution evidence on both two accounts as hinted in the preceding lines, it seems apt to first of all discuss an important aspect of the matter relating to non-presence of complainant at the spot when first incident took place. The initial lines of the FIR as well as private complaint whereby Muhammad Amjad (deceased) was shown to be returning from Lahore on 07.08.2014 and his inability to find any conveyance from Mandi Ahmadabad due to his late arrival there, his decision to proceed by foot towards the house of his sister situated at *Chah Doney-wala* and reaching at Head *Doney-wala* at about 09:00 P.M and arrival of accused persons Muhammad Arshad, Maqsood Ahmad, Mudassar and two unknown persons duly armed with firearms on motorcycles and their encircling of Muhammad Amjad and raising of noise by Muhammad Amjad, is a narration qua which whole

evidence of the prosecution is silent as to from which source and mode same came into the know of complainant when from the bare reading of application for registration of F.I.R. or even the contents of private complaint it stood established that he did not either witness those happenings nor he claimed to have received information qua pre-abduction happenings from anyone including the abductee either personally or through any telephonic message/conversation. In this backdrop, the mentioning of the above hinted narration in the FIR, appears to be a cock and bull story or to say the least, a fictional account.

10. Taking up now the worth of prosecution evidence qua the abduction of Muhammad Amjad on 07.08.2014 it has been observed that as per the case put forth by complainant, Muhammad Amjad was going by foot to the house of his sister at *Chah Doney-wala* from *Mandi Ahmadabad* and when he reached ahead of Head *Doney-wala*, five persons viz., Muhammad Arshad, Maqsood Ahmad, Mudassar and two unknown, armed with firearms, came there on motorcycles and they encircled Muhammad Amjad and the latter raised noise to save his life, whereupon Muhammad Ameer (PW-2) and Mubashar Ali (PW-3) attracted there while having torches and on seeing them, accused persons abducted Muhammad Amjad with intention to kill him and took him on a motorcycle towards Attari and the above said witnesses claimed to have informed the complainant, whereupon the complainant convened *Punchayat* for recovery of his son from the accused persons but they delayed the matter and did not return Muhammad Amjad. Undeniably, the complainant having received so called information qua abduction of his son, did not report the matter to police and instead he claimed to have convened *Punchayat*. Non-reporting of the matter by complainant to police is

simply beyond one's comprehension as if complainant's son in fact was abducted in the way as detailed in the F.I.R. and private complaint, normal and natural course available to complainant was to immediately report the matter to police in order to save the life of his son particularly when as per complainant's own version there existed previous enmity between the parties. Nothing plausible has been put forth by the complainant for not resorting to the appropriate mode of approaching the police for the recovery of his son. Explanation so put forth by complainant qua convening of *punchayat* hardly furnishes any plausible and reasonable ground for not reporting the matter to police. It may also be seen that in the complaint, no time whatsoever has been mentioned when PWs Muhammad Ameer and Mubashar Ali shown to have informed the complainant about the abduction of his son. While appearing in the witness box as PW-2, Ameer Ali in his examination-in-chief stated that they informed the complainant while reaching his home. This assertion of PW-2, however, was contradicted by Mubashar Ali (PW-3) in his cross-examination by stating that they told the matter to a passerby and the passerby informed the complainant about the abduction of his son. It may also be seen that as per own showing of complainant and his witnesses, Mubashar Ali (PW-3) is very close relative of the complainant whereas Ameer Ali PW-2 is from brotherhood of Mubashar Ali. Both these PWs made certain improvements in their statements which were alien to their earlier narrations before police. The improvements made by these PWs were duly confronted to them during cross-examination. The contents of complaint nowhere indicate that in the entire episode of abduction of Muhammad Amjad, he was subjected to physical torture by the accused persons. Mubashar Ali (PW-3) in his cross-examination, however, stated that Muhammad Amjad was also tortured by the

accused persons. He stated that Muhammad Amjad was being beaten up by the accused for around four minutes. He also introduced a new stance by stating that *Sota* blows and *Butt* blows were received by Muhammad Amjad. This whole narration qua physical torture on Muhammad Amjad by accused persons during his alleged abduction, at one hand is in conflict with the contents of complaint and on the other a weapon like *Sota* has also been introduced which nowhere finds mention in the complaint. Another important discrepancy in the prosecution case that needs to be hinted is that according to the contents of complaint, when Muhammad Ameer and Mubashar Ali PWs attracted to the spot, on seeing them accused persons abducted Muhammad Amjad and took him towards Attari. However, complainant (PW-1) in his examination-in-chief introduced an altogether strange version that PWs (Muhammad Ameer and Mubashar Ali) identified the accused persons and warned them whereupon accused persons extended them threats. It would not be out of context to mention here that according to the contents of complaint, Muhammad Hussain complainant when received information from Muhammad Ameer and Mubashar Ali qua abduction of his son, he convened *Punchayat* for recovery of his son. In his examination-in-chief, complainant PW-1 however introduced a different version by stating that he demanded return of his son from Asghar son of Kareem in presence of Muhammad Ameer and Mubashar Ali PWs and he four times demanded return of his son from accused persons through *Punchayat*. It may also be seen that as per prosecution's case, Muhammad Ameer and Mubashar Ali PWs were shown to have attracted to the spot when Muhammad Amjad raised noise to save his life as he was encircled by five duly armed accused persons owing to previous enmity. The venue reflected by the prosecution as the place

where Muhammad Amjad was abducted by the accused persons, as per own showing of PWs, was at a distance of around three acres from the abode of PWs Muhammad Ameer and Mubashar Ali. Undeniably, 20-25 houses of other people were also situated near the place of alleged abduction but strangely enough, nobody except Muhammad Ameer and Mubashar Ali (both related to complainant) was shown to have attracted to the spot on hearing the noise raised by Muhammad Amjad.

11. In view of the discrepant version of the complainant and PWs as discussed in detail in the preceding two paragraphs, this Court is of the considered view that the first episode of crime introduced in this case qua abduction of Muhammad Amjad by the accused persons on 07.08.2014 in presence of Muhammad Ameer (PW-2) and Mubashar Ali (PW-3) is a highly doubtful affair and is not proved through confidence inspiring evidence.

12. Coming now to the second episode of occurrence whereby Muhammad Amjad son of the complainant was shown to have been done to death by accused persons on 12.08.2014, as discussed in the preceding paragraphs, the matter qua alleged abduction of complainant's son was not reported to police prior to 12.08.2014. It was claimed by the complainant that on 12.08.2014, he received a clue that his son was confined in house of Haq Nawaz accused situated in *Dhari Rehmat Ali Daakhli Saddar Bala Chowki Sufaid*, whereupon he along with Nawab Ali and Muhammad Zubair PWs reached the said place at *Fajar* time and saw that Maqsood Ahmad, Mudassar, Haq Nawaz and two unknown accused had overpowered Muhammad Amjad and they were torturing him whereas Muhammad Arshad had strangulated Muhammad Amjad with a cloth (*Safa)*. The entire case of prosecution is silent as to from where the complainant received information that his son was confined in the

house of Haq Nawaz. Likewise, none of the accused was shown to have been armed with any kind of weapon when they were inflicting torture and ultimately murdered Muhammad Amjad, yet no attempt whatsoever was shown to be made by the complainant or the PWs, who undeniably were closely related to the deceased, to save the life of Muhammad Amjad by practically restricting assailants or to the least making any sort of earnest supplication to the accused persons. It is also strange to note that when complainant as per his own version was aware of the fact qua the abduction of his son by the accused persons with whom he had previous animosity and he came to know about the presence of his son at a certain place, why did he not report the matter to police to take police officials with him to rescue his son, is a question that at one hand remained mystery and on the other, reflects that the story qua witnessing of the occurrence in the result of which Muhammad Amjad was done to death, was an after-thought idea to show presence of complainant and witnesses at the spot. The whole conduct of the complainant and prosecution witnesses can conveniently be counted as pathetic one and same runs counter to the natural human conduct and behavior in the ordinary course of events. Provisions of Article 129 of Qanun-e-Shahadat Order, 1984 allow the courts to presume the existence of any fact, which it thinks likely to have happened in the ordinary course of natural events and human conduct in relation to the facts of a particular case. The conduct of witnesses of ocular account in the instant case vividly was opposite to the common course of natural events and human conduct, further suggesting that the witnesses of ocular account were not present at the time of occurrence. I am fortified in my view from the principles laid down by the Supreme Court of Pakistan in case reported as "*Pathan v. the State*" **(2015 SCMR 315)** wherein it was observed that causing of

large number of injuries one after another to the deceased with scissors must have consumed reasonable time due to pause in between the first injury and the last one but all the three PWs including the son with a strong stature and built remained as silent spectators and did not react or show any response when the accused was causing injuries. It was further observed in said case as under:-

> "*No man on the earth would believe that a close relative would remain silent spectator in a situation like this because their intervention was very natural to rescue the deceased but they did nothing*---"

While the foregoing is sufficient, in itself, to cast doubt on the presence of PWs of ocular account at the spot, there is nonetheless another important aspect of the case that requires consideration that according to prosecution story, Muhammad Amjad was abducted by the accused persons on 07.08.2014 and accused persons started beating him in their house at Fajar time on 12.08.2014 when complainant and his witnesses who claimed to have reached at the spot. It would be hard to believe that assailants would have waited for arrival of PWs so as to enable them to witness the occurrence and on their arrival they started causing injuries on the person of Muhammad Amjad. Such a behavior on the part of assailants is not in consonance with the natural human behavior and it can very conveniently be inferred that PWs were not present at the spot and they have merely been introduced as witnesses of ocular account after due deliberations and consultation. Reliance in this respect may safely be placed on case reported as "*The State through Advocate General Khyber Pakhtunkhwa, Peshawar v. Hassan Jalil and others*" **(2019 SCMR 1154)**, wherein it was observed that arrival of PWs at the venue exactly on a point of time when assailants allegedly did away with deceased, in itself is a circumstances that

reflected on the very genesis of the prosecution case. Similar view was taken by august Supreme Court of Pakistan in case reported as "*Muhammad Imran v The State*" **(2020 SCMR 857)**, wherein it was observed that arrival of witnesses exactly on a point of time when accused started inflicting blows to the deceased, with their inability to apprehend him, without there being any weapon to keep them away, casts shadows on the hypothesis of their presence during the fateful moments. This aspect of the matter when is seen in conjunction with above discussed aspect qua conduct of the PWs, they can conveniently be termed as chance witnesses.

13. It may also be seen that motive for commission of crime as asserted in the FIR is that there is enmity between complainant side and accused Arshad etc on a murder case. Muhammad Hussain complainant

PW-1 in his examination in chief, however, stated the motive that accused persons Arshad etc had enmity with them for the murder of Ramzan. In cross examination, complainant PW-1 provided certain details of the criminal cases against both the parties. According to him, he was implicated by the accused side in a criminal case for the offence under section 324 PPC through supplementary statement. Complainant PW-1, however, admitted it correct during cross examination that no FIR was got registered by accused persons against his son Amjad (deceased). It was version of complainant PW-1 during cross examination that the accused persons being inimical to him, murdered his son. It is deduced in this backdrop that accused persons did not have any specific motive against the deceased, rather their hostility was with the whole kinfolk of complainant. If it is believed that the accused persons had criminal rivalry with the complainant's clan, then prime target of the assailants should have been complainant

and PWs and not the deceased but strangely enough, the accused were shown to have targeted Muhammad Amjad son of the complainant opting not to cause any sort of harm to complainant and PWs. The motive set up by the complainant even if is taken as gospel truth there is no explanation on the record as to why only deceased from the complainant's side was targeted by the accused when the complainant against whom they had grudge, was also available at the place of occurrence along with his real brother Muhammad Zubair Ali (PW-4). Even it is highly unlikely that accused persons would have spared the witnesses of ocular account for allowing them to become witnesses and depose against them for sending them to gallows. So, the conduct of accused persons during the occurrence ran counter to natural human conduct and the behavior explained in the provisions of Article 129 of the Qanun-e-Shahadat, 1984. Guidance has been sought from the dicta laid down in cases *Zahir Yousaf and another v. The State and another* **(2017 SCMR 2002)** and *Mst. Rukhsana Begum and others v. Sajjad and others* **(2017 SCMR 596)**. Legitimate and irresistible conclusion that may conveniently be drawn from the above discussed facts is that the occurrence in consequence of which Muhammad Amjad lost his life, did not take place in the mode and manner as stated by the witnesses of ocular account. It is also a settled principle of law that motive is always considered as a double edged weapon which cuts both ways. It can be used by the accused to take revenge and at the same time can be a tool used by the complainant for false charge as well. There is also no cavil with the proposition that lack of motive, its weakness or even its non-proving is never fatal to prosecution case qua awarding conviction if a case otherwise stands proved through direct evidence with regard to the occurrence, however, at the same time the motive that is always considered a corroborative piece of evidence,

even if is proved, the same alone cannot be made basis for conviction of an accused on capital charge particularly where evidence of ocular account is totally disbelieved inasmuch as in such eventuality worth of evidence of motive would stand reduced to nil. As the ocular account in this case has already been disbelieved, the evidence of motive would have no consequence qua conviction. It is an admitted rule of appreciation of evidence that motive is only corroborative piece of evidence and if the ocular account is found to be unreliable then motive alone would have no evidentiary value.

