REPORTED JUDGMENTS

OF

HON'BLE MR. JUSTICE MUHAMMAD ANWAARUL HAQ

(CHIEF JUSTICE, LAHORE HIGH COURT, LAHORE)

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Mr. Justice Muhammad Anwaarul Haq

Chief Justice, Lahore High Court, Lahore

(October 23, 2018 to December 31, 2018)

Judge, Lahore High Court, Lahore

(February 19, 2010 to October 22, 2018)

Mr. Justice Muhammad Anwaarul Haq was elevated as Judge of Lahore High Court on February 19, 2010 and took oath as Chief Justice of Lahore High Court on October 23, 2018. He has been a practicing advocate at the High Courts and Hon'ble Supreme Court of Pakistan since 1983 and 2003 respectively. His area of practice was both Civil and Criminal Law. In the years' back from 1986 to 1992, he remained Special District Court Pleader and Special Public Prosecutor. He has been a founder member of ***Democrat Commission for Human Development (DCHD)*** *and founder member of* ***Insan Dost Tanzeem (I.D.T)*** *Jhelum. He joined Human Rights Commission of Pakistan (HRCP) and remained its National Council Member from 1992 to 1997. He also remained Legal Advisor (Panel Advocate) District Council Jhelum, Habib Bank Limited, Allied Bank Limited, WAPDA, Pakistan Post Office, Alliance Textile Mills, Municipal Committee Pind Dadan Khan, Pakistan Telecommunication Authority and U-Mobile Phone Company. He remained unopposed member of Punjab Bar Council from 2004 to 2009 and remained Non-Official visitor of prisons, appointed by the Government of Punjab. He wrote numerous articles/columns in Daily Dawn, Daily Nawa-i-Waqt and Weekly Akhbar-e-Jehan from 1977 to 2010. Justice Muhammad Anwaarul Haq attended "****Hague Forum Training on International Criminal Law"*** *from April 17 - 27, 2012 in Hague, Netherlands.*

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Criminal Miscellaneous No. 2538-B of 2010, decided on 17th March, 2010.

Criminal Procedure Code (V of 1898)---

----S. 497---Control of Narcotic Substances Act (XXV of 1997), Ss.9(c) & 15---Possessing narcotic---Bail, refusal of---Narcotic allegedly recovered from accused was of heavy quantity---Control of Narcotic Substances Act, 1997 was a special enactment having its own scheme and object---Intention of the legislature was evident from its different provisions that it was designed to curb the menace of narcotic drugs in the society, which was speedily increasing day by day---Offence with regard to narcotics, was not only against the society, but the mankind as well and thus entailed heavy punishment---Side of accused had not been able to show anything to say that accused had been involved in the case for any ulterior motive of the complainant or others---Each criminal case was to be adjudged in the background of its own facts and circumstances---Accused, in view of circumstances, was not entitled to bail; his bail petition was dismissed.

Saeed Chandio v. The State 2009 MLD 1409 ref.
Muhammad Anwar Naseem for Petitioner.
A.D. Naseem, Special Prosecutor for Respondent No.1.

ORDER

Petitioner Muhammad Rashid by way of the instant petition has prayed for post-arrest bail in case F.I.R. No. 66 registered under sections 9-C/15 of the Control of Narcotic Substances Act, 1997 with Police Station ANF, Lahore on 10-9-2009.

2. Briefly the allegation against him as per the F.I.R. is that on 10-9-2009 at about 3-15 p.m. he was apprehended by a raiding party along with others and from his possession three kilograms Charas, was recovered.

3. After hearing the learned counsel for the parties and perusing the record, we find that he allegedly on the above said date and time has been found in possession of three Kilograms Charas, while his co-accused Ansar and others had also been found in possession of such narcotics of different quantity.

4. The narcotic allegedly recovered from him was of heavy quantity. It has been argued on his behalf that in the case of Saeed Chandio v. The State (2009 MLD 1409, Karachi), an accused was allowed bail from whose possession five kilograms Charas was

recovered. We are afraid that the said authority is not applicable to his case as it was not a narcotics case and rather a question of bail in the case under section 302/34, P.P.C. We have carefully gone through that judgment. It has proceeded on different facts and circumstances than that of him.

5. We have carefully gone through his petition. In para. 3 of the same, there is mention of the said authority. This is but a wrong reliance on his part.

6. It may be mentioned here that the above Act is a special enactment. It has it's own scheme and object. The intention of the legislature is evident from it's different provisions that it was designed to curb the menace of narcotic drugs in the society, which is speedily increasing day by day.

7. It has also been contended on his behalf that the bail cannot be withheld as punishment in advance. We are unable to agree with this submission as the offence is not only against the society but the mankind as well. It entails heavy punishment. His side has not been able to show us anything to say that he has been involved in the instant case for any ulterior motive of the complainant or others.

8. It is pertinent to mention here that each criminal case is to be adjudged in the background of it's own facts and circumstances. Due to the facts and circumstances of his case, as observed by us above, we do not find him entitled to bail at this stage. The petition, therefore, is dismissed.

9. We may observe that that the above observations are tentative in nature and meant only for the disposal of the matter in hand. These shall have no bearing at all on any body's case at trial.

H.B.T./M-132/L Bail refused.

2010 P Cr. L J 1728
[Lahore]
Before Ch. Iftikhar Hussain and Muhammad Anwaarul Haq, JJ
IMTIAZ---Appellant/Applicant
Versus
THE STATE---Respondent

Criminal Miscellaneous No. 1 of 2010 in Criminal Appeal No. 2178 of 2009, decided on 6th May, 2010.

Criminal Procedure Code (V of 1898)---

---S. 426---Control of Narcotic Substances Act (XXV of 1997), S.9(c)---Possession of narcotics---Suspension of sentence---Application for---Applicant/accused had prayed for suspension of his sentence---Trial Court in impugned judgment had observed that extreme penalty of death was not awarded to accused, because, he was neither owner nor driver of

the truck, but just a helper of the truck; that co-accused had not been arrested by the Police; and that accused was very poor person and not in a position to purchase such a huge quantity of Charas himself---Such observations of the Trial Court had rendered the case of accused to be the one requiring reappraisal of the evidence on record to see that, if he, in such circumstances, could be convicted under the said offence or that his conviction and sentence could be maintained---Accused was arrested on 14-5-2007 and since then he was continuously suffering detention---No likelihood was in the sight that an early hearing of his appeal would be possible---Sentence of accused was suspended, in circumstances.

Mian Pervaiz Hussain for Appellant/Applicant.
Chaudhry Jamshaid Hussain, Deputy Prosecutor-General for the State.

ORDER

Criminal Miscellaneous No. 1 of 2010.

Applicant Imtiaz by way of the instant application has prayed for suspension of his sentence and admitting him to bail pending disposal of his appeal.

2. He, vide the judgment rendered on 24-9-2009, by Malik Mubeen Ahmad, the learned Additional Sessions Judge/Special Judge Anti-Narcotics, Sheikhupura, in case F.I.R. No.467 registered with Police Station Sadar, Sheikhupura on 14-5-2007, has been convicted under section 9(c) of the Act supra and sentenced to life imprisonment with fine of Rs.50,000 and in default thereof to further suffer six months' SI. The benefit under section 382-B, Cr.P.C. has been extended to him.

3. After hearing the learned counsel for the parties and perusing the impugned judgment, we would like to reproduce herein below para 16 of the impugned judgment:

> Extreme penalty of death is not awarded to accused because:-
>
> (i) He is neither owner nor driver of the truck but just a helper of the truck.
>
> (ii) Co-accused have not been arrested by the police.
>
> (iii) He is very poor person and not in a position to purchase such a huge quantity of charas himself.

4. These observations of the learned trial Court have rendered his case requiring reappraisal of the evidence on record to see that if he in such circumstances, could be convicted under the said offence or that his conviction and sentence can be maintained. The learned Deputy Prosecutor-General, when confronted with this position, he has not been able to given any satisfactory answer to the same.

5. According to his learned counsel, he has been arrested in this case on 14-5-2007 and since then is continuously suffering detention till date. There is no likelihood of early hearing of his appeal in the near future.

6. We, therefore, in such circumstances, accept this petition and suspend his sentence and admit him to bail pending disposal of his appeal subject to his furnishing bail bonds in the sum of Rs. 300,000 (Rupees three hundred thousand only) with two sureties each in the like amount to the satisfaction of the learned trial Court.

H.B.T./I-45/L Sentence suspended.

2010 Y L R 2383
[Lahore]
Before Muhammad Anwaarul Haq, J
RAHAT BASHIR---Petitioner
Versus
ADDITIONAL SESSIONS JUDGE, LAHORE and anther---Respondents

Writ Petition No. 18730 of 2009, decided on 3rd May, 2010.

(a) Illegal Dispossession Act (XI of 2005)---
----S. 3---Criminal Procedure Code (V of 1898), S.265-K---Constitution of Pakistan (1973), Art.199---Constitutional petition---Complaint---Not maintainable---Plea of---Effect---Plaintiff filed suit against defendant regarding disputed property while the defendant filed complaint under S.3 of the Illegal Dispossession Act, 2005 in respect of the same property---Plaintiff also filed an application under S.265-K, Cr. P. C. for acquittal---Trial Court dismissed the said application---Plaintiff asserted that the dispute between parties should have been resolved by the civil court and the complaint under S.3 of the Illegal Dispossession Act, 2005 was not maintainable---Validity---Trial Court had summoned the plaintiff/accused in the complaint after considering the evidence on record---Dispute between the parties should have been decided on merits after recording of evidence--- Illegal Dispossession Act, 2005 being a special law, High Court declined to circumvent the process of special law promulgated for a particular purpose---Constitutional petition was dismissed.

(b) Constitution of Pakistan (1973)---
----Art.199---Constitutional jurisdiction--Scope---High Courts, in matters of factual controversy between the parties, would interfere only in extraordinary circumstances under constitutional jurisdiction.

(c) Illegal Dispossession Act (XI of 2005)---
—S. 3—Special law–Interference by High Court—Scope—Illegal Dispossession Act, 2005 being a special law, High Court declined to circumvent the process of special law promulgated for a particular purpose.

Ch. Shahid Tabassum for Petitioner.
Ch. Muhammad Ishaq, Additional Advocate-General.
Mian Irfan Akram for Respondent No.2.

ORDER

MUHAMMAD ANWAARUL HAQ, J.---Through this petitions the petitioner assails order dated 18-8-2009 passed by the learned Additional Sessions Judge, Lahore.

2. Very briefly the facts relevant to disposal of this writ petition are that the petitioners purchased a plot from one Muhammad Akram and according to him he took the possession of said plot on 18-8-2004 from Khasra No.3848/3707/665 measuring 25 Marlas. Statedly respondent No. 2 purchased a plot in Khasra No.3852 on 28-9-2009 and according to the petitioner, respondent No. 2 claimed himself to be the owner of the plot owned by the petitioner.

3. The petitioner filed a suit against respondent No.2 on 4-12-2008 whereas respondent No.2 filed a complaint under section 3 of the Illegal Dispossession Act, 2005 regarding the same property against the petitioner and others. There- after the petitioner after joining proceedings before learned Additional Sessions Judge, filed an application under section 265-K, Cr.P.C. which was dismissed vide impugned order above mentioned.

4. The learned counsel for the petitioner contends that the matter is purely of civil nature and suit filed by the petitioner being already pending bars the proceedings under section 3 of illegal Dispossession Act, 2005. Further contends that the dispute between the parties should have been resolved by the Civil Court and the complaint under section 3 of the Act supra is not maintainable; that the petitioner and his co-accused have no history of being members of any land Mafia and are not at all land grabbers as defined in the Illegal Dispossession Act and that pendency of complaint is just an abuse of process of Court.

5. On the other hand, the learned counsel for respondent No.2 contends that impugned order dated 18-8-2009 being interlocutory in nature cannot be questioned in the constitution petition before this Court; that after scanning evidence produced by the complainant the accused were summoned to face the trial and there is strong and cogent evidence available against them that is yet to be recorded. He further contends that a Court can only decide a dispute after recording of evidence especially when matter relates to factual controversy between the parties.

6. I have heard the learned counsel for the petitioner as well as the learned counsel for respondent No.2 and have also gone through the record available on the file.

7. No doubt section 265-K, Cr.P.C. is meant to prevent the abuse of process of law and this power can be exercised at any stage of the trial/proceedings if the Court considers that there is no probability of the accused being convicted of any offence but in this case when the trial Court had summoned the accused in the complaint after considering the evidence on record then it seems appropriate that the dispute between the parties should have been decided on merits after recording of evidence. The Illegal Dispossession Act, 2005 is a special law, at this stage I am not inclined to circumvent the process of special law promulgated for a particular purpose when otherwise the impugned order is not a final order and there is plethora of judgments on the subject that in the matters of factual controversy between the

parties, High Court under its constitutional jurisdiction interferes only in extraordinary circumstances. The learned counsel for the petitioner is unable to point out any extraordinary circumstance, any jurisdictional error or illegal defect in the impugned order.

8. In view of the above this petition being devoid of any force, stands dismissed.

M. U.Y. /R-31 /L Petition dismissed.

2010 Y L R 2930
[Lahore]
Before Ch. Iftikhar Hussain and Muhammad Anwaarul Haq, JJ
IMDAD HUSSAIN and another---Appellants
Versus
THE STATE---Respondent

Criminal Appeal No. 1090 of 2009 and C.Ms. Nos. 655 and 744-M of 2010, decided on 13th May, 2010.

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

----S.514---Control of Narcotic Substances Act (XXV of 1997), S.9(c)---Possession of narcotics---Forfeiture of bond---Sessions Court after forfeiting the surety bonds of the petitioners submitted for the bail of accused in the case, had imposed a penalty of Rs.100, 000 each on them---In matters of sureties no lenient view should be taken and the entire amount of the bail bond should be recovered as an amount of penalty, and that the failure thereof and the reduction of penalty to the tune of 1/5th or 1/10th was simply ridiculous and encouraged the people to go into abscondence---Sessions Court while taking a lenient view had already 'reduced the penalty imposed upon the petitioners upto 50% in the present case---Impugned order did not warrant any interference---Appeal was dismissed accordingly.
Karam Ali v. The State 2008 PCr.LJ 213 and Gul Muhammad v. The State 2005 YLR 1602 distinguished.
Saeed Akhtar v. The State 2009 SCMR 834; Zeeshan Kazmi v. The State PLD 1997 SC 267; Abdul Bari v. Malik Amir Jan and 4 others PLD 1998 SC 50 and Abbas Ali and another v. The State 2004 SCMR 879 ref.
Muhammad Aslam and another v. The State 2004 SCMR 211 rel.

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

----S.514---Forfeiture of bond---Imposition of penalty---Rule of caution---No lenient view should be taken in the matters of sureties and the entire amount of bail bond should be recovered as an amount of penalty, failure thereof and reduction in amount of penalty would simply encourage the people to go into abscondence.
Muhammad Aslam and another v. The State 2004 SCMR 211 ref.
Muhammad Javaid Iqbal Qureshi for Appellants.
Chaudhry Jamshaid Hussain, Deputy Prosecutor-General for the State.
Date of hearing: 13th May, 2010.

JUDGMENT

MUHAMMAD ANWAARUL HAQ, J.---Both the appellants assail the order dated 6-6-2009 passed by the learned Sessions Judge, Nankana Sahib whereby he has imposed a penalty of Rs.1,00,000 each after forfeiting their surety bonds which they had submitted for the bail of one Sajid Rashid accused, involved in case F.I.R. No.43/2008, under section 9(c) of the Control of Narcotic Substances Act, 1997 at Police Station Faizabad.

2. Learned counsel for the appellants contends that the appellants stood sureties only on humanitarian grounds and not for any lust or monetory gain. He further contends that order of the learned trial Court is harsh, the appellants' financial position is not as such to pay the huge amount and they at least deserve suitable reduction in the same. He has placed reliance on the cases of Karam Ali v. The State (2008 PCr.LJ 213) and Gul Muhammad v. The State (2005 YLR 1602).

3. Learned Deputy Prosecutor General, however, controverted the arguments and supported the judgment and placing reliance on judgment of the Hon'ble Supreme Court in Saeed Akhter v. State 2009 SCMR 834, contends that appellants do not deserve any more concession in this regard.

4. Heard. Record perused.

5. After hearing the learned counsel for the appellants, learned Deputy Prosecutor General, going through the record and dictum laid down by the Hon'ble Supreme Court of Pakistan in 2009 SCMR 834, we find no ground to interfere with the finding of the learned trial Court. It is by now well settled by the Hon'ble Supreme Court of Pakistan in numerous cases such as "Zeeshan Kazmi v. The State" (PLD 1997 Supreme Court 267), "Abdul Bari v. Malik Amir Jan and 4 others" (PLD 1998 Supreme Court 50), "Abbas Ali and another v. The State" (2004 SCMR 879), "Muhammad Aslam and another v. The State" (2004 SCMR 211), that no lenient view should be taken and entire amount of the bail bond should be recovered as an amount of penalty, rather in 2004 SCMR 211, the Hon'ble Supreme Court held as under:-

> "It is abundantly known by now c that this Court in numerous cases, like Zeeshan Kazmi v. The State PLD 1997 SC 267, has ruled that in matters of sureties, no lenient view should be taken and the entire amount of the bail bond should be recovered as an amount of penalty. That the failure thereof and the reduction of amount of penalty to the tune of 1/5th or 1/10th was simply ridiculous and encouraged the people to go into abscondence."

Both the judgments referred above by the learned counsel for the appellants are not relevant to the facts and circumstances of this case. As in the case of Karam Ali v. The State (2008 PCr.LJ 213) the matter was remanded to the learned trial Court without any reduction in the surety bond and in the second case Gul Muhammad v. The State (2005 YLR 1602) it was observed that a balance should have been kept between undue leniency and undue severity by taking into consideration the financial statute of the surety. We have observed that the

learned Sessions Judge has already taken a very lenient view while reducing the penalty up to 50% in this case.

6. In view of the above, the impugned order passed by the learned Sessions Judge dated 6-6-2009 does not call for any interference and this appeal is, therefore, dismissed.

C.M. Nos.655 and 744-M of 2010

7. As the main appeal has been dismissed by this Court, therefore, these miscellaneous petitions being lost their relevance, Dismissed.

N.H.Q./I-27/L Appeal dismissed.

2011 M L D 311
[Lahore]
Before Muhammad Anwaarul Haq, J
Mian MUHAMMAD SHABBIR---Petitioner
Versus
THE STATE and another---Respondents

Criminal Miscellaneous No. 12722-B of 2010, decided on 7th December, 2010.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), S.489-F---Dishonouring of cheque---Bail, refusal of---Counsel for accused admitted that a compromise between the parties had taken place and in view of the same pre-arrest bail of accused was confirmed---Counsel had further admitted that both the cheques given to the complainant, had been dishonoured and pre-arrest bail so granted to accused had also been recalled---Counsel for accused was unable to explain about four years' absconsion of accused---Though case against accused did not' fall within the prohibitory clause of S.497, Cr.P.C., and accused was behind the bars for a considerable long period; and bail in such like case was a rule and refusal was an exception, but conduct of accused clearly reflected that he had misused the relief of bail earlier granted to him as his cheques given to the complainant had been dishonoured and he remained fugitive from law for about four years---Such was sufficient to make case of accused an exception to the general rule and that disentitled him for any discretionary relief in his favour---Bail petition filed by accused being devoid of any force, was dismissed, in circumstances.

Zafar Iqbal v. Muhammad Anwar and other 2009 SCMR 1488 and Tariq Bahsir and 5 others v. The State PLD 1995 SC 34 ref.

Zia Ullah Khan for Petitioner.

Rana Tassawar Ali Khan Rana, Deputy Prosecutor-General for the State with Javed Iqbal S.-I. with record.

Suhail Mushtaq Chaudhry for the Complainant.

ORDER

MUHAMMAD ANWAARUL HAQ, J.---Through this petition, Mian Muhammad Shabbir petitioner has sought post-arrest bail in case F.I.R. No. 228, dated 10-3-2006, for an offence under section 489-F, P.P.C. registered with Police Station Lower Mall, Lahore.

2. The learned counsel for the petitioner contends that the case against the petitioner is totally false; that in fact it was a business transaction and the amount so paid by the complainant to the petitioner was an investment and the alleged cheques issued to the complainant were only given as guarantee; that disputed cheques when handed over to the complainant were blank 'and later on filled in by the complainant himself; that case against the petitioner does not fall within the prohibitory clause of section 497, Cr.P.C. and the petitioner is behind the bars for the last more than eight months; that case against the petitioner is one of further inquiry into his guilt; that mere absconsion of the petitioner for about four years is not by itself a ground to

refuse him bail. Learned counsel relying on the case of Zafar Iqbal v. Muhammad Anwar and others (2009 SCMR 1488) contends that case law is identical to the facts and circumstance of this case, hence, petitioner is entitled for bail.

3. Conversely, learned Deputy Prosecutor-General assisted by the learned counsel for the complainant vehemently opposed this bail application on the grounds that issuance of cheques total amounting to Rs.11,00,000 by the petitioner is admitted and statement of the bank official on record reveals that cheques were dishonoured on presentation; that conduct of the petitioner disentitles him for discretionary relief in his favour as the petitioner in the first round of his bail on 15-5-2006 entered into a compromise and handed over two cheques for the whole amount to be paid to the complainant and the bail of the petitioner was confirmed by this Court but the cheques so given were also dishonoured and petitioner disappeared and remained fugitive from law for about four years, meanwhile, pre-arrest bail so granted to the petitioner by this Court has already been recalled. Further contends that challan against the petitioner has been submitted before the learned trial Court and as per observation of the learned trial Court in the order dated 7-10-2010, trial is likely to be concluded within the next three months and from now within about one month.

4. Heard. Record perused.

5. Learned counsel for the petitioner very frankly admits that a compromise between the parties took place, and in view of the same pre-arrest bail of the petitioner was confirmed by this Court on 15-5-2006 vide Criminal Miscellaneous No. 2985-B of 2006, he further admits that both the cheques given to the complainant, details of which were duly incorporated in the bail granting order of this Court, had been dishonoured and pre-arrest bail so granted has also been recalled on 11-10-2006 vide Criminal Original No. 75 of 2006. Learned counsel for the petitioner is unable to explain about four years' absconsion of the petitioner from 15-5-2006 to 11-3-2010.

6. It is correct that case against the petitioner does not fall within the prohibitory clause of section 497, Cr.P.C. and petitioner is behind the bars for a considerable long period that is about nine months and bail in such like cases is a rule and refusal is an exception as held in the case of Tariq Bashir and 5 others v. The State (PLD 1995 SC 34) but in my humble view the above mentioned conduct of the petitioner clearly reflects that he has misused the relief of bail earlier granted to him, his cheques given to the complainant have been dishonoured and he remained fugitive from law for about four years that is sufficient to make his case an exception to the general rule and that disentitles him for any discretionary relief in his favour. The case law referred by learned counsel for the petitioner is quite distinguishable as in Para No. 9 of the judgment, the Hon'ble Supreme Court has observed that petitioner in that case had already returned a huge portion of amount to the complainant but in this case petitioner has not paid a single penny to the complainant as per his undertaking made before this Court on 15-5-2006, hence, this petition being devoid of any force is dismissed. Learned trial Court is directed to conclude the trial of the petitioner earliest the possible.

7. It is, however, clarified that observations made herein above are just tentative in nature and strictly confined to the disposal of this bail petition.

H.B.T./M-665/L Bail refused.

2011 M L D 337
[Lahore]
Before Muhammad Anwaarul Haq, J
MUHAMMAD RAMZAN---Petitioner
Versus
S.H.O. and others---Respondents

Criminal Miscellaneous No.1798-H of 2010, decided on 9th December, 2010.

Criminal Procedure Code (V of 1898)---

----S. 491---High Court (Lahore) Rules and Orders Volume-V, Chapter-4, Part-F (Rules Framed under S.491(2), Cr.P.C.) Rr.16 & 17---Habeas corpus petition---Petitioner stated that alleged detenue telephonically contacted him two days prior to filing of petition and informed him that she was living in a very critical condition as the respondents had detained her in a locked room and were not allowing her to move any where; and were exercising undue pressure upon her to get a decree for dissolution of marriage from the Family Court--Alleged detenue was produced in the court by the Police and she controverted the story narrated by the petitioner in his habeas corpus petition; she stated that she was living with her parents with her own free-will and did not want to go with her husband/petitioner, who had filed said petition only to harass her and her family members---Lady further stated that it was second petition of the petitioner before the High Court, whereas his earlier similar petition moved in the Trial Court was dismissed----In view of growing tendency of filing frivolous habeas corpus petitions before the courts, certain rules/instructions regarding habeas petitions had been issued by the High Court; if petition was found baseless or unjustified, the court should seek guidance from Rr.16 & 17 framed under S.491(2), Cr. P. C. under High Court (Lahore) Rules and Orders Volume-V, Chapter-4, Part-F---It was necessary in such like cases to require the parties, keeping in view their social status to deposit a hand some security amount before proceeding any further in the petitions relating to female especially---Court was bound to see that if habeas corpus petition was filed to disgrace the respondent, then in appropriate case, while deciding the matter, the petitioner should be burdened with costs/forfeiture of security so deposited; and if the court deemed it necessary, the security could be ordered to be paid to the respondent as compensation---Present case was appropriate where security amount deposited by the petitioner should be paid to alleged detenue as compensation.