14. Looking the matter from a different angle, occurrence of murder of Amjad Iqbal, as per the contents of private complaint took place around Fajar time on 12.08.2014 whereas written application Ex.PA was claimed to have been moved at 01:05 P.M. In this way, crime alleged to have taken place around Fajar time (04:30 A.M to 05:30 A.M), was reported to police with delay of around 08 hours. No explanation whatsoever has been put forward by the prosecution for such inordinate delay. This being so, there could have been no reason for moving of application Ex.PA at 01:05 P.M, except preliminary investigation and prior consultation to nominate the accused and plant eyewitnesses of the crime. It may also be seen that autopsy in this case was conducted at 10:00 P.M. i.e. after around seventeen hours of the occurrence. According to post mortem examination report Ex.PC/2, dead body was received in hospital at 05:00 P.M. and police papers were received at 09:30 P.M. No plausible explanation is forthcoming by the prosecution to justify such a belated submission of police papers and post mortem examination and the same would give rise to a legitimate presumption that police papers were sent to hospital after deliberations and consultation. Reliance in this regard may safely be

placed on case reported as *Muhammad Rafique alias Feeqa v. The State* **(2019 SCMR 1068)**, wherein following observation was made: -

> "---*Such unexplained delay in the post mortem of a deceased would surely put a prudent mind on guard to very cautiously assess and scrutinize the prosecution's evidence---In such circumstances, the most natural inference would be that the delay so caused was for preliminary investigation and prior consultation to nominate the accused and plant eyewitnesses of the crime*."

It would not be out of context to mention here that according to the case put forth by complainant, death of Muhammad Amjad was result of physical torture on him by accused persons and strangulation caused by Arshad accused with a cloth (*safa*). Medical Officer PW-6 observed injury No.1 a contusion 6 x 2 CM at right side of neck of the deceased and opined that cause of death is asphyxia resulting from strangulation due to injury No.1. In cross examination, however, PW-6 admitted it correct that there was no contusion, laceration or abrasion present on the right side, backside or front side of neck. Medical Officer also admitted it correct in cross examination that if strangulation is committed by wrapping the rope, cord or *safa*, then injuries would be all around the neck. This admission on the part of Medical Officer, indeed contradicts the version of ocular account whereby Muhammad Arshad accused was shown to have strangulated the deceased with a *safa*. Therefore, it can very conveniently be inferred that medical evidence in this case is in contradiction with the ocular account. Medical evidence although is corroboratory in nature, however, it is an established principle of law that corroborative piece of evidence is meant to test the veracity of ocular evidence and both corroborative

and ocular testimonies are to be read together and not in isolation. Guidance has been sought from case *"Noor Muhammad v. The State"* (**2010 SCMR 97)**. Had witnesses of ocular account been present at the spot and witnessed the occurrence as claimed by them, there could have been no possibility of conflict in between ocular account and medical evidence qua the mode of causing death of Muhammad Amjad. Where oral evidence is inconsistent with the medical evidence, oral evidence cannot be accepted to be made basis for the conviction of an accused. Guidance has been sought from case *"Barkat Ali v. Muhammad Asif and others"* **(2007 SCMR 1812).** It has also been held in *Abdul Subhan's case* **PLD 1994 SC 178** that if medical evidence leaves room for doubt, benefit of that doubt should go to accused and not to prosecution. In view of glaring conflict in between ocular account and medical evidence that indeed belies the version of witnesses of ocular account of having witnessed the occurrence at the spot, their presence at the spot is not free from the doubts.

15. Adverting now to the investigation of this case, the same had negated the version of the complainant party and signaled about

non-involvement of the accused in the alleged occurrence by giving detailed reasons qua the death of Muhammad Amjad and ultimately they were placed in column No.02 of the report under section 173 Cr.P.C. Opinion of police though is not binding upon the Court, yet in the backdrop of above hinted discrepancies in prosecution's case, same had not been found to be biased and also creates doubt qua culpability of appellants. The appellants are, therefore, entitled to the benefit of doubt as a right. Reliance in this regard may safely be placed on case reported as *"Khalid Mehmood and others v. The State"* **(2011 SCMR 664)**, wherein the Supreme Court of Pakistan held as under: -

> *"Adverting to the case of Abid Hussain appellant, it may be observed that no weapon of offence has been effected from his possession. He was found innocent by different police agencies including Ch. Akhtar Hussain, DSP, CIA, Sheikhupura and got discharged from the Court of the Magistrate, which order was not challenged by the complainant. We entertain serious doubt in our minds regarding participation of appellant Abid Hussain in the commission of crime. The evidence of the complainant and Nasir Ahmad P.Ws. qua appellant Abid Hussain is not credible and trustworthy.*
>
> *(Underlining is to supply emphasis)*

16. In view of peculiar facts and circumstances of this case, presence of witnesses of ocular account at the spot is highly doubtful and possibility of lodging of F.I.R. by nominating the accused persons after some deliberation and consultation cannot be ruled out. Prosecution's case from its inception to end remained replete with doubts whereas as per established principle of law, when a single circumstance creating reasonable doubt in a prudent mind about the guilt of accused arises, he would be entitled to such benefit as a matter of right. Reliance in this regard may safely be placed on case reported as *Tariq Pervez v. The State* (**1995 SCMR 1345)**.

17. Upshot of above discussion is that prosecution hopelessly failed to prove its case against appellants. The evidence produced in this case by complainant could not be relied upon for awarding conviction. Therefore, respectfully following the dicta laid down by the Supreme Court in above referred case findings of

conviction recorded against appellants by learned Additional Sessions Judge, Depalpur in the impugned judgment are not sustainable, which are hereby set aside allowing the instant criminal appeal. Consequently, appellants **Muhammad Arshad, Mudassar and Maqsood Ahmad are acquitted of the charge** extending benefit of doubt to them. Appellant Muhammad Arshad is in jail. He is ordered to be released forthwith if not required to be detained in any other case. Appellants Maqsood Ahmad and Mudassar are on bail. Their bail bonds are cancelled and sureties stand discharged of the liability of bail bonds.

(Shakil Ahmad)
Judge

Approved for reporting

Judge

2024 LHC 3700

Crl. Misc. No. 47663-B of 2024

Bilal Sikandar

Versus

The State and another

21.08.2024 Mr. Mushtaq Ahmad Mohal, Advocate for the petitioner.
Miss Rashida Parveen, Assistant District Public Prosecutor with Junaid, SI.

After dismissal of his post-arrest bail petition by learned Additional Sessions Judge, Sargodha, *vide* order dated 07.03.2024, Bilal Sikandar, accused/petitioner has filed instant petition under section 497 of the Code of Criminal Procedure, 1898 (Cr.P.C.) seeking post-arrest bail in case F.I.R. No.99 of 2024 dated 02.02.2024 registered at Police Station Bhagtanwala District Sargodha for the offences under sections 302, 311 of the Pakistan Penal Code, 1860 (PPC).

2. Allegation, in a nutshell, against the accused/petitioner is that he, by exhorting that Ramsha (his sister) has brought dishonour to them and he would not leave her alive, made a straight fire shot hitting on the back of Ramsha, who succumbed to the injury at the spot.

3. Heard. Record perused.

4. Instant is a case in which Ramsha (aged about 21/22 years) lost her life in the consequence of a fire shot injury alleged to have been made on her by none other than her real brother, on account of '*ghairat'*. The occurrence that took place on 02.02.2024 at 12:30 PM was claimed to have been witnessed by Muhammad Junaid Ahmed, T/SI and the constables who, during the course of patrolling, when reached near the house of deceased, rushed inside the house on hearing an uproar coming inside the house. According to them,

accused/petitioner who was armed with 12-bore single barrel, made straight fire shot hitting on the person of Ramsha who fell down and succumbed to the injury at the spot. Strangely enough, none of the inmates, including the parents of the deceased, opted to become the complainant qua the incidence in which their own daughter was done to death, and even they did not give their account regarding the murder of the deceased immediately, just after the occurrence that how and under which circumstances Ramsha became injured and lost her life. Occurrence has been shown to be witnessed by the independent persons belonging to the police department who, *ex facie,* have no ill-will or any sort of grudge to falsely involve the accused/petitioner with the commission of murder of his own sister. Even, the accused/petitioner remained fugitive from law for the period of around 5 months and when finally rounded up, got recovered the firearm. The investigator also collected a crime empty from the spot and the same was sent to the office of PFSA. The firearm recovered from the accused/petitioner has also been dispatched to the concerned quarter for analysis. The police/investigator seemed to have collected sufficient evidence/material linking the accused/petitioner with the commission of alleged crime.

5. Issue of honour killing had been noticed by courts with grave concern and in case "*Muhammad Akram Khan v. The State*" **(PLD 2001 SC 96)**, while answering stance taken by defence that accused committed offence under the impulse of *'ghairat'*, the Supreme Court of Pakistan observed as under: -

> *"Legally and morally speaking, nobody has any right nor can anybody be allowed to take law in his own hands to take the life of anybody in the name of "Ghairat". Neither the law of the land nor religion permits so-called honour killing which amounts to murder (Qatl- i-Amd) simpliciter. Such iniquitous and vile act is violative of fundamental right as enshrined in Article 9 of the Constitution of Islamic Republic of Pakistan which provides that no person would be deprived of life or liberty except in accordance with law and any custom or usage*

in that respect is void under Article 8(1) of the Constitution. In this case, the plea of "Ghairat" cannot be deemed to be a mitigating circumstance as the motive was not directly against the deceased."