Shahid Mehmood Khan Khilji for Petitioner.
Taswar Ali Khan Rana, Deputy Prosecutor-General for the State.
Mst. Saeed Kanwal Muhammad Jahangir Khan, A.S.-I. with record.
Muhammad Tariq Naveed Dhiloon for Respondents Nos. 3, 4, 7, 8 and 12.

ORDER

MUHAMMAD ANWAARUL HAQ, J.--This petition filed by Muhammad Ramzan petitioner under section 491, Cr.P.Code pertains to the recovery and production of her wife namely Mst. Saeed Kanwal (alleged detenue) from the illegal and improper custody of the respondents Nos.3 to 13.

2. In Paragraph No.6 of instant petition it was alleged by the petitioner that Mst. Saeed Kanwal, alleged detenue telephonically contacted him two days prior to filling of this petition

and informed him that she was living in a very critical condition, respondents have detained her in a locked room, they were not allowing her to move anywhere and 16 were exerting undue pressure upon her to get a decree for dissolution of marriage from the Family Court.

3. Keeping in view the contents of the petition and contentions raised by learned counsel for the petitioner, respondent No.1 was directed to produce the alleged detenue before this court subject to deposit of security amount of Rs.10,000.

4. In compliance of this Court's order dated 10-11-2010, Muhammad Jahangir Khan, A.S.-I. has produced the alleged detenue Mst. Saeed Kanwal today before this Court, who while controverting all the story narrated in the petition states that she is living with her parents with her own free will and does not want to go with her husband/petitioner, who has filed instant petition only to harass her and her family members. She further states that this is second application of the petitioner before this court whereas his earlier similar application moved in the Court of learned Additional Sessions Judge was dismissed on 16-10-2010.

5. In view of the above statement of Mst. Saeed Kanwal (alleged detenue), this petition is dismissed.

6. However, before parting with this order, in view of growing tendency of filling of frivolous applications under section 491, Cr.P.Code before the courts of Learned Sessions Judges and before this court, it is pertinent to reproduce relevant instructions regarding Habeas Petitions issued by this Court:

> High Court Rules and Orders Volume-V, Chapter-4, Part-F (Rules framed under section 491(2) of the Cr.P.Code, 1898, to regulate procedure in cases under section 491).
>
> Rule-16.---To check the tendency to file frivolous habeas corpus petitions, the court may, at its discretion, require the party concerned to deposit in advance an amount as fixed by the court directing the issuance of rule nisi to be paid to the detenus as compensation if the petition is found to be frivolous or vexatious.
>
> Rule 17.---In disposing of any such rule the Court may in its discretion make an order for the payment by one side or the other of the costs of the rule.

The unjustified humiliation to the girls and their families brought before the courts by the police is an irreparable injury in the case of frivolous petitions filed under section 491 Cr.P.Code. It is observed with great concern that if such an application is found baseless or unjustified the court should seek guidance from Rules 16 and 17 referred above and it is necessary in such like cases to require the parties concerned, keeping in view their. social status, to deposit a handsome security amount before proceeding any further in the petitions relating to females especially. It is abundant duty of the Court to see that Habeas Petition so filed, if was filed to disgrace the respondents, then, in appropriate cases while deciding these matters the petitioners should be burdened with costs/forfeiture of security so deposited and if court deems it necessary the security can be ordered to be paid to the respondents as compensation.

7. In view of the above, case in hand is an appropriate case where security amount deposited by the petitioner i.e. Rs.10,000 should be paid to Mst. Saeed Kanwal as compensation. Office is directed to pay the security amount so deposited to Mst. Saeed Kanwal after observing the relevant formalities in this respect.

H.B.T./M-664/L Order accordingly.

2011 M L D 3 2 6
[Lahore]
Before Manzoor Ahmad Malik and Muhammad Anwaarul Haq, JJ
UMAR SHAHZAD alias SHAIB---Petitioner
Versus
THE STATE---Respondent

Criminal Appeal No.1814 of 2004 and Murder Reference No.294 of 2009, heard on 2nd December, 2010.

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

----S. 302(b)/34---Qatl-e-amd---F.I.R. was promptly lodged with all the necessary details of occurrence, which had ruled out the possibility of any consultation or deliberation on behalf of the complainant---One of the prosecution witnesses being real father of the deceased and other one his brother-in-law, presence of said two witnesses along with deceased at the place of occurrence which was shop of deceased, was very natural and plausible---No reason of false implication of accused by said witnesses was available and there was no reason to doubt their testimony because they had no enmity of any sort with the accused---Mere relationship of witness was not sufficient to discredit his testimony---Even otherwise, substitution in such like cases, where both eye-witnesses were closed relatives of the deceased, was a rare phenomenon because it was impossible that near kith and kin would let off the real culprit and would substitute another person in a murder case---No material contradiction was found between the ocular and medical evidence---No empty having been recovered from the spot, mere report of Forensic Science Laboratory that gun recovered from accused was in working order, was of no avail to the prosecution---Acquittal of all other co-accused would not advance the case of accused in any manner, firstly for the reason that their case was quite distinguishable; as none of them had caused any injury to the deceased; and fatal injury had been attributed to accused only; secondly principle of "Falsus in uno Falsus in omnibus" had no universal application; and grain had to be sifted from the chaff to ensure justice---Prosecution had succeeded in proving its case against accused beyond any reasonable doubt---No reason existed to interfere with finding of the Trial Court regarding conviction of accused under S.302(b), P.P.C.---Conviction of accused which was in accordance with law, was maintained.

Haji v. The State 2010 SCMR 650; Khalid Saif Ullah v. The State 2008 SCMR 688; Ali Gohar v. State 1996 SCMR 549 and Khadim Hussain v. The State 2010 SCMR 1090 ref.

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

----S. 302(b)/34---Qatl-e-amd---Appreciation of evidence---Sentence, reduction in---Mitigating circumstances---Prosecution had alleged a specific motive, but had failed to

prove the same---Accused and deceased having no previous enmity, exact cause of incident remained in mystery---No allegation was of repetition of the fire by accused--Recovery of weapon of offence in absence of any crime-empty from the spot had lost its significance---Age of accused at the time of occurrence was about 18 years---Accused in peculiar circumstances of the case, deserved benefit of doubt to the extent of his sentence one out of two provided under S.302(b), P.P.C.---Accused was entitled for the benefit of doubt as an extenuating circumstance, while deciding his question of sentence---Maintaining conviction of accused under S.302(b), P.P.C., his sentence of death was altered into imprisonment for life---Benefit of S.382-B, Cr.P.C. was also extended to accused.

Mir Muhammad alias Miro v. The State 2009 SCMR 1188 and Ansar Ahmad Khan Barki v. The State and another 1993 SCMR 1660 ref.
Azhar Hameed Chaudhry for Appellant.
Ch. Muhammad Mustafa, Deputy Prosecutor-General for the State.
Date of hearing: 2nd December, 2010.

JUDGMENT

MUHAMMAD ANWAARUL HAQ, J.----Umar Shehzad alias Sahib appellant along with his co-accused Ghulam Abbas, Muhammad Azam and Noor Muhammad was tried in case F.I.R. No. 409, dated 19-12-2002, registered at Police Station Ali Pur Chatha, District Gujranwala for offences under sections 302 read with sections 34 and 109, P.P.C. At the conclusion of the trial, the learned trial Court vide its judgment dated 28-10-2004, while acquitting co-accused Ghulam Abbas, Muhammad Azam and Noor Muhammad, had convicted Umar Shahzad alias Sahib appellant under section 302(b), P.P.C. and sentenced him to 'Death' for the Oatl-e-Amd of Ehsan Ullah. He was also directed to pay Rs. 1,00,000 (Rupees one hundred thousand only) as compensation to the legal heirs of the deceased under section 544-A, Cr.P.C.

2. Feeling aggrieved, the appellant Umar Shahzad alias Sahib while 'challenging his conviction and sentence has filed Criminal Appeal No. 1814 of 2004, whereas learned trial Court has transmitted Murder Reference No. 294 of 2009 for confirmation or otherwise of the 'Death' sentence of the appellant. Both these interlinked matters are being disposed of together through this single judgment.

3. Prosecution story in brief un-folded in the F.I.R. (Exh.PE) by Muhammad Aslam complainant (P.W.5) is that on 19-12-2002 at about 8-00 p.m. Ehsan Ullah, brother in law (Behnoi) of the complainant, was preparing sweets (Burfi) outside his shop, whereas complainant along with Akbar Ali, Inayat Ullah and Muhammad Bashir were sitting on a bench near to him. Meanwhile, Umar Shahzad alias Sahib (appellant) armed with a .12 bore single barrel gun and his brother namely Imran Shahzad (Juvenile, separately tried and acquitted) emerged there, Imran Shahzad accused raised a lalkara that Ehsan-Ullah be taught a lesson for not giving commodities on credit, Umar Shahzad alias Sahib appellant made a fire shot which hit on right side of the back of the neck of Ehsan-Ullah (deceased) who fell down and succumbed to the injury, accused while raising lalkara fled away.

It was further alleged in the F.I.R. that Umar Shahzad alias Sahib has committed this murder on the abetment of Muhammad Azam, Muhammad Abbas and Noor Muhammad.

The motive behind the occurrence as per F.I.R. (Exh. PE) was that Umar Shahzad alias Sahib had been lending commodities from the shop of Ehsan-Ullah (deceased) for which he had to pay Rs.3000 and when deceased demanded money, accused abused him and the complainant also interfered but accused did not calm down and for the last about one week was threatening Ehsan-Ullah of dire consequences and due to that grudge accused committed his murder.

4. On 19-12-2002 after registration of F.I.R. (Exh. PE) Munawar Hussain S.-I. (P.W.9) proceeded to the place of occurrence, prepared inquest report, (Exh. PG), injury statement (Exh. PH) and sent the dead body for autopsy. He also inspected the spot, collected blood stained earth, secured the same vide recovery memo (Exh. PK), sketched the rough site plan (Exh. PL) and recorded statements of the P.Ws. under section 161 Cr.P.Code. Later on, investigation of this case was entrusted to Imran Abbas Inspector (P. W.10). On 16-1-2003 he formally arrested Umar Shehzad alias Sahib appellant, who led to the recovery of gun (P-1) which was taken into possession by the Investigating Officer through recovery memo. (Exh. PA).

5. After completion of investigation, challan .was submitted .before the learned trial Court, and charge was framed against them, appellant pleaded not guilty and claimed trial.

6. To substantiate the charge, prosecution had examined ten witnesses in all, out of winch, Dr. Muhammad Nasrullah Khan (P.W.4) provided medical evidence; Muhammad Aslam complainant (P.W.5) and Inayat-ullah (P.W.6) furnished ocular account, whereas Munawar Hussain S.I. (P.W.9) and Imran Abbas Inspector (P.W.10) had conducted investigation of this case.

7. Dr. Muhammad Nasrullah Khan (P.W.4) conducted post-mortem examination on the dead-body of Ehsan-ullah and observed following injuries on his person:--

(1) Fire-arm entrance wound 3 cm x 2.5 cm on the back of right side of head 4 cm behind the right ear and 2 cm above hair margin (back of neck). Hairs around the wound were burnt.

(2) Abrasion 2 cm x 0.5 cm left side of forehead.

In his opinion, the cause of death was Injury No. 1, sufficient to cause death in ordinary course of nature.

Probable time elapsed between injuries and death was 5 to 10 minutes and between death and post mortem 12 to 14 hours.

8. Appellant and his co-accused when examined under section 342, Cr.P. Code they denied the allegations and professed their innocence. While answering to question, "Why this case against you and why the P.Ws have deposed against you?" appellant replied as under:--

"Deceased Ehsan-Ullah had illicit relations with the wife of my uncle Abbas and due to this some days before the occurrence a quarrel took place between me and Ehsanullah and his relatives due to this grudge and enmity I was involved in this case. The P.Ws. are close relatives of deceased and also inimical towards me and co-accused."

Neither the appellant nor his co-accused made statements under section 340(2) Cr.P. Code they also did not produce any evidence in their defence. The learned trial Court vide its judgment dated 8-10-2004, while acquitting co-accused Ghulam Abbas, Muhammad Azam and Noor Muhammad, found Umar Shehzad alias Sahib, appellant guilty and convicted and sentenced him as mentioned above.

9. Learned counsel for .the appellant, in support of this appeal contends that story of the prosecution as set out in the F,I.R. is not probable; that complainant and eye-witnesses mentioned in the F.I.R. are not the residents of the place where the occurrence took place and this fact has been admitted by them while appealing before the Court; that there is a conflict between the ocular account and medical evidence as the deceased suffered an injury on the backside of his head and the hairs around the wound are burnt which clearly suggests that he was fired from a very close range whereas none of the eye-witnesses have stated that the deceased was fired from the backside; that the, prosecution alleged a specific motive but miserably failed to prove it and it has been disbelieved by the learned trial Court; that recovery of gun (P-1) and report of Forensic Science Laboratory are inconsequential because no crime-empty was recovered from the spot; that co-accused of the appellant have already been acquitted by the learned trial Court and on the basis of same evidence, appellant cannot be convicted until and unless some strong corroborative evidence is brought on record; that both the eye-witnesses i.e. Muhammad Aslam complainant (P.W.5) and Inayat-ullah (P,.W.6) are related and interested witnesses and are not reliable. Further contends that if Court is not persuaded regarding the acquittal of the appellant, this is not a case of capital punishment because the prosecution has failed to substantiate the motive set out in the F.I.R. and the learned trial Court has disbelieved the same; that there is no allegation of repetition of fire and that at the time of occurrence appellant was around 18 years of age according to his statement recordedunder section 342, Cr.P. Code; that there was no previous enmity between the parties; that it remained shrouded in mystery as to what exactly had happened between the deceased and the appellant immediately prior to the occurrence and that recovery of weapon without recovery of any empty is an extenuating circumstance in favour of the appellant and he deserves lesser penalty in the circumstances of the case.

10. On the other hand, learned Deputy Prosecutor-General opposed this appeal on the grounds that in this case direct F.I.R. at the police station was got registered within a period of thirty five minutes with all necessary details of the occurrence by the complainant; that ocular account has been furnished by father of the deceased, Inayat-ullah (P.W.6) and Muhammad Aslam complainant (P.W.5) brother-in-law, having no enmity with the appellant; that case of acquitted co-accused of the appellant is distinguishable as no fire shot was attributed to any of them; that prosecution case has been fully proved through ocular account supported by medical evidence. Lastly contends that there is no mitigating circumstances in favour of the appellant because he has killed the deceased in a very callous

manner, hence, he does not deserve any leniency and is not entitled to any exception, hence, appeal of the appellant be dismissed and murder reference be answered in the affirmative.

11. We have heard the learned counsel for the parties at length, and have given anxious consideration to their arguments and have also scanned the record with their able assistance.

12. The occurrence took place on '19-12-2002 at about 8-00 p.m. at the sweet shop of the deceased, matter was reported to the police at police station by Muhammad Aslam complainant (P.W.5) on the .same day at 8-35 p.m. within thirty five minutes. We have noticed that it is an exemplary prompt F.I.R. with all the necessary details of this unfortunate occurrence that rules out the possibility of any consultation A or deliberation on behalf of the complainant/prosecution.

13. In order to prove the ocular account prosecution has examined real father Inayat Ullah (P.W.6) and Muhammad Aslam complainant (P.W.5) brother-in-law of the deceased, presence of both these eyewitnesses at the place of occurrence cannot be considered improbable against the natural conduct as the deceased was running a sweet shop and their presence along with deceased in a village is very natural and plausible and we do not find any reason of false implication of the appellant by them in this case, even otherwise, there is no reason to doubt their testimonies because they have no enmity of any sort with the appellant. Mere relationship of the witness is not sufficient to discredit his testimony. In this respect, we respectfully refer the case of Haji v. The State (2010 SCMR 650), wherein the Hon'ble Supreme Court has observed as under:--

> "Both the ocular witnesses undoubtly are inter se related and to the deceased but their relationship ipso facto would not reflect adversely against the veracity of the evidence of these witnesses in absence of any motive wanting in the case, to falsely involve the appellant with the commission of the offence and there is nothing in their evidence to suggest that they were inimical towards the appellant and mere inter se relationship as above noted would not be a reason to discard their evidence which otherwise in our considered opinion is confidence-inspiring for the purpose of conviction of the appellant on the capital charge being natural and reliable witnesses of the incident."

Even otherwise substitution in such like cases where both the eye-witnesses are close relatives of the deceased, is a rare phenomenon because it is impossible that near kith and kin would let off the real culprit and shall substitute some innocent person in a murder case. Here, we refer the case of Khalid Saif Ullah v. The State (2008 SCMR 688) wherein Hon'ble Supreme Court of Pakistan has observed as under: --

> "Substitution is a phenomenon of a rare occurrence because even the interested witnesses would not normally allow real culprits for the murder of their relations let off by involving innocent persons. In this context, reference can usefully be mode to the case of Irshad Ahmad and others v. The State and others PLD 1996 SC 138."

14. We have not been able to find out any material contradiction between the ocular account and medical evidence. The distance between the appellant and deceased as per site plan

(Exh. PB) is six feet and therefore, burning of hairs of the deceased is quite understandable as the distance between the barrel of the gun and the deceased was less than three feet. In the case of Ali Gohar v. State 1996 SCMR 549 it was held by the Honourable Supreme Court that the length of rifle should also be added in assessing the distance between the assailant and the deceased.

Therefore, we are of the view that there is absolutely no contradiction in ocular account and medical evidence.

15. As far as recovery of gun from the appellant and report of Forensic Science Laboratory (Exh.PN) is concerned, since no empty was recovered from the spot as such mere report of the Forensic Science Laboratory that the gun was in working order is of no avail to the prosecution.

16. As far as acquittal of all other co-accused of the appellant is concerned it does not advance the case of appellant in any manner firstly for the reason that their case is quite distinguishable as none of them had caused any injury to the deceased and fatal injury has been attributed to the appellant only, secondly it is by now well settled that principle of "falsus in uno falsus in omnibus" has no universal application and grain has to be sifted from the chaff to ensure justice. We refer an observation of the Honourable Supreme Court in the case titled, Khadim Hussain v. The State (2010 SCMR 1090) in the following words:--

> "In fact a futile exercise appears to have been made to press into service the doctrine of "falsus in uno falsus in omnibus (false in one thing, false in all), which is admittedly not applicable in prevalent system of criminal administration of justice and more so there is no rule having universally applicable that where some accused were not found guilty the other accused would ipso facto stand acquitted because the Court has to sift the grain from chaff. Samano v. State 1973 SCMR 162. There is no cavil to the proposition that the rule that the integrity of a witness is indivisible, despite its moral virtue, has not been endorsed by the superior Courts of this country without reservations and cannot be accepted as one of universal applications. In the last analysis, as stated in some of the eminent judicial decisions, the grain has to be sifted from the Chaff in each case, in the light of its own peculiar circumstances Riaz Hussain v. The State 2001 SCMR 177."

17. In the light of our above observations, we are of the considered view that prosecution has succeeded in proving its case against the appellant beyond any reasonable doubt and we do not find any convincing reason to interfere with the finding of the learned trial Court regarding the conviction of the appellant under section 302(b), P.P.C. that is in accordance with law and we maintain the same.

18. So far as the question of quantum of sentence of the appellant is concerned, we have noted some mitigating circumstances in favour of the appellant. Prosecution has alleged a specific motive but has miserably been failed to prove the same. Admittedly, appellant and deceased had no previous enmity and in this view of the matter, exact cause of this unfortunate incident remained shrouded in mystery. There is no allegation of repetition of the fire by the appellant. Recovery of weapon of offence in the absence of any crime-empty from the spot has lost its significance and lastly the age of the appellant at the time of occurrence was around 18 years.

19. In view of the above, we are convinced that appellant in the peculiar circumstances of this case deserves benefit of doubt to the extent of his sentence one out of two provided under section 302(b), P.P.C. It is well-recognized principle by now that accused is entitled for the benefit of doubt as an extenuating circumstance while deciding his question of sentence. Here, we very respectfully refer the case of Mir Muhammad alias Miro v. The State (2009 SCMR 1188) wherein the Hon'ble Supreme Court of Pakistan has emphasized as under:--

> "It will not be out of place to emphasize that in criminal cases, the question of quantum of sentence requires utmost care and caution on the part of the Courts, as such decisions restrict the life and liberties of the people. Indeed the accused persons are also entitled to extenuating benefit of doubt to the extent of quantum of sentence. In the case of Mst. Bevi v. Ghulam Shabbir and another 1980 SCMR 859, it was ruled by this Court" that the principle underlying the concept of benefit of doubt can in addition to the consideration of question of guilt or otherwise, be pressed also in matter of sentence."

In another case Ansar Ahmad Khan Barki v. The State and another (1993 SCMR 1660), Hon'ble Supreme Court of Pakistan has held that the prosecution is bound by law to exclude all possible extenuating circumstances in order to bring the charge home to the accused for the award of normal penalty of death.

20. We, therefore, while maintaining conviction of Umar Shehzad alias Sahib, appellant under section 302(b), P.P.C., alter his sentence of Death into Imprisonment for Life. The amount of compensation as ordered by the learned trial Court shall remain intact. Benefit of section 382-B, Cr.P.C. is also extended to the appellant. Criminal Appeal No. 1814 of 2004 is disposed of with the above modification in .the quantum of sentence.

21. Murder Reference No.294 of 2009 is answered in the Negative and death sentence awarded to Umar Shahzad alias Sahib is Not Confirmed.

H.B.T./U-20/L Sentence altered.

2011 P Cr. L J 344
[Lahore]
Before Muhammad Anwaarul Haq, J
ZAHID HUSSAIN---Petitioner
Versus
THE STATE and others---Respondents

Criminal 'Revision No. 1095 of 2010, decided on 10th December, 2010.

Criminal Procedure Code (V of 1898)---

----Ss. 410 & 423---Dismissal of criminal appeal for non-prosecution--Petitioner had assailed orders of the Trial Court whereby his criminal appeal against his conviction was dismissed for non prosecution; and later on his application for restoration of the same was also dismissed---After admission of criminal appeal, it could not be dismissed without adverting to the merits thereof; and non-appearance of the appellant or his counsel, was not a ground for dismissal, unless all the raised questions were determined and factual and legal aspects were thrashed as contemplated under S.423, Cr.P.C.---Impugned orders passed by

the Trial Court, were not warranted by law; and were against well settled principle of criminal jurisprudence---Said orders were set aside by High Court and matter was remanded to the appellate court for decision of appeal afresh on merits after hearing both the parties strictly in accordance with law.

Muhammad Bakhsh v. The State 1986 SCMR 59 ref.
Khawar Mehmood for Petitioner.
Tasawar Ali Khan Rana, Deputy Prosecutor-General for the State.
Date of hearing: 10th December, 2010.

JUDGMENT

MUHAMMAD ANWAARUL HAQ, J.---Through this petition, Zahid Hussain petitioner assails the orders dated, 30-9-2010 and 16-10-2010 whereby learned Additional Sessions Judge dismissed his criminal appeal against his conviction for non-prosecution and later on dismissed his application for restoration of the same.

2. Learned counsel for the petitioner contends that impugned orders of learned trial Court are against the basic settled legal proposition that a criminal appeal cannot be dismissed for non-prosecution and the learned trial court while passing impugned orders has committed a material irregularity; that arguments in criminal appeal against conviction of the petitioner had already been advanced by his learned counsel and the case was fixed only for pronouncement of judgment. Learned counsel for the petitioner contends that a criminal appeal ought to have been decided on merits under section 423 of the Cr.P.C.