In case *"Umer Din v. The State and others"* **(2017 YLR Note 378 [Lahore])**, while dealing with the case of post-arrest bail of an accused relating to honour killing, this Court observed as under: -

> *"8. It is important to observe that in our society granting post-arrest bails in 'honor killing' i.e. a violence against women will substantially increase such incidents, which in most of the cases is for gain of the property, demanding the hand of a woman of choice, settling the old scores and personal vendetta. Certainly, if such like act as committed by the petitioner is approved, it would lead to an anarchic situation in the society and lynching of women would become order of the day."*

In case *"Khadim Hussain and another v. The State"* **(PLD 2012 Baluchistan 179)**, while dealing with the same moot point it was observed as under: -

> *"I have noticed in a number of cases that the killing of innocent wife, sister and other female relatives, on the allegation of 'siyahkari' has become a routine practice, rather a fashion, and it is a high time to discourage such kind of unwarranted and shocking practice, resulting in double murder in the name of so-called honour killing. I am not impressed by the contention of learned counsel for the applicants that according to the prosecution's own showing,the occurrence is the result of 'siyahkari', as such the applicants were liable to be enlarged on bail. It is true that people do not swallow such kind of insult, touching the honour of their womenfolk and usually commit murder of alleged 'siyahkar' in order to vindicate and rehabilitate the family honour, but it is equally true that no one*

can be granted licence to take law of the land in his own hands and start executing the culprits himself instead of taking them to the Courts of law. The murder based on`Ghairat' does not furnish a valid ground for bail. Killing of innocent people, especially women on the pretext of 'siyahkari', is absolutely un-Islamic, illegal and unconstitutional. It is worth mentioning that the believers of Islam are not even allowed to divorce them, without establishing their accusation. We profess our love for Islam, but ignore clear Qur'anic Injunctions regarding the rights of women. The Holy Qur'an in Sura XXIV in Sura (NUUR) Verses 4 says:

"And those who launch a charge against chaste women and produce not four witnesses, (To support their allegation),--- Flog them with eight stripes; and reject their evidence even after: for such men are wicked transgressors;---"

In this regard, it would also be advantageous to reproduce Hadith 837 Book 48 (Sahih Bukhari), which speaks as under:--

"Narrated Ibn Abbas: Hilal bin Umaiya accused his wife before the Prophet of committing illegal sexual intercourse with Sharik bin Sahma. The Prophet said, "Produce a proof or else you would get the legal punishment (by being lashed) on your back" Hilal Said, "O Allah's Apostle! If any one of us saw another man over his wife, would he go to search for a proof" The Prophet went on saying, "Produce a proof or else you would get the legal punishment (by being lashed) on your back " The Prophet then mentioned the narration of Lian (as in the Holy Book). (Surat-al-Nur.. 24),"

Being conscious of the fact that it had become an ignominious practice in the society, particularly after promulgation of *Qisas* and *Diyat* Ordinance, 2000, that after doing away with females, either she may be a wife, mother, daughter,

or sister on the pretext of honour, real perpetrators were usually being let off after getting pardon from *wali/walis*, the legislature introduced certain amendments through the Criminal Law (Amendment) Act, 2004 (Act I of 2005), whereby the definition of an offence committed in the name or on the pretext of the honour was introduced. Similarly, clause (c) to section 302 of PPC was also amended and substituted through the Criminal Law (Amendment) (Offences in the Name or on Pretext of Honour) Act, 2016 as under: -

> *3. Amendment of section 302, Act XLV of 1860.—In the Penal Code, in section 302, in clause (c), for the full stop at the end, a colon shall be substituted and thereafter the following proviso shall be added, namely:*
>
> *"Provided that nothing in this clause apply to the offence of Qatl-i-Amd if committed in the name or on the pretext of honour and the same shall fall within the ambit of clause (a) or clause (b), as the case may be."*

In view of the above hinted amendment, an offence committed in the name or on the pretext of honour was excluded from the definition of *'qatl-i-amd'* as contained in Section 302 Clause (c) of PPC, as the phrase "in the name or on the pretext of honour" inserted in the first proviso to Section 302(c) of PPC clearly indicates that the murder committed in the name or on the pretext of honour had to be calculated as a murder committed with premeditation in the background of honour. Reliance in this regard may safely be placed on the case reported as "*Muhammad Qasim v. The State*" **(PLD 2018 SC 840)**.

Similarly, certain amendments were also made in Section 345 of Cr.P.C., introducing sub-section 2-A, and the same reads as under:-

> *"(2-A) Where an offence under Chapter XVI of the Pakistan Penal Code, 1860 (Act XLV of 1860), has been committed in the name or on the pretext of karo kari, siyah kari or similar other customs or practices, such offence may be waived or compound*

subject to such conditions as the Court may deem fit to impose with the consent of the parties having regard to the facts and circumstances of the case."

Similarly, as per provisions of sub-section (7) to Section 345 of Cr.PC, no offence shall be waived or compounded save as provided by this Section and section 311 of PPC. Another significant amendment has been introduced by amending section 299 of PPC and introducing clause (ee) through the Criminal Law (Amendment) (Offences in the Name or on Pretext of Honour) Act, 2016, whereby an offence that has been committed in the name or on the pretext of honour has been categorized as an offence falling within the meaning of '*fasad-fil-arz'*. As per provisions of section 311 of PPC, if the principle of *fasad-fil-arz* is attracted, the court may having regard to the facts and circumstances of the case, punish an offender against whom the right of *qisas* has been waived or compounded with death or imprisonment of life or imprisonment of either description for a term of which may extend to fourteen years as *ta'zir*. The sole proviso to this section further provides that if the offence has been committed in the name or on the pretext of honour, the punishment shall be imprisonment for life.

6. Submission made by learned counsel for petitioner that legal heirs of deceased who happened to be the parents of deceased, have forgiven the accused/petitioner and recorded their statements qua compounding the offence, therefore, accused/petitioner is entitled to be released on bail on the basis of compromise, is of little avail as in view of the amendments as made in sections 299(ee), section 302(c) and section 311 PPC read with proviso to section 345(2-A) and 345 (7) of Cr.PC, a convict in an honour killing case, still can face sentence of imprisonment for life even if legal heirs of a victim have settled the matter by way of compromise and pardoned the convict. Therefore, the accused/petitioner is not entitled to be released on bail on the basis of any statement made by the legal heirs of the deceased whereby they have compounded the offence as in view of provisions of Sections 345(2-A) & 345(7) of the Cr.P.C., no offence shall be waived or compounded save as

provided by the provisions of section 311 PPC.

7. The next submission of learned counsel for the petitioner is that there exists a glaring conflict between the ocular account and medical evidence; therefore, the case of the petitioner necessitates further inquiry entitling him to the grant of post arrest bail. According to him, as per witnesses of ocular account, the fire shot made by the accused/petitioner landed on the back of the deceased whereas as per postmortem report, the injury present on the back of the deceased has been shown as an everted wound, suggesting that it was an exit wound. This argument hardly holds any water for the simple reason that the sole argument qua conflict between medial evidence and ocular account can hardly be appreciated without deeper appreciation of evidence which exercise is not warranted at bail stage[1] particularly keeping in view the peculiar facts and circumstances of the instant case wherein accused/petitioner alone is named in the FIR with specific role of making fire shot on the person of none other than his real sister and he thereafter remained fugitive from law for the period of around 5 months and when rounded up got recovered firearm that was also sent to the concerned quarters for its matching with the crime empty secured by the investigator from the spot that had already been sent to the concerned quarters much prior to the recovery of firearm from the petitioner and last but not the least, accused/petitioner upon conclusion of investigation has been found involved in the commission of alleged crime. There is no cavil with the proposition that a case of further inquiry presupposes a tentative assessment of the material brought on record starting from the time of lodging of the FIR and the material collected during the course of investigation till the conclusion of the investigation, which in turn creates some doubt with respect to the involvement of an accused in the commission of crime, whereas the expression 'reasonable grounds' refers to grounds that may be legally tenable, admissible in evidence and appealing to a reasonable judicial mind as opposed to being whimsical, arbitrary, or presumptive. In case "*Ata-ullah v. The State*" **(2014 SCMR 1210)**, the Supreme Court of Pakistan observed that for all intents and purposes the doctrine of further inquiry demonstrates notional and exploratory of an accused in the commission of crime.

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1 *"Mumtaz v. The State"* **(2012 SCMR 556)**

Even in case *"Mst. Parveen Akhtar v. The State and others"* **(2002 SCMR 1886)**, it was observed that mere possibility of further inquiry which existed almost in every criminal case was not a ground for treating the matter as one of further inquiry falling within the purview of section 497(2) of Cr.PC. In the instant case, however, upon tentative assessment of the material available with the prosecution, this Court is convinced that reasonable grounds exist for believing that the accused/petitioner has committed a non- bailable offence falling within the ambit of the prohibitory clause as contained in Section 497 of Cr.PC, inasmuch as overwhelming evidence is available on the record to connect the accused/petitioner with the commission of the alleged crime. No case of post-arrest bail at all is made out. Petition is dismissed.

8. Needless to observe that observations made hereinabove are tentative in nature and shall be considered to have been made only to the extent of the decision of instant bail petition and shall not in any manner influence the trial court while deciding the main case. The learned trial court is directed to proceed to decide the main case expeditiously, preferably within a period of four months, from the receipt of certified copy of this Order. Office is directed to transmit a copy of this Order to learned trial court, forthwith.

The research assistance provided by Mr. Muhammad Afzil, Civil Judge/Research Officer, Research Center, Lahore High Court is appreciated.

(Shakil Ahmad)
Judge

Approved for reporting
Judge

2024 LHC 3881

Civil Revision No. 387 of 2024

Muhammad Usman Farooq Malik
Versus
Khaliq Zia & 2 others

03.09.2024 Mr. A.R. Aurangzeb, Advocate for the petitioner.

Concurrent findings of facts recorded by the courts below, whereby a suit for specific performance of contract instituted by Khaliq Zia and Bushra Naheed *(hereinafter referred to as "**plaintiffs**")* against Muhammad Usman Farooq Malik ***("petitioner")*** and Malik Ehsan ul Haq *(respondent No.3 herein)* was decreed by the trial court vide judgment and decree dated 11.10.2023 and appeal filed by petitioner against the said decree was dismissed by the Additional District Judge, Bahawalpur, have been impugned through this revision petition filed under section 115 of CPC.

2. Facts, in brief, leading to the filing of instant petition are that plaintiffs instituted a suit seeking specific performance of contract dated 11.02.2006 qua landed property as detailed in the plaint with the assertion that Malik Ihsan-ul-Haq *(defendant No.1 in the suit)* and the petitioner established a residential colony in Chak No.12/BC, Canal Garden, Tehsil and District Bahawalpur with the name and style of "Canal Garden Housing Scheme Sector-I" and started selling the plots on installments. Both the parties entered into an agreement to sell qua plot bearing No.137, measuring 01-Kanal and plaintiffs had been paying installments regularly and till the month of May, 2009 an amount to the tune of Rs.6,30,160/- was paid, where-after, respondent No.3 made an offer to the plaintiffs that if remaining total sum is paid in lumpsum,

then he would transfer the property by way of registered document and plaintiffs by agreeing to the offer, handed over cheque amounting to Rs.2,63,142/- for payment of remaining total consideration besides giving cash amount to the tune of Rs.31,000/- in lieu of expenses to be incurred on registration of sale deed and in pursuance thereof stamp paper No.405 dated 04.08.2009 was obtained and sale deed was duly written down on the same, however, document could not be got registered as respondent No.3 informed that document would be got registered later on because government had imposed ban on registration of documents. It was further narrated in the plaint that subsequently petitioner and respondent No.3 started dilly-dallying the matter on various pretexts and finally declined to transfer the plot three days prior to the filing of the suit. Petitioner appeared and contested the suit by filing written statement and controverted plaintiffs' stance and came up with the assertion that plaintiffs did not pay any amount to him, therefore, suit to his extent is liable to be dismissed. Respondent No.3 did not enter appearance before the trial court despite issuance of process and adopting of all methods for his service, as such he was proceeded against *ex parte.* The trial court, in view of the divergent pleadings of the parties, proceeded to frame seven issues including that of relief and after recording of evidence of the either sides and hearing arguments, proceeded to decree the suit in the following terms:-

> *"in view of my findings on above mentioned issues, the instant suit of the plaintiffs is hereby decreed. Plaintiffs are entitled to get transfer the suit property i.e. 01-kanal in Khata No.131/127, Khatooni No.534 to 538, situated in Chak No.12/BC, Canal Garden, Bahawalpur. The defendants are directed to transfer the suit property in the names of plaintiffs in the light of agreement to sell dated 11.02.2006 …"*

Being dissatisfied, petitioner filed an appeal, which was dismissed by

the Additional District Judge, Bahawalpur vide judgment and decree dated 26.04.2024, hence the instant petition.

3. Heard learned counsel for the petitioner. Record perused.

4. Stance taken by plaintiffs in their plaint that petitioner and respondent No.3 established a residential colony with the name and style of "Canal Garden Housing Scheme Sector-I" and started selling the plots on installments and were owners of residential plot No.137 situated in Chak No.12/BC, Canal Garden, Tehsil and District Bahawalpur, has not at all been denied in specific terms by the petitioner in his written statement. These facts, therefore would be deemed to have been admitted by the petitioner. Similarly, petitioner did not deny his signatures upon agreement to sell dated 11.02.2006 (Exh.P1) whereby suit plot was agreed to be sold to plaintiffs. It is by now a settled principle of law that admitted facts need not to be proved. It is also established principle of law that where a fact pleaded in the plaint is not specifically denied, the same shall be deemed to be accepted as correct in view of the provisions of *Order VIII* Rule 5 of CPC whereby an evasive denial would be construed as admission. Reliance in this regard may safely be placed on case *"Ghulam Rasool through L.Rs. and others v. Muhammad Hussain and others"*[1]. Version of petitioner, precisely, was that no consideration amount in pursuance of agreement to sell dated 11.02.2006 was ever paid to him. This very stance of petitioner stood contradicted from the contents of documents Exh.P-4 Exh.P-10, Exh.P-13,Exh.P-27, Exh.P-31 to Exh.P-36, Exh.P-40 and

[1] PLD 2011 SC 119

Exh.P-41. Petitioner, although came up with the assertion that he did not make any signature on any receipt yet no step was taken by the petitioner to get the signatures available on above hinted receipts compared with his admitted signatures. Mere bald statement of denying signatures on the receipts was not sufficient particularly where signatures available on the above hinted documents on their bare perusal seemed to have been tallied with the signatures on agreement to sell (that is admitted to have been signed by the petitioner). Respondent No.3 did not opt to appear and defend the suit despite issuance of process for his service and he was finally proceeded against *ex parte*. Plaintiffs' case to the extent of respondent No.3 remained unrebutted throughout. It may further be seen that one of the plaintiffs namely Khaliq Zia when appeared as PW-1, he in his examination-in-chief deposed that he along with his wife Bushra Naheed purchased one plot bearing No.137, measuring 01-Kanal in Khata No.131/127, Canal Garden Housing Scheme Sector-I and had been paying installments regularly and till the month of May, 2009 they paid an amount to the tune of Rs.6,30,160/-. All these depositions which have been made by PW-1 when he was under oath, had not at all been got confronted by the petitioner during the course of cross-examination. It is well-settled principle of law that any piece/part of evidence of a witness deposed in his examination-in-chief if not denied or controverted in cross examination, is presumed to be accepted by the other side. Reliance in this regard may safely be placed on case *"Abdul Rehman and another v. Zia-ul-Haque Makhdoom and others"*[2]. Petitioner when appeared as DW-1, he in his examination-in-chief did not at all deny the execution of agreement to sell

[2] 2012 SCMR 954

and even its contents whereby the suit plot was agreed to be sold by the petitioner and respondent No.3 to plaintiffs for the consideration of Rs.9,20,000/- and sale consideration was to be paid through installments. Petitioner only deposed that amount claimed to have been paid by plaintiffs was never paid to him and his signatures on certain receipts were forged but, at the cost of repetition, petitioner did not at all move any application before the trial court seeking comparison of the signatures available on the said receipts with his admitted signatures. Matter does not end here. Petitioner himself admitted during the course of cross-examination that the price of subject plot was paid by plaintiffs to respondent No.3. Plaintiffs' suit, in view of such admission, was liable to be decreed on the score alone and both the courts below rightly proceeded to decree the suit. According to petitioner, office of Canal Garden Housing scheme was situated at One Unit Chowk and it was respondent No.3 who had been doing whole paperwork regarding sale of plots. These admissions further confirm the fact that both petitioner and respondent No.3 have been dealing with the affairs of Canal Garden Housing Scheme particularly as shown in agreement to sell (Exh.P1) whereby petitioner has been shown as 'First Party' along with respondent No.3 and petitioner even during the course of his evidence admitted his signatures upon agreement to sell Exh.P1. So far as submission of learned counsel for petitioner that suit is barred by time, is concerned, it may be seen that the trial court while dealing with the proposition placed reliance on various authoritative pronouncements on the moot point and rightly came to the conclusion that cause of action was accrued to plaintiffs three days prior to filing of the suit when petitioner and respondent No.3 finally refused to transfer the subject plot in favour of plaintiffs. Question of limitation being mixed question of fact and law has rightly been decided by the trial court and nothing could be pointed out by learned counsel for the

petitioner to take any exception to the findings of the trial court.

5. As regards submission of learned counsel for petitioner that in view of novation of contract as claimed by plaintiffs in their plaint, petitioner stood relieved from the original agreement to sell and suit on the basis of agreement to sell (Exh:P1) was not competent against him therefore suit was liable to be dismissed to the extent of petitioner, it may be seen that the assertions made in the plaint qua transfer of subject plot after the payment of whole remaining amount hardly attract the principle of novation as embodied in section 62 of the Contract Act (IX of 1872), which is reproduced hereunder for the facility of ready reference: -

> *"62.* ***Effect of novation, rescission and alteration of contract.*** *If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed".*

Plain reading of above would show that if parties to a contract have come to an understanding to substitute a new contract either by rescinding or altering the contract, original contract needs not be performed. In case *"Muhammad Iftikhar Abbasi v. Mst. Naheed Begum and others"*[3], it has been elaborated that the word 'novation' practically and rationally denotes to substitute with a new contract where the obligations under the existing contract are brought to an end or extinguished. While defining the origin, scope and the essential requirements of novation, it was observed by Supreme Court of Pakistan in above referred case as under:-

> *"… The chronicle and etymology of the word "novation" reveals that it was borrowed from Latin word novation, novatio ornovare to make new, renew*

[3] 2022 SCMR 1074

and replace an existing legal obligation with a new one. Ref: https://www.merriam- webster.com. According to traditional meaning of novatio or novation in English (with some legal use of this Latin concept in England and the United States), the substitution of a new debt or obligation for an old one, which latter is thereby extinguished. It is novation if either the debtor, creditor or the obligation be changed. Ref: 137 N. Y. 542; Robinson's Elementary Law Revised edition, 294. https://legaldictionary.lawin.org. According to Black's Law Dictionary, 2nd Edition: Novation is the substitution of a new debt or obligation for an existing one. Civ. Code Cal. 1530; Civ. Code Dak. 863; Hard v. Burton, 62 Vt. 314, 20 Atl. 269; McCartney v. Kipp, 171Pa. 644, 33 Atl. 233; McDonnell v. Alabama Gold L. Ins. Co., 85 Ala. 401, 5 South. 120; Shafer's Appeal, 99 Pa. 246. Novation is a contract, consisting of two stipulations, one to extinguish an existing obligation; the other to substitute a new one in its place. Civ. Code La. art 2185. The term was originally a technical term of the civil law, but is now in very general use in English and American jurisprudence. In the civil law, there are three kinds of novation: (1) Where the debtor and creditor remain the same, but a new debt takes the place of the old one; (2) where the debt remains the same, but a new debtor is substituted; (3) where the debt and debtor remain, but a new creditor is substituted. Adams v. Power, 48 Miss. 451. Ref: https://openjurist.org. Along the lines of "Cheshire and Pifoot's Law of Contract" (Ninth Edition), Novation is a transaction by which, with the consent of all the parties concerned, a new contract is substituted for one that has already been made. The new contract may be between the original parties, e.g., where a written agreement is later incorporated in a deed; or between different parties, e.g., where a new person is

substituted for the original debtor or creditor. Whereas Lindley on the Law of Partnership (Thirteenth Edition), delineates this doctrine as a liability which is originally joint, or joint and several, may be extinguished by being replaced by a liability of a different nature; and this may happen in one of two ways, viz., either by an agreement to that effect come to between the parties liable and the person to whom they are liable, or by virtue of the doctrine of merger, independently of any such agreement. Sometimes called novation (see Commercial Bank of Tasmania v. Jones [1893] A.C. 313, 316). In the case of Mussarat Shaukat Ali v. Mrs. Safia Khatoon and others (1994 SCMR 2189), the Court held that section 62 of the Contract Act deals with the effect of novation, rescission and alteration of contract. The above provisions make it clear that if the parties to the contract agree to substitute a new contract in place of the original one, then the original contract need not be performed. Therefore, performance of original agreement between the parties is dispensed with only where the parties to the contract agree to substitute the original contract by a new contract. Whereas the Court in the case of Benjamin Scarf v. Alfred George Jardine ((1882) 7 AC 345) (HOL), held that in the court of first instance the case was treated really as one of what is called "novation," the term being derived from the civil law that there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be) or between different parties, the consideration mutually being the discharge of the old contract. In the case of Lata Construction and others v. Dr. Rameshchandra Ramniklal Shah and another (AIR 2000 SC 380), the Court held that one of the essential requirements of "novation" as contemplated by section 62 is that there should be complete substitution of a new contract in place

of the old. Substitution of a new contract in place of the old contract which would have the effect of rescinding or completely altering the terms of the original contract has to be by agreement between the parties. The substituted contract should rescind or alter or extinguish the previous contract."

The stance taken by plaintiffs in their plaint regarding an offer made by respondent No.3 qua payment of the total remaining sale consideration amounting to Rs.2,89,840/- in lumpsum so as to get registered sale deed executed, can hardly be considered as novation of contract. At the most, it can be counted as a slight modification in the contract for the simple reason that original contract was neither substituted by another contract nor rescinded. Slight modification qua the mode of payment would not come under the definition of novation as contained in section 62 of Contract Act, 1872. In case "*Bank Alfalah Limited, Lahore through Muhammad Rafiq and Syed Aqeel Abbas v. Punjab Small Industries Corporation through Managing Director"*[4], while referring to various authoritative pronouncements of the superior court, it has been elaborated as under: -

"... There is difference between alteration and novation of contract in section 62 of the Contract Act. The Novation is the complete substitution of the original contract with a new contract. The original contract remains no more in existence and the parties are not required to perform that. Contrarily an alteration of a contract is variation, modification or change in one or more respects which introduces new elements into the details of the contract, cancels some of them but leaves the general purpose and effect undisturbed. Generally the

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[4] *2023 CLD 14*

modifications are read into and become part of the original contract. The original terms also continue to be part of the contract and are not rescinded and/or superseded except in so far as they are inconsistent with the modifications. However, those of the original terms which cannot make sense when read with the alterations must be rejected.

18. Same is the distinction between alteration and rescission of the Contract. The alteration may produce two consequences. Firstly, where the modified contract possesses an independent contractual force, or enables the parties to sue upon the second contract alone as if the original contract does not exist, it will be deemed that the original contract is rescinded. Secondly, where the modified contract does not possess any independent contractual force or does not enable the parties to sue upon the modified arrangement, then the modifications are read into and become part of the original contract. The original terms also continue to be part of the contract and are not rescinded and/or superseded except in so far as they are inconsistent with the modifications"

It has further been observed in the above referred case law that when parties to a contract agree to substitute a new contract in place of previous one, performance of original contract would be dispensed with and where parties without any intention of rescinding or replacing the original contract only bring about any change or amendment in the original contract, the same will become part and parcel of original contract which would not be novated or rescinded. Even, to prove a novation, following four elements are required to coexist: -

(a) Existing of previous valid agreement;
(b) Consensus of the parties to cancel the first agreement;

(c) Agreement of the parties showing substitution of second agreement with the first one; and

(d) Validity of the second agreement.

In the present case, undeniably original contract remained intact and there was no substitution of fresh contract with the previous one. Mere slight modification qua the payment of remaining sale consideration would not be counted as novation.

6. Learned counsel for petitioner further emphasized that in view of the contents of agreement to sell, it was agreed between the parties that in case of any conflict, the proprietor namely 'Noor Mahal Estate Agency' would be authorized to decide the dispute which would be considered as a final decision, however, the trial court did not frame necessary issue in this regard. This argument of learned counsel for petitioner has no force for the simple reason that petitioner in his written statement did not opt to agitate this ground enabling the trial court to frame necessary issue in that regard. Strangely enough, this plea has never been taken by the petitioner throughout and same has been taken up now while filing the instant revision petition. It is by now a settled principle of law that a party cannot be permitted to raise a ground of attack or defense that has not been taken in the pleadings. As per the provisions of Order VI Rule 2 read with Order VIII Rule 2 CPC, a defendant is required to plead specifically the facts which may either constitute a defense or objection. If any party fails to take up a specific ground of attack in his pleadings, that party would not be permitted to deviate from the pleadings. Such party even cannot be allowed to set up a different and new plea while invoking revisional jurisdiction of this Court. The ground so urged by learned counsel for the petitioner in support of his instant revision petition, undeniably was not taken either before the trial court or before the appellate court,

therefore, such plea cannot be taken at the revisional stage for the first time.[5]

7. The case-laws[6] referred to by learned counsel for petitioner have to proceed on the peculiar facts and circumstances of those cases and the same have no bearing whatsoever to the facts and circumstances of the instant case, therefore, the same hardly lend any support to the case of the petitioner.