3. Learned Deputy Prosecutor-General very frankly concedes to the legal proposition and does not oppose this petition.

4. Heard.

5. Admittedly, it is a settled legal principle that after admission of a criminal appeal, it cannot be dismissed without adverting to the merits thereof and non-appearance of appellant or his counsel is not a ground for dismissal unless all the raised questions are determined and factual and legal aspects are thrashed as contemplated under section 423, Cr.P.C. I respectfully refer the esteemed judgment of the Hon'ble Supreme Court of Pakistan in case of Muhammad Bakhsh v. The State (1986 SCMR 59) wherein Apex Court has observed asunder:--

> "The proposition of law that a criminal appeal once admitted to regular hearing by the High Court must be decided on merits and cannot be dismissed for non-prosecution, is fully supported by the pronouncement of this Court in Muhammad Ashiq Faqir v. The State PLD 1970 SC 177……"

6. In view of the case law referred above I, am of the considered view that impugned orders dated 30-9-2010 and 16-10-2010 passed by learned Additional Sessions Judge, Lahore are not warranted by law and are against the well settled principle of criminal jurisprudence. Therefore, I, allow this revision petition, set aside both the impugned orders and remand back the matter to the learned appellate Court for decision of appeal afresh on merits, after hearing both the parties strictly in accordance with law.

H.B.T./Z-52/L Case remanded.

2011 P Cr. L J 357
[Lahore]
Before Muhammad Anwaarul Haq and Manzoor Ahmad Malik, JJ
MUHAMMAD MAZHAR---Appellant
Versus
MUHAMMAD FAYYAZ and others---Respondents

Criminal Appeal No. 1972 of 2004, decided on 3rd December, 2010.

Penal Code (XLV of 1860)---

----Ss. 302/148/149---Criminal Procedure Code (V of 1898), S.417---Qatl-e-amd---Appeal against acquittal---Deceased received injuries at point 'A' shown in the site plan, whereas the complainant and two prosecution witnesses claimed to have seen the occurrence, while standing at point 'B' at a distance of more than 770 feet and it did not sound to reason that complainant and prosecution witnesses could describe the weapons and seats of injuries---Case was that of cross firing between the complainant party and accused, wherein different weapons were freely used by the parties---Fact that a large number of empties, scattered over. a large area were collected by the Police, had indicated that occurrence did not took place as was mentioned in the F.I.R.---Complainant while lodging F.I.R., alleged that shot resulting into death of the deceased was fired by proclaimed offender---No injury on the person of the deceased was attributed to any of the twenty-eight accused persons---Subsequent improvement of the complainant through supplementary statement regarding attribution of an injury to an accused was afterthought on the face of it, as no importance was attached to a supplementary statement in preference to the F.I.R.---Eye-witness account and medical evidence, were at variance and did not coordinate with each other---Report of Forensic Science Laboratory, was not of any help to the prosecution being negative qua the accused persons---Counsel for the appellant was unable to point out any infirmity, legal or factual error in the impugned judgment and also remained unable to point out any particular or specific misreading or non-reading of the evidence on the part of the Trial Court---When an accused was acquitted from a case after regular trial, he would enjoy double presumption of innocence---Trial Court had given detailed convincing and plausible reasons for acquittal of the accused persons; and same were based upon accepted principles of criminal jurisprudence---No justification in circumstances existed to summon the twenty-eight accused persons in the appeal---Appeal was dismissed.

Khalid Javed and another v. The State 2003 SCMR 1419; Iftikhar Hussain and others v. The State 2004 SCMR 1185; Azhar Ali v. The State PLD 2010 SC 632; Inayatullah v. The State PLD 1979 SC 956; Sheo Swarup and others v. King Emperor AIR 1934 Privy Council 227 (2) and Yar Muhammad and 3 others v. The State 1992 SCMR 96 ref.
Malik Zafar Iqbal for Appellant.
Ch. Muhammad Mustafa, Deputy Prosecutor-General for the State.
Date of hearing: 3rd December, 2010.

JUDGMENT
MUHAMMAD ANWAARUL HAQ, J.---This appeal is directed against the judgment dated 8-11-2004 passed by the learned Sessions Judge, Sialkot whereby all the

respondents were acquitted from the charges under sections 302 and 149, P.P.C. in case F.I.R. No. 328 of 2001, under sections 302, 148, 149 and 109, P.P.C., Police Station Satrah, Tehsil Daska, District Sialkot, registered with the allegation against the respondents that they along with their co-accused namely Tahir Saleem and Muhammad Riaz (Proclaimed Offenders), in furtherance of their common intention had committed the Qatl-e-amd of complainant's son Muhammad Ansar by causing him fire-arm injuries with their respective weapons. However, the learned trial Court vide impugned judgment has convicted four respondents namely Muhammad Amin, Sikandar Hayat, Raza Muhammad Ali and Muhammad Jamil Razzaq under section 148, P.P.C. and sentenced them to three years' R.I. each along with a fine of Rs.10,000 each.

2. Learned counsel for the appellant in support of this appeal contends that the prosecution has produced overwhelming evidence on record against the respondents; that the complainant had no enmity with the respondents and no question of false implication or substitution arises in this case; that ocular account furnished by the prosecution is supported by the medical as well as other supportive pieces of evidence; that the learned trial Court has wrongly acquitted the respondents from the charge as the prosecution has produced sufficient evidence against respondents to connect them with the alleged commission of crime as they shared common intention with their co-accused; that acquittal of the respondents is the result of mis-reading and non-reading of the prosecution evidence on record; that learned trial court was not justified to acquit the respondents from the charge of murder of complainant's son Muhammad Ansar and that the respondents are liable to be convicted and sentenced.

3. On the other hand, learned Deputy Prosecutor-General supports the impugned judgment passed by the learned trial Court.

4. We have heard the arguments and have also scanned the record summoned through the order dated 19-10-2005.

5. We have noticed that deceased had received injuries at Point "A" shown in the site-plan Exh.PR, whereas the complainant P.W.15 and his two sons Mazhar P.W.16 and Azhar P.W.17 had seen the occurrence while standing at point `B' at a distance of more than 770 feet. It does not sound to reason that how they could describe the weapons and seats of injuries. It was a case of cross firing between the complainant party and the accused wherein different weapons were freely used by the parties, the fact that a large number of empties scattered over a large area were collected by the police indicates that occurrence did not took place as mentioned in the F.I.R. While lodging the F.I.R. complainant alleged that shot resulting into death of the deceased was fired by Tahir Saleem accused P.O. in this case. No injury on the person of the deceased was attributed to any of the twenty eight respondents. A subsequent improvement of the complainant through supplementary statement regarding attribution of an injury to Zahid Saleem/respondent is an afterthought on the face of it, as no importance is attached to a supplementary statement in preference to the F.I.R. We respectfully rely on the case of Khalid Javed and another v. The State (2003 SCMR 1419) wherein the Hon'ble Supreme Court has observed that First Information Report is a document, which is entered at the

complaint of the informant into a book, maintained at the police station under section 154, Cr.P.C. and is signed/thumb-marked by the informant while the supplementary statement is recorded under section 161, Cr.P.C. and is not signed, F.I.R. brings law into motion and the police under section 156, Cr.P.C. starts investigation of the case, any statement or further statement of the first informant recorded during the investigation by the police would neither be equated with F.I.R. nor read as part of the same and the value of the supplementary statement therefore, will be determined keeping in view the principles enunciated by the superior Courts in this behalf.

6. We have further noticed that there is blackening around injury No. 2 (wound of entry) that is a circumstance wholly against the case setup by the prosecution as fire was allegedly made from about 400 feet. Dr. Zafar Iqbal Baig (P. W.10) who had conducted the postmortem examination opined that all the three injuries on the person of the deceased could be the result of one fire shot. We are of the view that eye-witness account and medical evidence are at variance and do not coordinate with each other. Report of the Forensic Science Laboratory (Exh. PGG) is not of any help to the prosecution being negative qua the respondents.

7. Learned counsel for the appellant is unable to point out any infirmity, legal or factual error in the impugned judgment. He also remained unable to point out any particular or specific misreading or non-reading of the-evidence on the part of the learned trial Court.

8. It is settled principle of criminal dispensation of justice that when an accused is acquitted from a case after regular trial, he enjoys double presumption of innocence: We respectfully refer the case of Iftikhar Hussain and others v. The State (2004 SCMR 1185), wherein Hon'ble Supreme Court of Pakistan has observed as under:--

> "It is well settled principle of criminal administration of justice that when an accused is acquitted of the charge, he enjoys double presumption of innocence in his favour and Courts seized with acquittal appeal under section 417, Cr.P.C. are obliged to be very careful in dislodging such presumption."

In case of Azhar Ali v. The State (PLD 2010 Supreme Court 632) Hon'ble Supreme Court of Pakistan has observed as under:--

> "(17) For conversion of judgment of acquittal into a conviction judgment, the principles have long been settled and are being followed by the Courts in the sub-continent. This Court in the case of "Inayatullah v. The State (PLD 1979 SC 956) recognized that "Superior Courts have consistently laid down certain defined and fundamental principles for regulating their jurisdiction in the case of acquittal appeals."
>
> (18) These fundamental and regulatory principles were defined and endorsed from time to time. In the case of "Sheo Swarup and others v. King Emperor" AIR 1934 Privy Council 227 (2), it was held that:-

"……the High Court should and will always give proper weight and consideration to such matters as:

(1) the views of the trial Judge as to the credibility of the witnesses;
(2) the presumption of innocence in favour of the accused, as presumption certainly not weakened by the fact that he has been acquitted at his trial;
(3) the right of the accused to the benefit of any doubt; and
(4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses."

The Court in the case of "Yar Muhammad and 3 others v. The State" 1992 SCMR 96 observed that:

"Unless the judgment of the trial Court is perverse, completely illegal, and on perusal of evidence no other decision can be given except that the accused is guilty or there has been complete misreading of evidence leading to miscarriage of justice, the High Court will not exercise jurisdiction under , section 417, Cr. P.C. In exercising this jurisdiction the High Court is always slow unless it feels that gross injustice has been done in the administration of criminal Justice and

that the judgments of the learned Sessions Judge is perverse or is a result of complete misreading of evidence or that it is due to incompetence, stupidity or perversity that he has reached any distorted conclusions as to produce a positive miscarriage of justice."

9. We are satisfied that in this case the learned trial Court has given detailed, convincing and plausible reasons for acquittal of the respondents and same are based upon accepted principles of criminal jurisprudence, we therefore, find no justification to summon the twenty-eight respondents in this appeal, resultantly, appeal in hand stands dismissed.

H. B. T. /M-666/L Appeal dismissed.

2011 P Cr. L J 408
[Lahore]
Before Muhammad Anwaarul Haq, J
AKBAR ALI---Petitioner
Versus
THE STATE and another---Respondents

Criminal Miscellaneous No. 10279-B of 2010, decided on 15th October, 2010.

(a) Criminal Procedure Code (V of 1898)---
----S. 498---Penal Code (XLV of 1860), S. 420/468/471---Cheating and dishonestly inducing delivery of property, forgery for purpose of cheating, using as genuine a forged document---Pre-arrest bail, refusal of---Accused was nominated in the F.I.R. with specific allegation of committing fraud with the complainant and preparing a forged power of attorney regarding a huge property in his favour---Investigation of the case had revealed that

the alleged executants of the said power of attorney had not executed the same and that two of them resided abroad and they had not even visited Pakistan for the last ten years---Agreements showing money transaction between the parties could not be considered at this stage, as that would amount to deeper appreciation of the controversy between the parties---No mala fide or ulterior motive on the part of complainant or the police could be pointed out by the accused for his false involvement in the case---Sufficient incriminating material existed on record showing, prima facie, culpability of accused in the crime---Pre-arrest bail was denied to accused in circumstances.
Syed Lakhat-e-Hussnain v. State 2010 SCMR 855 ref.

(b) Criminal Procedure Code (V of 1898)---
----S. 497/498---Bail---Assessment of evidence---Principle---Authenticity of documents placed on record has to be determined at the first instance by Trial Court after recording evidence---Court seized with the matter of bail has only to see whether accused was connected with the commission of crime or not and for that purpose, only tentative assessment of evidence has to be made and deeper appreciation of evidence and circumstances appearing in the case at bail stage, is neither desirable nor permissible.

Syed Lakhat-e-Hussnain v. State 2010 SCMR 855 ref.
Muhammad Aqeel Wahid Chaudhary with the Petitioner in person.
Muhammad Ishaq, Deputy Prosecutor-General with Muhammad Arham, S.I./S.H.O. with Muhammad Ashraf S.I. (Inv.) for the State.
Ch. Iftikhar Ahmad for the Complainant.

ORDER

MUHAMMAD ANWAARUL HAQ, J.---Through this petition Akbar Ali, petitioner seeks pre-arrest bail in case F.I.R. No. 554, dated 1-5-2010, registered at Police Station North Cantt. Lahore in respect of offences under sections 420, 468 and 471, P.P.C.