8. There is no cavil with the proposition that concurrent findings of facts recorded by the courts below can never be treated as sacrosanct and can be interfered with in case of non-reading and misreading of the evidence. Undeniably, granting or refusal of request of specific performance of contract is purely within the discretion of the court. Where discretion of the court has been exercised justly and properly, the same cannot be taken to any exception while exercising limited jurisdiction in revision under section 115 of CPC which primarily is meant for correcting errors made by courts below in relation to existence or exercise of their jurisdiction and no occasion arises to exercise the jurisdiction conferred by section 115 of CPC with regard to a matter which is within the discretion or authority of the court concerned.

The powers conferred under section 115 of CPC, therefore, should never be exercised so as to usurp the discretion or the authority of the courts below[7]. Learned counsel for the petitioner, however, remained utterly unable to point out a single circumstance of misreading and non-reading of evidence by the courts below while passing the impugned judgments and decrees.

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[5] Major (Retd) Barkat Ali and others Vs. Qaim Din and others (2006 SCMR 562), Mst. Kulsoom and 6 others Vs. Mrs. Marium and 6 others (1988 CLC 870), Mst. Jannat Bibi Vs Sher Muhammad and others (1988 SCMR 1696), Bank of Punjab Vs. Amjad Latif Rana and another (2005 CLD 1678), Faqir Muhammad Vs. Shabbir Haider (2005 YLR 2873).

[6] Saif-ur-Rehman Vs. Ijaz and another (2023 SCMR 2133), Abdul Sattar Vs. Mst. Anar Bibi and others (PLD 2007 Supreme Court 609) and Abdul Qadir Vs. Mrs. Ameer Zadi and 8 others (2020 MLD 213).

[7] Qazi Abdul Kafil Vs. Abdul Qayum Khan and others (PLD 1969 Peshawar 294)

In the face of evidence so produced by the parties at trial, the trial court was left with no other option but to decree the suit and so rightly decreed in favour of plaintiffs. Finding of the appellate court too is unexceptionable. Learned counsel for the petitioner remained unable to point out even a single circumstance suggesting illegal assumption, non-exercise, or irregular exercise of jurisdiction by the courts below while passing the impugned judgments and decrees. Where concurrent findings of both the courts below on a question of fact is based on proper appreciation of evidence available on the record and does not suffer from any illegality or material irregularity affecting the merits of the case, the same cannot be taken to any exception at revisional stage. Reliance in this regard may safely be placed on cases reported as *"Sultan Muhammad and another v. Muhammad Qasim and others"*[8] and *"Abdul Khaliq (Deceased) through L.R.s. and others Vs. Ch. Rehmat Ali (Deceased) through L.R.s. and others"*[9]. In case titled *Salamat Ali and others v. Muhammad Din and others*[10], it has invariably been held that: -

> *"Needless to mention that a revisional Court cannot upset a finding of fact of the Court(s) below unless that finding is the result of misreading, non-reading, or perverse or absurd appraisal of some material evidence. The revisional Court cannot substitute the finding of the Court(s) below with its own merely for the reason that it finds its own finding more plausible than that of the Court(s) below".*

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[8] *2010 SCMR 1630*

[9] *2012 SCMR 508*

[10] *PLJ 2023 SC 8*

9. The sequel of above discussion is that instant was a fit case for the grant of relief of specific performance of contract to plaintiffs and both the courts below rightly decreed the suit, therefore, findings of both the courts below cannot be disturbed while invoking the provisions of 115 of CPC. Petition in hand is without any force; the same is **dismissed** *in limine.*

(SHAKIL AHMAD)

JUDGE

APPROVED FOR REPORTING

Judge

2024 LHC 4220

Writ Petition No. 2284 of 2024

SNGPL through G.M.

Versus

Muhammad Awais SDO Highway

JUDGMENT

Date of Hearing	01.10.2024
For Petitioner	Ms. Nadia Hayat, Advocate.
For Respondent	Mr. Salman Khan Bayalay, Advocate.
	Mr. Asif Ikram, Assistant Attorney General.

SHAKIL AHMAD, J. This is a petition that has been filed under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution") by Sui Northern Gas Pipelines Limited (SNGPL) through its General Manager (G.M) to impugn order dated 14.05.2024 passed by learned Additional District Judge/ Judge Gas Utility Court, Rawalpindi, whereby petitioner has been directed to restore respondent's supply of gas subject to payment of restoration fee.

2. Facts, in brief, giving rise to the filing of instant petition are that Muhammad Awais (respondent) instituted a suit against SNGPL seeking permanent and mandatory injunction besides the prayer of restoration of Sui Gas connection/meter, precisely with the assertion that he was working as a Junior Clerk in the office of Highway Division, Rawalpindi and he applied for allotment of married accommodation, whereupon House No.1 Faizabad Murree Road, Rawalpindi was allotted to him on 03.09.2020 and after having occupied the house it transpired to respondent that gas connection was not available there, where-after he approached the petitioner whereupon he was

informed that owing to some dues from earlier occupant, supply of gas could not be restored. Upon consistent and repeated requests made by the respondent for restoration of supply of gas, instead of restoring gas supply, petitioner filed suit against SDO Highways before Gas Utility Court for recovery of outstanding amount to the tune of Rs.3,45,520/- with interest at bank rate till the realization of decretal/recoverable amount. According to respondent, having come to know about pendency of suit before the Gas Utility Court, Rawalpindi, respondent moved an application for restoration/ re-installation of Sui gas meter, however, said application was dismissed with the observation that respondent can file proper suit against petitioner, hence respondent filed suit seeking permanent as well as mandatory injunction and also filed an application seeking injunctive order to the effect that petitioner may be directed to restore the gas connection/meter till the final decision of the case. Petitioner appeared and contested the matter. Learned trial court while deciding application proceeded to pass the impugned order, hence this petition.

3. Learned counsel for the petitioner contends that in view of bar contained under section 29 of the Gas (Theft Control and Recovery) Act, 2016 (hereinafter referred to as '2016 Act') no injunctive order can be passed by Gas Utility Court either prohibiting or directing the petitioner from disconnecting the supply of gas of a premises or to restore the supply of gas to a premises unless the plaintiff at the time of filing the suit deposits with the Gas Utility Court the amount assessed against him by the Gas Utility Company. Upon Court query that whether impugned order has been complied with by the petitioner, learned counsel for the petitioner submitted that since the impugned order is against the provisions of section 29 of the 2016 Act, the same has not been complied with so far. As against this, learned counsel for

the respondent argued that the Gas Utility Court rightly proceeded to pass the impugned order as neither any sum due was ever assessed against the respondent nor the respondent has ever been declared defaulter. Learned counsel for the respondent argued that when no amount whatsoever was outstanding against the respondent, there was no question of deposit of any amount by the respondent. He further argued that the conduct of the petitioner by non-compliance of injunctive order passed by the trial court is contumacious.

4. Heard learned counsel for the parties at length. Record so annexed with the petition perused.

5. Learned counsel for the petitioner solely relied upon the provisions of section 29 of the 2016 Act in support of her stance that impugned order was passed in utter disregard of said provisions. Before dealing with the stance taken by learned counsel for the petitioner, it would be advantageous to reproduce hereunder section 29 of 2016 Act for the facility of ready reference: -

> "29**. Bar of jurisdiction**. – (1) Notwithstanding any other law for the time being in force, no Gas Utility Court shall make an order prohibiting the Gas Utility Company from disconnecting the supply of gas to a premises or requiring it to restore supply of gas to such premises if the consumer is in default and any such order made before the commencement of this Act shall cease to have effect:
>
> Provided that nothing contained herein shall apply to a case in which the plaintiff, applicant or appellant, within a period of thirty days of the aforesaid date or at the time of filing the suit, application or appeal, as the case may

be, deposits with the Gas Utility Court the amount assessed against him by the Gas Utility Company and all further charges of the Gas Utility Company as and when they become due and in the event of his failing to do so, any order prohibiting the Gas Utility Company from discontinuing the supply of gas to the premises or requiring it to restore the supply of gas to the premises, if already made, shall cease to have effect.

(2) Where an amount has been deposited under sub-section (1), the Gas Utility Court shall direct it to be deposited in a scheduled bank in the name of the Gas Utility Company on an undertaking being furnished by the Gas Utility Company to the effect that in case the suit or appeal is decided against it, it shall repay the said amount to the plaintiff or appellant, as the case may be, with such reasonable return as the Gas Utility Court may determine."

Plain reading of above would suggest that while creating an embargo on passing of order either prohibiting Gas Utility Court from disconnecting the supply of gas from premises or requiring to restore supply of gas to a premises, a proviso has also been added to sub-section 1 of section 29 of 2016 Act. Upon reading conjointly the provisions of section 29(1) along with its proviso it evinces that if a plaintiff, applicant or appellant as the case may be, deposits a sum due so assessed against him by Gas Utility Company with the Gas Utility Court within a period of thirty days at the time of filing of suit, application or appeal, the Gas Utility Court may pass an order either prohibiting or requiring Gas Utility Company from disconnecting or restoring the supply of gas to plaintiff/applicant or appellant. Bar so contained in section

29 of the 2016 Act, thus would be attracted where plaintiff/applicant/appellant fails to deposit the sum so assessed against him by Gas Utility Company with the Gas Utility Court. In the instant case, undeniably no sum due has ever been assessed against the respondent by the petitioner, as such he has not been declared to be in default in any manner whatsoever. Provisions of section 29 of the 2016 Act are silent qua the situation where a person against whom no sum has been assessed by Gas Utility Company, opts to file suit being aggrieved by an action of Gas Utility Company by also praying for passing of injunctive order. Given this vacuum, Gas Utility Court may conveniently invoke its inherent jurisdiction and powers as granted by Section 151 of the CPC, in light of Section 5 of the 2016 Act, which stipulates that, subject to the provisions of the Act, Gas Utility Court in the exercise of its jurisdiction shall have all the powers vested in a Civil Court under the Code of Civil Procedure, 1908. It may therefore be resolved conveniently that where no sum due has been assessed by Gas Utility Company against a plaintiff, the Gas Utility Court despite the bar contained in section 29 of the Act, still has got inherent powers in view of section 151 of the CPC which mandates that nothing in the Code shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice and to prevent abuse of the process of the Court.

6. It may further be observed that clause contained under the head of 'PAYMENT' in the terms and conditions of the contract for the supply of gas as relied by the petitioner, shall not apply to the Government owned allocated premises, for which the company shall recover the dues, if any, from the previous occupant directly or through his parent department or through Estate Management Office. Relevant clause contained in the terms and conditions in

contract for the supply of gas for domestic use is reproduced hereunder for the facility of ready reference: -

PAYMENT

(i) …….
(ii) …….
(iii) …….
(iv) …….
(v) The Consumer hereby affirms that no such connection at the premises where a gas connection is being provided, was previously disconnected, on account of non-payment of gas bills/charges etc, and understands that, in case the position is found otherwise, the Consumer shall be liable to clear/pay such dues/charges on der and as if such amount is due from and payable by him Provided that this clause shall not apply to Government owned allocated premises for which the Company shall recover the dues, if any, from the previous occupant directly or through his parent department or through Estate Management office.

(Emphasis supplied).

In view of above stipulation, it is yet to be resolved and determined by trial court whether petitioner had any authority to disconnect supply of gas of a premises that is owned by Government wherein gas is used merely for domestic/residential purpose by Government employees. Undeniably, the house that has been allotted to respondent is a Government owned premises and respondent can also not be considered as successor-in-interest as defined under clause 'n' of sub-section 1 of section 2 of the 2016 Act, whereby while defining the term successor-in-interest it has been specifically mentioned that the term successor-in-interest would not include a person who occupies such

premises merely as a tenant. Admittedly, no sum due as defined under clause 'o' of sub-section 1 to section 2 of the 2016 Act has ever been assessed against the respondent as the respondent has not so far purchased or received gas for self-consumption. It has also not been denied that respondent is an employee in Highway department and he has been allotted House No.1 Faizabad Murree Road, Rawalpindi vide letter No.1478-80/C dated 03.09.2020. Admittedly, the petitioner has already filed suit for recovery of Rs.3,45,520/- against the earlier occupant of the house who said to have used the gas supplied by the petitioner.

7. Extraordinary constitutional jurisdiction of this Court undoubtedly is discretionary and equitable. If there was an order which might not be technically correct or there was any irregularity but it had not caused any miscarriage of justice and to the contrary was in furtherance of interest of justice and welfare of the person concerned, this Court would not take exception to the same while exercising its constitutional jurisdiction for the simple reason that this Court in exercise of its jurisdiction under Article 199 of the Constitution would always come in the aid of justice and would never come in the aid of injustice. Learned trial court has rightly proceeded to pass the impugned order keeping in view peculiar facts and circumstances of the instant case, as such the same is not open to any exception while exercising extraordinary constitutional jurisdiction of this Court.

8. This now brings me to yet another important and delicate proposition that whether any of the parties can raise and justify plea of non-compliance of an order passed by a court on the pretext that the same was against the law. As hinted earlier in paragraph No.3, during the course of arguments a query was put to learned counsel for the petitioner that impugned order directing petitioner to restore the supply of gas was passed on 14.05.2024 and no order qua suspension of the same was passed by this Court while issuing notice to

the respondent, what refrained the petitioner from complying with the order dated 14.05.2024, learned counsel for the petitioner came up with the naïve argument that since impugned order was passed in derogation of the provisions of section 29 of the 2016 Act, the same has not so far been complied with by the petitioner. This stance, on the face of it, is misconceived rather contumacious. When an injunctive order directing the petitioner to restore the supply of gas has been passed by the trial court, the same must have been obeyed by the petitioner so long as the order remains intact. In case '*Iftikhar Ali v. Javid Dastgir Mirza and 6 others*' **(PLD 1975 Lahore 126)**, while dealing with somewhat similar sort of moot point it was observed as under: -

> "5… . …When an injunction order has been issued, it must be obeyed; and the only remedy of the aggrieved party is to come up in appeal to a superior Court to have the order vacated. So long as the order stands and its operation has not been suspended by another Court or by the Court which passed the order, it will not be tolerated that any person should disobey that order. It is so because the administration of justice can only be effective if it has the means to enforce Court orders and to punish acts tending to impair public confidence in the authority or integrity of the Judges who administer the course of justice. In *Spokes v. Banbury Board of Bealth (1865) L R l Eq. 42, Wood, V-C.,* said that "*the simple and only view is that an order must be obeyed, that those who wish to get rid of that order must do so by the proper course, an appeal. So long as it exists, the order must be obeyed, and obeyed to the letter*,". Again, in *Knight v. Clifton (1971) 2 All E R 378 at /.393 (C A) Sachs, L.J.*, observed that "*when an injunction prohibits an act, that prohibition is absolute, and is not to be related to intent unless otherwise stated on the fact of the order . . . . . .*" In *Eastern Trust Co. v. Mckenzie Mann & Co. Ltd. 1915 A C 750 (P C),* Sir George Farwell observed that it should

> perhaps be added that an interim or interlocutory injunction has the same force as a final order, and that the same principles of obedience apply. It is thus settled that a person cannot disregard an order or an injunction of a Court, and if he, in fact, disobeys it, he does so at his peril.".
>
> (Emphasis supplied).

This view of the apex Court subsequently has been followed by this Court in case "*M/s Chaudhry Sugar Mills Ltd. v. The Province of Punjab, etc*" in ICA No.1456 of 2016. For the sake of arguments, even if the injunctive order was either erroneous or passed against the provisions of section 29 of the 2016 Act, it would hardly allow the petitioner to make itself a judge of the validity of the order passed against it, and by his own act of disobedience to consider the same as illegal. Such tendency or practice, if allowed to be prevailed, will weaken the public confidence on the integrity of courts while administering the cause of justice. Whether an order is right or wrong, it is duty of the parties to obey the order or get the same set aside by the higher court. If a party to a proceeding considers that the court while passing an injunctive order has committed an error in the understanding of law applicable, or in its application, he can only resort to the remedy available to him in accordance with law. Non-compliance of injunctive order by a party on the basis of self-serving assumption that the same has been passed erroneously, would tend to the subversion of orderly administration of civil Government. In case *"The State of Bihar v. Rani Sonabati Kumari"* **(1961 AIR 221)** it was observed as under: -

> "If any party to the proceedings considers that any Court has committed any error, in the understanding of the law or in its application, resort must be had to such review or appeals as the law provides. When once an order has been passed which the Court has jurisdiction to pass, it is the duty of all persons bound by it to obey the order so long as it

> stands, and it would tend to the subversion of, orderly administration and civil Government, if parties could disobey orders with impunity. If such is the position as regard private parties, the duty to obey is all the more imperative in the case of Governmental authorities, otherwise there would be a conflict between one branch of the State polity, viz., the executive and another branch-the Judicial. If disobedience could go unchecked, it would result in orders of Court ceasing to have any meaning and judicial power itself becoming a mockery. When the State Government obeys a law, or gives effect to an order of a Court passed against it, it is not doing anything which detracts from its dignity, but rather, invests the law and the Courts with the dignity which are their due, which enhances the prestige of the executive Government itself, in a democratic set-up."
>
> (Emphasis supplied).

The obedience that has to be given to the orders of the Court, can hardly be made dependent on parties' opinion as to their propriety[1]. In case **"Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911)** while dealing the similar moot point it was observed as under:-

> "If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the "judicial power of the United States" would be a mere mockery. This power has been uniformly held to be necessary to the protection of the court from insults and oppression while in the ordinary exercise of its duty, and to enable it to enforce its judgments and orders necessary to the due administration of law and the protection of the rights of citizens."
>
> (Emphasis supplied).

[1]. *Mawazzam Ali Khan and others v. Shebash Chandra Pakrashi and another (AIR 1927 Calcutta 598)*

In case "**Howat v. Kansas, 258 U.S. 181 (1922)**", while deciding the similar sort of controversy it has been observed as under: -

> "----An injunction duly issuing out of a court of general jurisdiction with equity powers, upon pleadings properly invoking its action, and served upon persons, made parties therein and within the jurisdiction, must be obeyed by them, however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority to be punished. "

(Emphasis supplied).

The Supreme Court in case *"The University of Dacca v. Dr. A.N.M. Mahmood and Dr. K.T. Hussain"* **(PLD 1966 Supreme Court 802)** observed that even if ultimately, it may be found that the injunction order was erroneous or illegal, the liability of the University authorities to obey it, would not be affected.

9. Intentional and continuous non-compliance of the order of court by the petitioner on the basis of self-assumed opinion that the order has been passed in derogation of provisions of law, would hardly justify inaction on the part of petitioner qua the compliance of injunction order passed by the trial court. Such conduct would rather be legitimately considered as contumacious in the first place exposing the petitioner to the initiation of contempt proceedings which as per learned counsel for the respondent have been initiated before the learned trial court and the same are still to be adjudicated upon by the learned trial court, and at the same time such conduct of the petitioner disentitles the

petitioner to the equitable and discretionary relief under Article 199 of the Constitution particularly where impugned order passed by trial court has been held to be passed in accordance with law. Therefore, no indulgence can be shown to the petitioner owing to his contumacious conduct that can hardly be condoned as extraordinary constitutional jurisdiction of this Court falls within the realm of equitable and discretionary jurisdiction.

10. The sequel of above discussion is that petition in hand is devoid of any force, the same is dismissed.

The research assistance provided by Mr. Adil Sarwar Sial, Civil Judge/Research Officer, Research Center, Lahore High Court Rawalpindi Bench, is appreciated.

(SHAKIL AHMAD)
JUDGE

Approved for reporting.
Judge

2024 LHC 4274

Crl.Misc. No.3303-M of 2024

Muhammad Zareen

Versus

Learned Addl: Sessions Judge, etc.

11.10.2024 Mr. Haider Mehmood Mirza, Advocate for the petitioner.

Muhammad Zareen *(petitioner herein)* has filed instant application under section 561-A of Cr.PC to impugn order dated 27.05.2024 and judgment dated 27.09.2024 passed by learned Senior Civil Judge (Criminal Division), Jhelum and learned Additional District Judge, Jhelum respectively, whereby application for exhumation of dead body of Mst. Maryam Zareen filed by Adil Hussain *(respondent No.4 herein)* was accepted and revision petition filed by the petitioner against the said order was dismissed.

2. Heard learned counsel for the petitioner and record so annexed with the petition perused.

3. It has straightaway been observed that respondent No.4 has raised serious suspicion qua alleged unnatural death of her sister namely Mst. Maryam Zareen. Respondent No.4 who is real brother of deceased Maryam Zareen had a right to get his suspicion removed qua administering poison to her sister by the petitioner. Guidance has been sought from the case reported as *"Ameer Afzal Baig v. Ahsan Ullah Baig and others"* **(2006 SCMR 1468),** wherein it was observed that the legal heir had a right to get the suspicion removed, more particularly, when exhumation by itself could never lead to involvement of someone unless postmortem is conducted and report is positive. It may further be observed that exhumation and thereafter post-mortem examination merely are the tools to unearth the real cause of death of deceased. So far as submission of learned counsel for the petitioner that in case of disinterment/exhumation, dignity and sanctity of grave would be

violated is concerned, it may be observed that life is a sacred right of human being and same has been recognized, safe-guarded and protected as a fundamental right and if this right is violated or transgressed upon, law of land comes into motion to deal with the offender, therefore, in order to uncover the fact as to whether one met natural or unnatural death particularly where a doubt has been created in the mind of real brother of the deceased, it is rather more sacred and necessary for the sake of justice justifying disinterment of the dead body. Mere fact that dead body had already been buried and its exhumation may cause disrespect to the dead body, in no way be counted as a good and valid ground to deny the request of disinterment particularly where disinterment is necessary to advance the cause of justice. In the instant case respondent No.4 who is real brother of deceased was justified in making application for exhumation of her daughter so as to know the cause of her death. Both the courts below have rightly proceeded in the matter and accepted the petition filed by respondent No.4. Learned counsel for petitioner remained unable to point out even a single circumstance from where it can remotely be ascertained that learned courts below while passing the impugned order/judgment have acted either without jurisdiction or the impugned order and judgment have been passed in violation of any law. Learned counsel for the petitioner failed to point out even single circumstance of any patent illegality or jurisdictional defect in the impugned order/judgment. No case warranting any interference in the impugned order/judgment at all is made out.

4. The upshot of above discussion is that petition in hand is devoid of any force, therefore, the same is dismissed *in limine*.

(SHAKIL AHMAD)
JUDGE

Approved for reporting.

Judge

2024 LHC 4494

Writ Petition No.2889 of 2020

Mst. Shamim Akhtar

Versus

Additional District Judge Rawalpindi & others.

JUDGMENT

Date of Hearing	23.10.2024
For Petitioner	Ch. Muhammad Mobeen Shazaib, Advocate.
For Respondent	Mr. Asif Raza Bhatti, Advocate.

SHAKIL AHMAD, J. Titled petition is being decided along with Writ Petition No.2478 of 2020 through this consolidated judgment as judgments and decrees dated 14.09.2020 and 12.10.2020 passed by learned Judge Family Court and Additional District Judge Rawalpindi, respectively, are under challenge in these petitions by the same parties.

2. For the facility of ready reference, hereinafter Mst. Shamim Akhtar will be referred to as **'petitioner'** and Farooq Azam will be referred to as **'respondent'**.

3. Facts of the case, in brief, giving rise to the filing of these petitions are that petitioner instituted a suit against the respondent seeking decree for recovery of maintenance allowance, Rs.300,000/- as stipulated in the *Nikah nama* and four *tolas* gold ornaments. The respondent contested the suit by filing written statement. After framing of issues and recording of evidence of the parties, the Judge Family Court, Rawalpindi proceeded to decree the suit in the following terms:-

"1. The plaintiff is entitled to get Rs.20,000/- per month w.e.f. the date of desertion i.e. 16.12.2017 till expiry of her iddat period i.e. 15.05.2018.