2. The learned counsel for the petitioner contends that the petitioner is innocent, he has not committed any crime and has falsely been involved in this case due to mala fide intention of the complainant; that Power of Attorney mentioned in the F.I.R. is a registered document and presumption of truth is attached with the same; that the petitioner is a bona fide purchaser of property from the legal heirs of Himmat Khan and huge amqunts have been paid to them by the petitioner, therefore, sections 420, 468 and 471, P.P.C. do not attract in this case; that the offences against the petitioner do not fall within the prohibitory clause of section 497, Cr. P. C. and in fact the complainant party has committed fraud with the petitioner.

3. On the other hand, learned Deputy Prosecutor-General assisted by the learned counsel for the complainant vehemently contesting this bail application maintains that pre-arrest bail is an extraordinary relief and deeper appreciation of the merits of the case at this stage is not proper; that offence against the petitioner is proved on the record as some of the executants shown in the Power of Attorney, subject-matter of the F.I.R., were not even present in Pakistan when this forged and fake Power of Attorney has been executed; and that the

petitioner has committed a heinous offence, hence, he is not entitled for extraordinary relief of pre-arrest bail.

4. Heard. Record perused.

5. Petitioner is nominated in the F.I.R. with specific allegation of committing fraud with the complainant and that of preparing a forged Power of Attorney regarding a huge property in his favour. Statement of Muhammad Zul-Kufal son of Himmat Khan recorded by Investigating Officer shows that Power of Attorney mentioned in the F.I.R. was never executed by him or even by his mother and sisters. During the investigation, it has also been transpired that Mst. Durr-e-Shehwar and Mst. Naila, two alleged executants of Power of Attorney reside abroad and they have not even visited Pakistan for the last about ten years. Many agreements referred by the learned counsel for the petitioner showing money transactions between the parties cannot be considered at this stage, as that amounts to the deeper appreciation of the controversy between the parties. Here, I respectfully refer an observation of Hon'ble Supreme Court of Pakistan in the case of Syed Lakhat-e-Hussnain v. State (2010 SCMR 855):-

> "We are not likely to make any comments on the authenticity of the documents placed on record, as at the first instance it is for the trial Court after recording of evidence to determine the authenticity of the same, Court had only to see whether accused was connected with the commission of crime or not and for that purpose, only tentative assessment of evidence was to be made and deeper appreciation of • evidence and circumstances appearing in the case were neither desirable nor permissible at bail stage."

The petitioner is unable to point out any mala fide or ulterior motive on the part of the complainant or the police for his false involvement in this case. There is sufficient incriminating material available on the record showing prima facie culpability of the petitioner in the alleged crime; hence, petitioner is not entitled to the extra ordinary relief of pre-arrest bail.

6. This petition is, therefore, dismissed and ad interim pre-arrest bail already allowed to the petitioner by this Court vide order dated 20-9-2010 is hereby recalled.

7. It is, however, clarified that observations made herein above are just tentative in nature and strictly confined to the disposal of this bail petition.

N.H.Q./A-244/L Pre-arrest bail refused.

2011 P Cr. L J 517
[Lahore]
Before Manzoor Ahmad Malik and Muhammad Anwaarul Haq, JJ
PUNNAM KHAN---Appellant
Versus
THE STATE---Respondent

Criminal Appeal No. 458-J of 2006 and Murder Reference No. 918 of 2004, heard on 11th November, 2010.

(a) Penal Code (XLV of 1860)---
----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Incident was a broad daylight occurrence and in the promptly lodged F.I.R., all the necessary details of the occurrence had duly been mentioned by the complainant, who was a real daughter of the deceased---No previous enmity existed between the parties and accused was a single nominated accused in the F.I.R.---Prosecution, in order to prove the ocular account had examined real son of the deceased, who had no enmity with accused; and no reason was found for false implication of accused by said witness; his statement was not only straightforward, but coherent and consistent on all material aspects of the case and said statement was corroborated by the medical evidence and was further strengthened by the recovery of crime weapon, blood stained churri---Reports of Chemical Examiner and Serologist, were positive to prove that the churri so recovered at the instance of accused was stained with human blood---Mere relationship of the witness, was not sufficient to discredit his testimony---Non-production of other eye-witnesses was also not damaging for the prosecution, because, it was not the quantity, but the quality of evidence that mattered-Even in the case of a single accused nominated in the F.I.R., it was impossible that near kith and kin would let off the real culprit and would substitute some innocent person in a murder case---Prosecution, in circumstances, had succeeded in proving its case against accused beyond any reasonable doubt and no convincing reason was found to interfere with the finding of the Trial Court regarding the conviction of accused under S.302(b), P.P.C., which was quite in accordance with law and same was maintained.
Mandoos Khan v. The State 2003 SCMR 884 and Khalid Saif Ullah v. The State 2008 SCMR 688 ref.

(b) Penal Code (XLV of 1860)---
----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Benefit of doubt---Quantum of sentence---Allegation in the F.I.R. was that accused gave a single churri blow on the person of deceased---Motive set out by the prosecution did not sound the reason because in the F.I.R. no motive was alleged by the prosecution---Complainant while appearing before the court as prosecution witness stated that accused was working as servant in the shop of the deceased and the deceased dismissed him from his service; and that accused on that grudge killed the deceased which suggested that no serious enmity existed between the parties, but in the circumstances, what happened just before the occurrence was shrouded in mystery---Reason of qatl-e-amd was introduced through dying declaration of the deceased by his daughter, which had lost its relevance,

because no question regarding that dying declaration was put to accused in his statement under S.342, Cr.P.C.---Accused who was about eighteen years of age at the time of occurrence, in the peculiar circumstances of the case, deserved benefit of doubt to the extent of sentence one out of two provided under S.302(b), P.P.C.---While maintaining conviction of accused under S.302(b), P.P.C. his sentence of death was altered into imprisonment for life.
Mir Muhammad alias Miro v. The State 2009 SCMR 1188 and Ansar Ahmad Khan Barki v. The State and another 1993 SCMR 1660 rel.
Barrister Salman Safdar for Appellant.
Nemo for Complainant.
Ch. Muhammad Mustafa, Deputy Prosecutor-General for the State.
Date of hearing : 11th November, 2010.

JUDGMENT

MUHAMMAD ANWAARUL HAQ, J.---Punnam Khan appellant was tried in case F.I.R. No. 242, dated 23-4-2002, registered at Police Station Baghbanpura, under section 302, P.P.C. At the conclusion of the trial, the learned trial Court vide its judgment dated 30-9-2004, had convicted Punnam Khan appellant under section 302(b), P.P.C. and sentenced him to `Death' as Ta'zir for the Qatl-eamd of Muhammad Sadiq. He was also directed to pay Rs.50,000 (Rupees fifty thousand only) as compensation to the legal heirs of the deceased under section 544-A, Cr.P.C.

2. Feeling aggrieved, the appellant Punnam Khan while challenging his conviction and sentence has filed Criminal Appeal No. 458-J of 2006, whereas learned trial Court has transmitted Murder Reference No.918 of 2004 for confirmation or otherwise of the `Death' sentence of the appellant. Both these interlinked matters are being disposed of together through this single judgment.

3. Prosecution story in brief un-folded in the F.I.R. (Exh. PA) by Mst. Aneela Sadiq complainant (P.W.1) is that on 23-4-2002 at about 6-45 a.m. the complainant was present at her house when her brother Nauman Haider (P.W.2) came to her and informed that he and Umar Hayat were present with his father Muhammad Sadiq at the roof of the shop of his father situated at Shalamar Chowk, where at about 6-30 a.m. Punnam Khan accused armed with a Churri came there and inflicted a blow of Churri to his father on the left side of his ribs, they tried to apprehend the accused but he fled away from the spot. Complainant in the F.I.R. further stated that his brother Nauman Haider while leaving behind Umar Hayat at the spot, rushed to inform her about this occurrence, on this information, complainant and Nauman Haider rushed towards Chock Shalamar and found their father, smeared in blood on the roof of the said shop, they immediately shifted and got him admitted in Shalimar Hospital for treatment. In the hospital, complainant asked Muhammad Sadiq (deceased) about the incident, who replied that Punnam Khan appellant on the asking of somebody else, had injured him while inflicting a Churri blow. Muhammad Sadiq succumbed to the injuries in the hospital. It was further alleged in the F.I.R. that this occurrence was witnessed by Nauman Haider (P.W.2) and Umar Hayat (given-up P.W.).

The motive behind the occurrence was introduced by the complainant while appearing before the Court as P.W. 1, that the appellant was an employee in the shop of her father Muhammad Sadiq (deceased), who had dismissed him from his services and on this grudge, the appellant killed his father.

4. On 23-4-2002 after registration of this case, Noor Ali S.I. (P.W.13) reached Shalimar Hospital, Lahore where he found the dead body of Muhammad Sadiq (deceased) lying in emergency ward, he prepared inquest report (Exh. PG), recorded statements of the P.Ws., sketched the rough site-plan (Exh. PH) and sent the dead body for autopsy. On 27-5-2002 he obtained proclamation of the appellant from the trial Court, thereafter he was transferred from the Investigation Cell.

On 8-8-2002 investigation of this case was entrusted to Muhammad Mazhar Iqbal Inspector (P.W.14), on the same day Punnam Khan, appellant surrendered himself through a counsel before area Magistrate. On 10-8-2002 during investigation of this case while in police custody appellant led to the recovery of weapon of offence i.e. blood stained Churri (P-1) which was taken into possession by the Investigating Officer.

5. Charge was framed against the appellant on 11-4-2003, to which he pleaded not guilty and claimed trial.

6. To substantiate the charge, prosecution had examined fourteen witnesses in total, out of which, Dr. Maqbool Hussain (P. W.11) provided medical evidence; Mst. Aneela Sadiq, complainant (P.W.1) appeared to prove F.I.R. she further provided evidence regarding dying declaration of the deceased, and Nauman Haider (P.W.2) furnished the ocular account. Noor Ali S.I. (P. W.13) and Muhammad Mazhar Iqbal, Inspector (P. W.14) had conducted investigation of this case.

7. Post Mortem examination on the dead body of Muhammad Sadiq was conducted by Dr. Maqbool Hussain, (P. W.11) on 23-4-2002 and observed following injury on his person:--

> Stab wound on the left side of abdomen measuring 4 x 1.5 cm having clear margins 13.5 cm left umbilicus at 3 O'clock position.
> In his opinion, injury was ante-mortem and was caused by sharp edged weapon. The cause of death in this case was damage to the stomach, left kidney and mesentery, under injury No.1, leading to hemorrhage and shock.
> Probable time elapsed between death and post mortem was 4 to 12 hours.

8. Appellant was examined under section 342, Cr.P.C. He denied the allegation and professed his innocence. While answering to question, "Why this case against you and why the P.Ws. have deposed against you?" Punnam Khan, appellant replied as under:--

> "That actually the murder of Muhammad Sadiq was committed by his own son namely Nauman at the instigation of his Mamon Umar Hayat, as said Umar Hayat was under the debt of the deceased as the deceased was pressing hard to Umar Hayat for the return of the said amount, whereupon said Umar Hayat hatchet a plan, his nephew (son of deceased) was in the habit of drinking and usually he was ousted

from the house by his father, so, Umar Hayat offered him alcohol and when Nauman was under state of intoxication, Umar Hayat instigated him to kill his father if he want to lead happy life, who did so and at the time of occurrence only these two persons were present that is why, they instead of shifting the injured to the hospital, immediately waited till the injured breathed his last and then shifted him to the hospital. I was roped into this case as the complainant herself had joined hand with her brother and maternal Uncle Umar Hayat to save them.

I was involved in this case under discussion as I belonged where the occurrence took place. My father worked hard to meet both hands at Mian Meer Market Saddar, Lahore Cantt. being labourers and previously no case was registered against me. I also used to help my father in his work, on the day of occurrence I was not present at home but was with my father in Mian Meer Market (Lunda Market) and through night we both father and son, remained busy with the work. That the above narrated facts came into my knowledge through residents of locality 2/3 persons from the said locality accompanied my father to the police station to bring into light the true facts but the I.O. threatened them to refrain them from producing defence in my father, then they will be involved in case under section 216, P.P.C. Further more the I.O. also harassed my father to refrain from bring anything in my defence or witnesses in my defence. In fact Nauman P.W. and Umar Hayat (given up) are the persons of ill repute and due to their highhandedness, the people refused to appear in my defence. The complainant also hide the truth fact stating that I was not known to them but the reality is that I along with my family members as well as my relatives have family as well as visiting terms with the complainant's family and we used to invite each other at the marriage ceremonies. In this respect I produce photographs Mark-A to Mark-E in my defence. I also produce my birth certificate Mark-F, issued by City District Government, Lahore. The complainant, Nauman and Umar Hayat in collusion with each other have made me a scapegoat."