2. The plaintiff is entitled to recover Rs.03 lac from the defendant as per column No.18 of Nikahnama.

3. The claim of plaintiff for recovery of gold ornaments is dismissed".

Both the parties assailed the judgment and decree of the trial court by filing separate appeals and Additional District Judge Rawalpindi, vide judgment and decree dated 12.10.2020 decided both the appeals as under:-

> *"The sequel of above discussion is that, appeal filed by Mst. Shamim Akhtar is partly allowed in the manner that she is held entitled to recover the gold ornaments weighing 4 tolas, whereas, the rival appeal of Farooq Azam is partly allowed in terms that Mst. Shamim Akhtar is allowed to recover Rs.60,000/- for the period of iddat only and further she is not entitled to recover Rs.300,000/- from the respondent (defendant) as dower. …"*
>
> Being dissatisfied, both the parties have filed instant petitions.

4. Heard learned counsel for the parties and record so annexed with the petitions perused.

5. Learned counsel for petitioner and the respondent are only objecting to the decrees of courts below qua dower and gold ornaments, respectively.

6. As regards petitioner's claim qua recovery of Rs.3,00,000/- as stipulated in the *Nikah nama*, it may be observed that petitioner averred in the plaint that she got married to the respondent in lieu of dower of Rs.10,000/-. She further claimed that it was also agreed that an amount of Rs.300,000/- will be given to the petitioner in case respondent pronounces divorce on petitioner or he

contracts second marriage and that respondent has contracted marriage with one Sania Nazar on 17.02.2018 and also divorced the petitioner, therefore, she is entitled to recover Rs.300,000/-. The respondent, in his written statement did not deny specifically qua fixation of Rs.300,000/-, however, asserted that all the dower has been paid and he divorced petitioner upon her asking. Before dilating upon the proposition, it seems apt to reproduce hereunder the stipulation as hinted against columns No.18 to 22 of Nikah Nama: -

طلاق کی صورت میں3 لاکھ روپیہ، ناراضگی کی صورت میں 20 ہزار ماہوار خرچ، دوسری شادی کی صورت میں بھی یہی شرائط، سارا زیور دونوں طرف سے عورت کا ہو گا۔یہ شرائط اس وقت ہونگی جب غلطی دولہا والوں کی طرف سے ہو گی۔

From the bare perusal of above, it transpires that both the parties agreed upon the stipulation qua payment of Rs.300,000/- in the events of pronouncing divorce upon petitioner and contracting second marriage by the respondent. Narration given in Nikah Nama qua the amount can legitimately be counted as deferred dower that was to become payable on happening of any of the events so mentioned therein. In the instant case since respondent has contracted second marriage and also divorced the petitioner, therefore, the petitioner was entitled to the decree for the dower to the tune of Rs.300,000/-. Needless to observe that the stipulation agreed upon between the parties qua payment of certain amount by respondent to the petitioner on the event of divorce or contracting second marriage, in no way curtails the right of husband to pronounce divorce. Any stipulation or condition agreed between the parties mutually and with their free consent cannot be considered as an absolute bar to either pronounce divorce. In case *"Ghulam Shabbir v. Mst. Abbas Bibi and others"* **(2022 CLC 963)** the moot point, whether any condition incorporated in the Nikah Nama qua payment of compensation to wife in case

of divorce was contrary to the law and Islamic injunctions or not, was taken up and resolved in the following terms:

> *"3……. The vires and constitutionality of the Muslim Family Law, Ordinance, 1961 and schedule thereto, which included to Nikah Nama, were variously subjected to challenge successfully. Clause 19 forms part of Nikah Nama - Form-II, added in terms of Rules 8, 10, 11 and 12 of the W.P. Rules under the Muslims Family Law Ordinance, 1961.*
>
> *4. Clause 19 of Nikah Nama in this case is grossly misconstrued. The financial benefits agreed mutually are in the nature of reasonable financial support for setting her free. There is no cavil that terms of Nikah Nama constitutes a civil contract between the parties, both of which are at liberty to agree to the terms of arrangement. Clause-19, as available in Nikah Nama, is not in the nature of absolute bar qua right to divorce. It is not disputed that petitioner had divorced the wife - which manifest that no bar to divorce was imposed.*
>
> *5. As far as contractual obligation in column 19 is concerned, it was agreed and factum of Nikah Nama is not disputed. The amount agreed in terms of clause-19 of Nikah Nama is spousal support - having all the attributes of alimony - wherein reasonable benefits were offered to enable ex-wife to have dignified and comfortable life. There is no restriction that husband cannot agree to arrange for maintenance or agree to extend fiscal advantage to the wife, even after the divorce. This nature of the benefit / advantage, which is not in any manner is restricting right of divorce, is in fact an act of bestowing benefit or gift upon wife to support*

her, hence, cannot be termed as illegal or contrary to the spirit of ISLAM and teachings of Quran."

7. It may further be observed that there exists no categorization of the dower either in the Holy Quran or Sunnah[1]. Any amount/property agreed to be paid by the husband to wife on the happening of some future event, by all intents and purposes be construed as a deferred dower to be paid by the husband on the happening of such event. While discussing the scope and nature of prompt and deferred dower, Syed Ameer Ali, a prominent jurist of his age, in his celebrated compilation Mohammedan Law (Volume II) that was published in 1965 by All Pakistan Legal Decisions, Lahore while defining prompt and the deferred dower observed as under: -

*"**Prompt and deferred dower.***

As there is nothing in the Koran or in the traditions tending to show that the integral payment of the dower prior to consummation is obligatory in law, the later jurisconsults have held that a portion of the mahr should be considered payable at once or on demand, and the remainder on the dissolution of the contract, whether by divorce or the death of either of the parties. The portion which is payable immediately is called the mahr-i-mu'ajjal, "prompt" or "exigible"; and a wife can refuse to enter the conjugal domicile until the payment of the prompt portion of the dower. The other portion is called mahr-i-muwajjal "deferred dower" which does not become due until the dissolution of the contract. It is customary in India to fix half the dower as prompt and the remaining moiety as deferred or "postponed:" but

1. *"Dr. Sabira Sultana v. Maqsood Sulari, Additional District and Sessions Judge, Rawalpindi and 2 others"* **(2000 CLC 1384)**

the parties are entitled to make any other stipulation they choose. For example, they may allow the whole amount to remain unpaid until the death of either of the husband or the wife. Generally speaking, among the Musulmans of India, the deferred dower is a penal sum, which is allowed to remain unpaid with the object of compelling the husband to fulfill the terms of the marriage-contract in their entirety."

(Underlining is to supply emphasis).

So, any penal sum that has to be paid by the husband on the event of some future happenings as agreed by him although penal in nature yet same may be considered as deferred dower in view of exposition given by late Syed Ameer Ali. Faiz Badruddin Tyabji in paragraph No. 98 of his famous work 'Muhammadan Law'[2], defined the terms prompt and deferred dower in the following words:

"Mahr may be (a) either prompt, or exigible (in Arabic mu'ajjal) i.e., payable immediately on marriage if demanded by the wife or (b) deferred (in Arabic muwajjal) i.e., payable on the dissolution of marriage, or the happening of some specified event".

(emphasis supplied)

In view of above, it can very conveniently be resolved that where no specific or definite period is settled for the payment of deferred dower, wife would become entitled to dower at the event of dissolution of marriage or on the death of any of the spouses. If any sum or property is agreed to be paid or given

[2]. *third edition published by N.M. Tripathi & Co., Bombay 1940.*

to the wife on the happening of some specified event, the same would become payable on the occurrence of that specified event as a deferred dower. In the instant case, there was a specific stipulation in the Nikah Nama that in case of divorcing the petitioner or contracting second marriage by the respondent, the respondent would pay an amount to the tune of Rs.300,000/- to the petitioner. Undeniably, respondent has divorced the petitioner, therefore, petitioner was entitled to recover an amount to the tune of Rs.300,000/-as stipulated in Nikah Nama by construing the same as a deferred dower. Respondent simply failed to substantiate his stance as taken in his written statement qua pronouncing of divorce upon petitioner on her insistence. Learned Judge Family Court rightly resolved the issue qua entitlement of respondent for receiving Rs.3,00,000/-, whereas learned Appellate Court fell in obvious error disentitling petitioner to recover Rs.3,00,000/-.

8. Adverting to respondent's claim qua gold ornaments, it may be observed that petitioner in paragraph No.5 of the plaint claimed that "*on 16.12.2017, the defendant after giving severe beatings to the plaintiff ousted the plaintiff in wearing apparels and snatched the gold ornaments*". Respondent controverted petitioner's stance with the assertion that on the day of alleged snatching, he was abroad. The petitioner during cross-examination negated her version and stated that on 16.12.2017 the defendant was abroad. The relevant portion of cross-examination of the petitioner is reproduced hereunder for the facility of ready reference:-

یہ درست ہے کہ مورخہ 16.12.2017 کو مدعا علیہ پاکستان میں موجود نہ تھا۔

From the above deposition, it can very conveniently be observed that petitioner failed to substantiate her claim that the respondent snatched gold ornaments from her. Learned Judge Family Court, thus, rightly proceeded to non-suit petitioner qua her claim of gold ornaments.

9. In view of above discussion, it can very conveniently be observed that the appellate court fell in obvious error while passing the impugned judgment and decree. In this backdrop, instant case and the connected case are the fit cases for interfering in the impugned judgment and decree of the appellate court in view of the guidelines given in Mst. Tayyeba Ambareen's[3] case by invoking the provisions of Article 199 of the Constitution.

10. The upshot of above discussion is that both the petitions are partly allowed and the judgment and decree dated 12.10.2020 passed by the Additional District Judge, Rawalpindi to the extent of entitling petitioner to recover four tolas gold ornaments and declining petitioner's claim to recover

Rs.300,000/- from the respondent, is set aside and judgment and decree of the trial court dated 14.09.2020 is restored, whereby petitioner was non-suited qua her claim of gold ornaments and was held entitled to receive Rs.3,00,000/- as stipulated in *Nikahnama*.

(SHAKIL AHMAD)
JUDGE

Approved for reporting
Judge

[3] *Mst. Tayyeba Ambareen and another v. Shafqat Ali Kiyani and another (2023 SCMR 426).*

2024 LHC 4642

Writ Petition No. 67022 of 2024

M/s Five Star Steel Industry (Pvt.) Ltd., etc.

Versus

Federation of Pakistan through Secretary Ministry of Law & Justice, etc.

28.10.2024 Barrister Momin Malik , Advocate for petitioners.

Rana Nauman Khalid, Assistant Attorney General on Court's call.

Barrister Asad Ullah Chathha, Advocate for NEPRA (respondent No2), on watching brief.

This is a petition that has been filed by M/s Five Star Steel Industry (Pvt) Ltd. and 04 others *(petitioners herein)* under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (the 'Constitution') with the following prayer: -

"In view of the narrated facts and submissions, it is therefore, most respectfully prayed that the instant petition may kindly be accepted in the following terms:

1. The impugned decision of the respondent No.2/NEPRA Authority dated 11.07.2024 may be declared illegal, unlawful and void ab initio in violation of section 31 of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997.
2. The increased Fixed Charges imposed in the impugned bills amounting to Rs.57,00,000/- for petitioner No.1 and Rs.18,00,000/- for petitioner No.2, for the month of September 2024 issued by the respondent No.4/LESCO may be set aside as being disproportionate, unreasonable, arbitrary and exploitative.

3. The during the pendency of the instant writ petition, the operation of the impugned bill for the month of September 2024 be suspended only to the extent of imposition of increased fixed charges amounting to Rs.57,00,000/- for petitioner No.1 and Rs.18,00,000/- for the petitioner No.2, Rs.34,00,000/- for the petitioner No.3, Rs.1,26,00,000/- for the petitioner No.4 and Rs.1,50,00,000/- for the petitioner No.5 and hence allow the petitioners to deposit bills for the month of September 2024, within a period of four days whereas for the differential amount payable pursuant to the impugned decision dated 11.07.2024, the petitioners be allowed to submit post-dated cheques of the d9ifferential amount of fixed charges with respondents within a period of four days.

4. During the pendency of instant writ petition, the operation of the impugned bills may very kindly be suspended and the electricity connections may not be disconnected.

Any other relief, which this Honourable Court may deem fit and appropriate may very kindly be granted."

2. Heard learned counsel for the parties and record annexed with the petition has been perused.

3. Petitioners are aggrieved by decision of National Electric Power Regulatory Authority ("NEPRA") dated 11.07.2024, in pursuance whereof fixed charges have been imposed in petitioners' electricity bills for the month of September, 2024. According to learned counsel for petitioners fixed charges have been imposed without any lawful justification and same are liable to be set-aside as being disproportionate, unreasonable and arbitrary. Learned counsel appearing on behalf of NEPRA, at the outset, raised the objection qua maintainability of instant petition by arguing that petitioners have the remedy of challenging the impugned decision by filing an appeal under section 12(G) of the Regulation of Generation, Transmission and Distribution of Electric

Power Act, 1997 (the "Act"). Learned counsel for petitioners when confronted with the objection, argued that Appellate Tribunal NEPRA (hereinafter referred to as "Tribunal") under section 12(G) of the Act is non-functional at present owing to the fact that seat of Member Finance in the Tribunal is lying vacant. He has also referred order dated 23.08.2024 passed by this Court in Writ Petition No.50029 of 2024 whereby on the ground that Tribunal was not functional and that petitioners in view of non-functionality of the Tribunal cannot be left remediless, notice was issued by this Court to respondents besides granting interim relief. Learned counsel appearing on behalf of NEPRA vehemently controverted the above submissions by stating that the Tribunal is fully functional at the moment and that the orders in the earlier filed cases were obtained by petitioners by misleading the Court as in fact the Tribunal was also functional at the time of passing of the earlier orders. Learned Assistant Attorney General after obtaining instructions from the concerned quarters has apprised that the Tribunal is functional at the moment and cases are being entertained and heard by the Tribunal. This information conveyed by the learned Law Officer has also been got confirmed through Office of this Court. There is no cavil with the proposition that extraordinary constitutional jurisdiction under the provisions of Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 is discretionary and equitable and while exercising this jurisdiction, the conduct of the party assumes vital significance and importance. He who seeks equity must come to the Court with clean hands. Where petitioners had attempted to suppress material facts, they would become disentitled to the grant of equitable and discretionary relief. Petitioners did not come to this Court with clean hands and attempted to mislead the Court by suppressing the fact qua functionality of the Tribunal, therefore, petitioners are not entitled to get discretionary and

equitable relief under Article 199 of the Constitution and this petition is liable to be dismissed on this score alone.

4. Apart, there is some force in the submissions made by learned counsel for NEPRA that petitioners, if are aggrieved by the decision of the authority, they have the remedy of filing an appeal under section 12(G) of the Act before the Tribunal established under section 11 of the Act within a period of thirty days of the decision particularly in the backdrop of fact that the Tribunal is fully functional. It is by now settled principle of law that where an alternate, equally efficacious and statutory remedy is available to an aggrieved person, he ought to have availed of that remedy instead of invoking extraordinary constitutional jurisdiction of this Court under Article 199 of the Constitution. It is correct that bar on the filing of petition under Article 199 of the Constitution without availing alternate remedy may be ignored in cases where any jurisdictional error, lack of authority is apparent or impugned action has been shown to be based on *mala fide* or in blatant disregard of law. In the instant case, however, learned counsel for petitioners failed to point out any of the eventualities hinted in the preceding line, justifying invoking of extraordinary constitutional jurisdiction of this Court. In case "*Indus Trading and Contracting Company v. Collector of Customs (Preventive) Karachi and others*" **(2016 SCMR 842)**, while dealing the moot point, it has been held that:-

> "----Ordinarily, the jurisdiction of the High Courts under Article 199 of the Constitution should not be invoked where alternative forum under a special law, duly empowered to decide the controversy is available and functioning. Where a special law provides legal remedy for the resolution of a dispute, the intention of the legislature in creating such remedy is that the disputes falling within the ambit of such

forum be taken only before it for resolution. The very purpose of creating a special forum is that disputes should reach expeditious resolution headed by quasi judicial or judicial officers who with their specific knowledge, expertise and experience are well equipped to decide controversies relating to a particular subject in a shortest possible time. Therefore, in spite of such remedy being made available under the law, resorting to the provisions of Article 199(1) of the Constitution, as a matter of course, would not only demonstrate mistrust on the functioning of the special forum but it is painful to know that High Courts have been over-burdened with a very large number of such cases. This in turn results in delays in the resolution of the dispute as a large number of cases get decided after several years. These cases ought to be taken to forum provided under the Special law instead of the High Courts. Such bypass of the proper forum is contrary to the intention of the provisions of Article 199(1) of the Constitution which confers jurisdiction on the High Court only and only when there is no adequate remedy available under any law. Where adequate forum is fully functional, the High Courts must depredate such tendency at the very initial stage and relegate the parties to seek remedy before the special forum created under the special law to which the controversy relates".

In case *Mian Azam Waheed and 2 others v. The Collector of Customs through Additional Collector of Customs, Karachi* **(2023 SCMR 1247)**, it was observed by the Supreme Court that writ jurisdiction of the High Court cannot be exploited as the sole solution or remedy for ventilating all miseries, distresses and plights regardless of having equally efficacious, alternate and adequate remedy provided under the law which cannot be bypassed to attract the writ jurisdiction. In the instant case, petitioners do have the efficacious,

adequate and statutory remedy available to them to raise their grievance before the Tribunal, therefore, instant petition is also held to be not maintainable.

5. The upshot of above discussion is that petition in hand is simply misconceived, therefore, the same is dismissed *in limine*.

(SHAKIL AHMAD)
JUDGE

Approved for reporting

Judge

2024 LHC 4648

Crl. Misc. No. 63668-B of 2024

Waseem

Versus

The State and another

28.10.2024 Ch. Zulqarnain Baryar, Advocate for petitioner.

Ms. Tahira Yasmeen, District Public Prosecutor with Sumaira Bashir Inspector.

Complainant in person.

This is a petition that has been filed under Section 497 Cr.P.C. by Waseem (**accused/petitioner**) seeking post arrest bail in case FIR No.381 of 2024 dated 11.08.2024 registered at Police Station Noor Kot, District Narowal for the offences under Sections 376(iii)/511 of Pakistan Penal Code, 1860 **("PPC")**. Earlier application of the petitioner for the same relief was dismissed by learned Additional Sessions Judge, Narowal vide order dated 09.09.2024.

2. Allegation, in a nutshell, against accused/petitioner is that he attempted to commit sodomy with the minor son (aged 13 years) of the complainant.

3. Having heard learned counsel for the petitioner, learned DPP and upon tentative assessment of the material available on the record, it has been straightaway noticed that accused/petitioner is named in the FIR with specific role of making an attempt to commit sodomy with minor son of complainant. Learned counsel for the accused/petitioner submitted that allegation so raised against the accused/petitioner is not supported by any medical evidence, therefore, he is entitled to grant of bail particularly where allegation against

him was merely an attempt to commit sodomy. This stance of learned counsel for the accused/petitioner is simply misconceived and is not tenable for the reason that the act of sodomy has not been alleged to have completed as merely an allegation of attempt of sodomy has been raised against the accused/petitioner. As per contents of the F.I.R., the victim was rescued after raising an uproar, which drew the attention of the PWs at the spot. It may further be seen that section 377A of PPC has been introduced in the PPC through Criminal Law (Second Amendment), Act 2016 which contemplates the offense of "sexual abuse," punishable under Section 377B of PPC. Before delving into the theme, scope and extent of provisions of section 377A of PPC, it seems apt to have a glance at the provisions of section 377A & 377B of PPC, same are reproduced hereunder for the facility of ready reference:-

> *"**377A. Sexual abuse**.—Whoever employs, uses, forces, persuades, induces, entices, or coerces any person to engage in, or assist any other person to engage in fondling, stroking, caressing, exhibitionism, voyeurism or any obscene or sexually explicit conduct or simulation of such conduct either independently or in conjunction with other acts, with or without consent where age of person is less than eighteen years, is said to commit the offence of sexual abuse.*
>
> ***377B. Punishment.** Whoever commits the offence of sexual abuse shall be punished with imprisonment of either description for a term which shall not be less than fourteen years and may extend up to twenty years and with fine which shall not be less than one million rupees."*

Plain reading of provisions of section 377A of PPC reflects that the term 'sexual abuse' does not explicitly contemplate commission or consummation of rape or sodomy with the victims below the age of 18 years. This distinction

appears to be appropriate for the reason that the moment an act of rape is alleged to have been committed with a minor below the age of 16 years the matter would come out of the domain of section 377A of PPC and fall squarely under the provisions of section 376(3) of PPC entailing the more stringent punishment of death or imprisonment for life or fine. The term "sexual abuse," as outlined in section 377A of the PPC, has a broader and more comprehensive definition than simply referring to 'an attempt to commit an act of sodomy or rape' as it includes certain acts and behaviors leading to any obscene or sexually explicit conduct either independently or in conjunction with other acts with or without consent of a victim below the age of 18 years. As per provisions of section 377A of PPC, an act of employing, using, forcing, persuading, inducing, enticing or coercing any person to engage in fondling, stroking and caressing any obscene or sexual explicit conduct either independently or in conjunction with other acts with or without consent of a victim less than 18 years would be considered and counted as the crime of sexual abuse as punishable under section 377B of the PPC entailing minimum sentence of fourteen years that may extend up to twenty years with fine which shall not be less than one million rupees. In case "*Mubeen Ahmed v. The State and another"* **(PLD 2021 Islamabad 431)**, it has been observed that the provisions of section 337A and 377B of PPC have been incorporated through Criminal Law (Second Amendment), Act 2016 in order to ensure that Pakistan fulfills its obligations under the United Nations' Convention on Rights of Child as ratified in the year 1990. It has further been observed in the case referred *supra,* as under:-

> *"8. Article 34 of the United Nations' Convention on Rights of Child that had inspired the creation of the offence of sexual abuse in Pakistan. The object of*

introducing section 377A of P.P.C. is to protect children who form a vulnerable segment of the society and are unable to guard against and comprehend the consequences of actions of others (and the consequences of even their own actions). It is for this purpose that through promulgation of section 377A, the State has assumed the obligation to protect children from any form of sexual abuse.

…"

While elaborating the intent, scope and purpose of section 377A of PPC, it has been held as under:-

> *"13. In relation to section 377A the criminal justice system must make allowance for the child victim's inability to comprehend the inappropriateness of sexual abuse that he/she suffers and the fear factor that may lead to nondisclosure of the abuse suffered or delayed disclosure of such abuse or self-blame due to the fear of being disbelieved by parents or family members or out of fear of being hurt by molester. When it comes to children as victims of sexual abuse, the ordinary rules regarding the need for the victim of an offence reporting a crime to the police without delay cannot be applied in a straightjacket manner. …"*

The victim, in the instant case, has fully implicated the accused/petitioner in his statement recorded under sections 161 Cr.P.C on the day of occurrence and also ascribed accused/petitioner specific role of attempt to commit sodomy with him in his statement recorded under section 164 of Cr.P.C. The contents of FIR in addition to the statement of the minor victim recorded under section 164 of Cr.P.C, when are taken on

their face value, the same *ex facie* link the accused/petitioner with the commission of crime falling within the purview of section 377B of PPC entailing the punishment that falls within the ambit of prohibitory clause of section 497(1) of Cr.P.C. There exist reasonable grounds for believing that accused/ petitioner has committed an offence falling within the ambit of prohibitory clause of section 497(1) of Cr.P.C. No case of post arrest bail at all is made out. Petition in in hand is devoid of any force, same is dismissed with the direction to trial court to proceed to decide the main case expeditiously preferably within a period of three months.

4. Before parting with this order, it has been noticed with grave concern that despite introduction of sections 377A and 377B in PPC, FIRs regarding attempts to commit sodomy or rape against minors under the age of 18 still include references to sections 377 or 376 of PPC read with section 511 of PPC. Office is directed to transmit copy of this order to Inspector General of Police, Punjab for his information and compliance.

(SHAKIL AHMAD)
JUDGE

Approved for reporting
Judge