The appellant did not make statement under section 340(2), Cr.P.C. but produced some documents (Mark-A to Mark-E) in his defence. The learned trial Court vide its judgment dated 30-9-2004, found Punnam Khan, appellant guilty and convicted and sentenced him as mentioned above.

9. Learned counsel for the appellant in support of this appeal contends that prosecution story is highly improbable and doubtful in nature; that circumstances suggest that it was an un-witnessed occurrence and thereafter a false case was concocted against the appellant; that statement of Mst. Aneela Sadiq complainant (PW-1) is of no use for the prosecution because she has not witnessed the occurrence and the statement regarding the dying declaration allegedly made by her father is also not reliable; that the most important witness of this occurrence Umar Hayat, real maternal uncle of the complainant was given up as having been won over, therefore adverse inference has to be drawn under Article 129(g) of the Qanun-e-Shandat, Order, 1984; that recovery of Churi (P-1) taken into possession vide recovery memo. (Exh. PC) is also of no avail for the prosecution as the other recovery witness namely Muhammad Ishfaq was given up and Churri was allegedly recovered after many days of the occurrence; that there is only one statement against the appellant i.e. statement of Nauman

Haider (P.W.2) which is not confidence inspiring because of unnatural conduct of this witness who left his father in injured condition and went to inform his sister instead of shifting him to the hospital and even otherwise, story of the prosecution is not believable because if two witnesses were present at the spot, they could easily apprehend the appellant; that the prosecution has failed to prove the motive and it remained shrouded in mystery as to what happened at the time of occurrence. Learned counsel for the appellant lastly contends that the appellant was having immature age of 18 years at the time of occurrence he inflicted only one injury and did not repeat the same and deserves lesser penalty in the circumstances of the case.

10. On the other hand, learned Deputy Prosecutor-General opposes this appeal on the grounds that the appellant as a single accused is nominated in the F.I.R. with specific allegation of giving Churri blow on the person of Muhammad Sadiq (deceased); that the occurrence took place in broad daylight at 6-30 a.m., and the F.I.R. (Exh. PA) was got registered on the same day at 8-25 a.m. with all the necessary details of the unfortunate occurrence duly mentioned by the complainant i.e. real daughter of the deceased and the appellant has not been able to even suggest any enmity with the complainant party; that it is the quality of evidence and not the quantity, which matters in a criminal case and the solitary statement of an eye-witness, if it inspires confidence, can be relied for the conviction; that there is a dying declaration of Muhammad Sadiq (deceased) that is a legal evidence under Article 46 of the Qanun-e-Shahadat, Order 1984; that the evidence of Nauman Haider (P.W.2) is confidence inspiring supported by medical evidence and positive report of Serologist regarding the weapon of offence Churri recovered at the instance of the appellant; that Mst. Aneela Sadiq complainant (P.W.1) is daughter while Nauman Haider (P.W.2) is son of the deceased, who had no reason whatsoever to involve the appellant having no enmity with him, even otherwise, substitution in such like cases is a rare phenomenon as the appellant has not been able to even suggest any reason for his false implication in this case; that the appellant has killed the deceased in a very brutal manner, therefore, he does not deserve any leniency and is not entitled to any exception hence, appeal of the appellant be dismissed and murder reference be answered in the affirmative.

11. We have heard the learned counsel for the appellant and the learned Deputy Prosecutor-General for the State at a considerable length and have gone through the record with their able assistance.

12. The occurrence took place on 23-4-2002 at 6-30 a.m. matter was reported to the ,police by Mst. Aneela Sadiq complainant (P. W.1) on the same day at 8-00 a.m. and formal F.I.R. (Exh. PA) was recorded at 8-15 a.m. Muhammad Sadiq (deceased) in injured condition was shifted to Shalamar Hospital, Lahore immediately after the occurrence where he died later on. We have noticed that it was a broad daylight occurrence and in the promptly lodged F.I.R. all the necessary details of this unfortunate occurrence have duly been mentioned by the complainant, who is a real daughter of the deceased. There is no previous enmity between the parties and appellant is a single nominated accused in the F.I.R.

13. In order to prove the ocular account prosecution has examined Nauman Haider (P.W.2) real son of the deceased, who has no enmity, with the appellant and we do not find any

reason of his false implication by him in this case, his statement is not only straightforward but coherent and consistent on all material aspects of the case. His statement is corroborated by the medical evidence and further strengthened by the recovery of Crime Weapon blood stained Churri, report of Chemical Examiner and of Serologist are positive to prove that the Churri so recovered at the instance of appellant was stained with human blood. Mere relationship of the witness is not sufficient to discredit his testimony. In this respect, we respectfully refer the case of Haji v. The State (2010 SCMR 650), wherein the Hon'ble Supreme Court has observed as under:

> "Both the ocular witnesses undoubtly are inter se related and to the deceased but their relationship ipso facto would not reflect adversely against the veracity of the evidence of these witnesses in absence of any motive wanting in the case, to falsely involve the appellant with the commission of the offence and there is nothing in their evidence to suggest that they were inimical towards the appellant and mere inter se relationship as above noted would not be a reason to discard their evidence which otherwise in our considered opinion is confidence-inspiring for the purpose of conviction of the appellant on the capital charge being natural and reliable witnesses of the incident."

Non-producing of other eye-witnesses is also not damaging for the prosecution because it is not the quantity but the quality of evidence that matters, other eye-witnesses Umar Hayat was declared won over by the complainant and that's why he was not produced by the prosecution. It is important to note that appellant has also not opted to call him as a Court Witness or a Defence Witness. Here, we refer the case of Mandoos Khan v. The State (2003 SCMR 884) wherein the Hon'ble Supreme Court of Pakistan has observed as under:--

> "It is settled proposition of law that prosecution must produce best kind of evidence to establish accusation against accused facing trial but simultaneously it has no obligation to produce a good number of witnesses because it has an option to produce as many as witnesses which in its consideration are sufficient to bring home guilt against the accused, following the principle of law that to establish accusation, indeed it is not the quantity but quality of the evidence, which gets preference. In forming this view we are fortified with the judgments reported in Allah Bakhsh v. Shami and others (PLD 1980 SC 225) and Sarfaraz alias Sappi and two others v. The State (2000 SCMR 1758)."

Even otherwise in the case of a single accused nominated in the F.I.R. it is impossible that near kith and kin would let off the real culprit and shall substitute some innocent person in a murder case. Here, we refer the case of Khalid Saif Ullah v. The State (2008 SCMR 688) wherein Hon'ble Supreme Court of Pakistan has observed as under:

> "Substitution is a phenomenon of a rare occurrence because even the interested witnesses would not normally allow real culprits for the murder of their relations let off by involving innocent persons. In this context, reference can usefully be made to the case of Irshad Ahmad and others v. The State and others PLD 1996 SC 138."

14. In the light of our above observations, we are of the considered view that prosecution has succeeded in proving its case against the appellant beyond any reasonable doubt and we do not find any convincing reason to interfere with the finding of the learned trial Court

regarding the conviction of the appellant under section 302(b), P.P.C. that is quite in accordance with law and we maintain the same.

15. So far as the question of quantum of sentence of the appellant is concerned, we have noted that it is alleged in the F.I.R. that the appellant gave a single Churri blow on the person of Muhammad Sadiq (deceased). We have further noticed that the motive set out by the prosecution does not sound to reason because in the F.I.R. there is no motive alleged by the prosecution but Mst. Aneela Sadiq complainant while appearing before the Court as P.W.1 stated that the appellant was working as servant in the shop of the deceased. and the deceased dismissed him from his services, therefore, the appellant on this grudge killed the deceased, which suggests that there was no serious enmity between the parties but in the circumstances, what happened just before the occurrence is shrouded in mystery and reason of Qatl-e-amd introduced through dying declaration of the deceased by his daughter P.W. has otherwise lost its relevance because no question regarding this dying declaration was put to the appellant in his statement under section 342, Cr.P.C.

16. In view of the above we are convinced that appellant who was about eighteen years of age at the time of occurrence in the peculiar circumstances of this case deserves benefit of doubt to the extent of his sentence one out of two provided under section 302(b), P.P.C., we very respectfully refer here the case of Mir Muhammad alias Miro v. The Sate (2009 SCMR 1188) wherein the Hon'ble Supreme Court of Pakistan has emphasized as under:--

> "It will not be out of place to emphasize that in criminal cases, the question of quantum of sentence requires utmost care and caution on the part of the Courts, as such decisions restrict the life and liberties of the people. Indeed the accused persons are also entitled to extenuating benefit of doubt to the extent of quantum of sentence. In the case of Mst. Bevi v. Ghulam Shabbir and another 1980 SCMR 859, it was ruled by this Court" that the principle underlying the concept of benefit of doubt can in addition to the consideration of question of guilt or otherwise, be, pressed also in matter of sentence."

In another case Ansar Ahmad Khan Barki v. The State and another (1993 SCMR 1660), Hon'ble Supreme Court of Pakistan has held that the prosecution is bound by law to exclude all possible extenuating circumstances in order to bring the charge home to the accused for the award of normal penalty of death.

17. We, therefore, while maintaining conviction of Punnam Khan, appellant under section 302(b), P.P.C., alter his sentence of Death into Imprisonment for Life. The amount of compensation as ordered by the learned trial court shall remain intact. Benefit of section 382-B, Cr.P.C. is also extended to the appellant. Criminal Appeal No. 458-J of 2006 is partly allowed with the above modification in the quantum of sentence.

18. Murder Reference No. 918 of 2004 is answered in the Negative and death sentence awarded to Punnam Khan is not confirmed.

H.B.T./P-33/L Sentence altered.

2011 P Cr. L J 552
[Lahore]
Before Sh. Najam-ul-Hasan and Muhammad Anwaarul Haq, JJ
MUHAMMAD IDREES---Appellant
Versus
THE STATE---Respondent

Criminal Appeal No. 296-J and Murder Reference No. 429 of 2005, heard on 30th September, 2010.

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

----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Case of prosecution rested upon evidence of extra judicial confession, exculpatory statement of co-accused, recovery of a Danda at the instance of accused and medical evidence---Extra judicial confession of accused was of best importance when both the witnesses of extra judicial confession had stated that Police did not record their statements during the investigation under S.161, Cr.P.C.---Evidence of a witness whose statement had not been recorded during the investigation, was not worth reliance---Even otherwise, extra judicial confession was a weak type of evidence and it must receive strong corroboration from other reliable evidence---Statement of co-accused was just an exculpatory statement and could not be made basis for the conviction of accused; and even was of little value against its maker---Not permissible under the law to treat the statement of co-accused as evidence against other accused---Medical evidence by itself was not an evidence to reflect as to who was responsible for causing injuries to the deceased; and it could not be used to the extent of corroboration of ocular account, if any, or to corroborate any other strong circumstance---Evidence of complainant was just based upon suspicion and suspicion however strong, could not take place of an evidence to be used for the conviction of accused--Recovery of Danda at the instance of accused was not blood stained and it was never sent to the Chemical Examiner for tracing of any blood stains on the same---Prosecution had failed to prove the case against accused and no legal, convincing or trustworthy evidence was available connecting accused with the crime alleged against him---Conviction and sentence of accused, were set aside, accused was acquitted of the charge and was set at liberty, in circumstances.
1996 MLD 1311; 1995 PCr.LJ 248; Tahir Javed v. The State 2009 SCMR 166; Zafar Iqbal and others v. The State 2006 SCMR 463 and State v. Asfandyar Wali and 2 others 1982 SCMR 321 ref.

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

----S. 161---Examination of witnesses by police---Evidence of a witness whose statement had not been recorded during the investigation, was not worth reliance.

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

----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Circumstantial evidence---All the circumstances, constituting a chain should create a combined effect towards the guilt of an

accused; and it should be established beyond any shadow of doubt without missing of any link whatsoever---Finding of guilt must rest on unimpeachable evidence---Many dents in a criminal case were not necessary; and a single doubt in a prudent mind was sufficient to extend the benefit of doubt to accused---One tainted piece of evidence could not corroborate another tainted piece of evidence---Surmises, conjectures presumptions and assumptions, could not take place of trustworthy, cogent and reliable evidence in criminal cases, especially in the cases of capital sentence.

Muhammad Akram v. The State 2009 SCMR 230 ref.
Maqbool Aimad Qureshi, (Defence Counsel at State expense) for the Appellant.
Qazi Zafar Iqbal, Additional Prosecutor-General for the State.
Date of hearing: 30th September, 2010.

JUDGMENT

MUHAMMAD ANWAARUL HAQ, J.---Muhammad Idrees, appellant along with his co-accused Umme-i-Salma was tried in case F.I.R. No. 99, dated 11-3-2004, registered at Police Station Saddar, District Gujranwala for an offence under sections 302, 34, P.P.C. At conclusion of the trial, the learned trial Court vide its judgment dated 25-4-2005 while acquitting Umme-i-Salma co-accused has convicted Muhammad Idrees, appellant under section 302(b), P.P.C. and sentenced to "Death" for the Qatl-e-amd of Faikal Hassan. He was also directed to pay Rs.1,00,000 (rupees one lac only) as compensation to the legal heirs of the deceased under section 544-A, Cr.P.C. or in default thereof to undergo simple imprisonment for six months.

2. Feeling aggrieved, Muhammad Idrees, appellant has challenged his conviction and sentence through Criminal Appeal No.296-J of 2005 whereas learned trial Court has transmitted the Murder Reference No.429 of 2005 for confirmation or otherwise the death sentence of the appellant. Both the matters being unified are disposed of through this single judgment.

3. Prosecution's story in brief un-folded in F.I.R. (Exh.PF) by Nazir Ahmad, complainant (P.W.7) is that about five years back, Muzamil Hussain son of the complainant was married with Mst. Umme-i-Salma and a son was born out of that wedlock namely Faikal Hassan. Four months prior to the occurrence, his son had divorced Mst. Umme-i-Salma and allowed Faikal Hassan, being minor, to live with her, Mst. Umme-i-Salma contracted her second marriage with Muhammad Idrees. On 10-3-2004 at about 7-00 p.m. complainant received information about the death of his grandson, he along with his wife and son-in-law Muhammad Imran went to the house of Idrees, situated at Jandiala Baghawala and found his grandson died. Idrees and his family members told him that Faikal Hassan has been died due to illness, but the complainant on checking found marks of injuries and blood oozing from his ears upon which he got registered the F.I.R.

4. After registration of the case, on 11-3-2004 Saifullah, S.I. (P. W.11) inspected the place of occurrence, prepared injury statement, inquest report and sent the dead body for autopsy, he sketched rough site-plan and also secured the blood through cotton from the place of

occurrence. On 17-3-2004, he arrested Muhammad Idrees, appellant who while in police custody on 25-3-2004 led to the recovery of Danda (P-1).

5. Dr. Naveed Ahmed, (P.W.4) conducted post mortem examination on the dead body of Faikal Hassan and observed the following injuries on his person:--

(1) Contused swelling 4 x 2 c.m. on the lower part of right cheek.

(2) Contused swelling 5 x 2 c.m. on the left cheek.

(3) Contused swelling 1-1/2 x 1 c.m. on the upper lip and part of nose with blood stained nostrils and shakiness of central inciser teeth.

(4) Swelling 12 x 10 c.m. on the. head front and middle part frontoprital region 6 c.m. from the right ear.

(5) Swelling 6 x 6 c.m. on front of left foot with punctured marks over it.

(6) Swelling 8 x 6 c.m. on the right foot front part.

In his opinion the cause of death was cardio respiratory failure as a result of cessation of brain function due to haemorrhage (hemotoma) compressing the brain consequent upon injury No.4, caused by some blunt weapon. All the injuries were ante mortem in nature and were caused by blunt weapon.

Probable time between injuries and death was within two hours and between death and post mortem, about 16 to 20 hours.

6. To substantiate the charge, prosecution had examined eleven witnesses in total, out of which, Dr. Naveed Ahmad, (P.W.4) provided medical evidence, Nazir Ahmad (P.W.7) got lodged the F.I.R. and appeared as complainant of this case, Bashir Ahmed (P.W.8) and Muhammad Sharif (PW.9) provided evidence of extra judicial confession. The remaining evidence produced by the prosecution was more or less formal in nature.

7. Appellant and his co-accused were examined under section 342, Cr.P.C. They denied the allegations and professed their innocence. While answering to question "Why this case against you and why the P.Ws. have deposed against you?" they replied as under:--

Muhammad Idrees

"Muzzamil Hussain ex-husband of Umme-e-Salma used to take Faikal Hassan deceased to the house of the complainant and the death of Faikal Hassan deceased took place in the house or Nazir complainant. Muzzamil Hussain also wanted to re-marry Umme-e-Salma co-accused after the death of Faikal Hassan a false story was concocted to falsely implicate me in this case and the statement of accused Umme-e-Salma under section 342, Cr.P.C. clearly indicates that .she has succumbed to the

pressure of complainant and she has introduced a new concocted story. The complainant and other P.Ws. who are inter se related and inimical towards me for the above mentioned reasons therefore, all the P.Ws, have falsely deposed against me so to get rid of me from the way of remarriage of Umme-e-Salma and Muzzamil Hussain and to black mail me."

Mst. Umme-e-Salma:

"My son Faikal'Hassan was murdered by Idrees accused present in court in my presence. He inflicted danda blows on his head, forehead and on his feet. He also inflicted danda blows on his mouth. I am innocent. I have not shared any intention with accused Idrees. Being the mother of Faikal aged two years I even cannot think about it. I was declared innocent by the police during investigation. He murdered Faikal due to the reason that he disliked Fiakal Hassan and I tried to hand over Faikal to his grandfather but he refused to give him to his grand-father."

8. Appellant did not opt to make any statement under section 340(2), Cr.P.C., and did not produce any evidence in his defence. However Umme-i-Salma made her statement under oath as contemplated under section 340(2), Cr.P.C., almost the same she made under section 342, Cr.P.C. The learned trial Court vide its judgment dated 25-4-2005 while acquitting Mst. Umme-i-Salma co-accused, found Muhammad Idrees appellant guilty and convicted and sentenced him as mentioned above.

9. Learned counsel for the appellant contends that it is a case in which there is no eyewitness of the occurrence and the whole prosecution case is based on circumstantial evidence; that the prosecution evidence is based on the extra-judicial confession of the appellant; that while appearing in the Court both the witnesses of extra-judicial confession admitted that they never made any statement during investigation and their statements were recorded one year after the occurrence; that 'recovery of danda on the pointation of the appellant is of no value because the said danda was not found blood stained; that the medical evidence only indicates the presence of certain injuries on the person of the deceased and the doctor has admitted that such injuries could be the result of falling on ground; that the co-accused of the appellant Umm-i-Salma has stated that the appellant has committed this offence, but as she herself is an accused, as such her. statement cannot be used against the appellant; that no motive for commission of murder has come on record; that the statement of the co-accused recorded under section 340(2), Cr.P.C: is not sufficient for the conviction of the appellant.

10. On the other hand, learned Additional Prosecutor-General states that the deceased was done to death in the house of the appellant; that the presence of injuries on the person of deceased corroborated by extra judicial confession of the appellant provides full strength to the suspicion of the complainant; that during the investigation the appellant was found fully involved in this case and he is not entitled to any leniency.

11. We have heard the arguments from both the sides and have perused the record, carefully.

12. Case of the prosecution rests upon evidence of extra judicial confession, exculpatory statement of the co-accused of the appellant Mst. Umme-i-Salma, recovery of a Danda at the instance of the appellant and medical evidence.

13. As far as extra judicial confession of the appellant is concerned, it is of least importance when both the witnesses of extra judicial confession P.W.8 Bashir Ahmad and P.W.9 Muhammad Sharif categorically stated that police did not record their statements during the investigation under section 161, Cr.P.C. It is well settled that evidence of a witness whose statement has not been recorded during the investigation is not worth reliance. We may refer here 1996 MLD 1311 and 1995 PCr.LJ 248. Even otherwise, it is well-established principle of Criminal Jurisprudence that extra judicial confession is a weak type of evidence and it must receive strong corroboration from other reliable evidence. For ready reference we respectfully refer the case of Tahir Javed v. The State (2009 SCMR 166), and Zafar Iqbal and others v. The State (2006 SCMR 463).

14. As far as statement of Umme-i-Salma co-accused of the petitioner is concerned that is just an exculpatory statement and cannot be made basis for the conviction of the appellant and even is of little value against its maker. It is not permitted under the law to treat the statement of the co-accused, as evidence against other accused. For ready reference we respectfully refer the case of State v. Asfandyar Wali and 2 others (1982 SCMR 321).

15. Medical evidence by itself is not an evidence to reflect who is responsible for causing injuries to the deceased and it can only be used to the extent of corroboration of ocular account if any or to corroborate any other strong circumstance. Evidence of P.W.7 complainant is just based upon suspicion and suspicion however strong cannot take place of an evidence to be "used for the conviction of the accused.

16. As far as recovery of Danda is concerned, admittedly the Danda was not blood stained and it was never sent to the Chemical Examiner for tracing of any bloodstains on the same.

17. In the case of circumstantial evidence it is well settled principle that all the circumstances constituting a chain should create a combined effect towards the guilt of an accused and it should be established beyond any shadow of doubt without missing of any link whatsoever. Finding of guilt must rest on unimpeachable evidence. It is also a well-settled standard of appreciation of evidence that many dents in a criminal case are not necessary and a single doubt in a prudent mind is sufficient to extend the benefit of doubt to the accused. In this respect we very respectfully refer the case of Muhammad Akrain v. The State (2009 SCMR 230) in which Hon'ble Supreme Court of Pakistan emphasized as under:

> "It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be

entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

18. It is a fundamental principle of Criminal Jurisprudence that a tainted piece of evidence cannot corroborate another tainted piece of evidence. Surmises, conjectures, presumptions and assumptions cannot take place of trustworthy, cogent and reliable evidence in criminal cases, especially in the cases of capital sentence.

19. Prosecution has miserably failed to prove the case against the appellant and there is no legal, convincing or trustworthy evidence connecting the appellant with the crime alleged against him. We therefore, allow Criminal Appeal No.296-J of 2005, set aside the conviction and sentence of Muhammad Idrees, appellant and acquit him of the charge. He be set at liberty forthwith, if not required to be detained in any other case.

20. Murder Reference (M.R. No. 429 of 2005) is answered in negative and death sentence of the appellant Muhammad Idrees is not confirmed.

H.B.T./M-603/L Appeal allowed.

2011 P Cr. L J 737
[Lahore]
Before Muhammad Anwaarul Haq and Manzoor Ahmad Malik, JJ
MUHAMMAD RAMZAN and others---Appellants
Versus
THE STATE and others---Respondents

Criminal Appeals Nos. 1447, 1676 of 2005, Criminal Revision No. 816 of 2005 and Murder Reference No. 03 of 2006, heard on 8th February, 2011.

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

---S. 302(b)---Criminal Procedure Code (V of 1898), S. 154---F.I.R., delay in registration---Effect---First priority of complainant's side was to save life of injured instead of reporting matter to police---About two hours delay in reporting the matter to police, in the circumstances, was not of much importance.

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

----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Benefit of doubt---Related witnesses---Recovery and motive---Sentence, reduction in---Accused was convicted by Trial Court under S. 302(b), P.P.C. and was sentenced to death---Validity---Mere relationship of complainant and eye-witness with deceased was not a ground to disbelieve their evidence, which was confidence inspiring on all material aspects of case and especially when there was no deep-rooted enmity between complainant party and accused---Mere relationship of witnesses was not a ground itself to discredit their testimony---No independent witness in respect of motive was examined and Trial Court had rightly disbelieved the motive part---

Even if motive and recovery of Churri (weapon of offence) were excluded from consideration, there remained sufficient evidence in the form of ocular account fully supported by medical evidence---High Court maintained conviction of accused under S.302(b), P.P.C.---Accused deserved benefit of doubt to the extent of his sentence one out of two provided under S. 302(b), P.P.C.---Accused was entitled for benefit of doubt as an extenuating circumstance while deciding his question of sentence---High Court altered sentence of accused from death to imprisonment for life---Appeal was decided accordingly.

Haji v. The State 2010 SCMR 650; Allah Dad and another v. The State 1995 SCMR 142; Shehruddin v. Allah Rakhio and 5 others 1989 SCMR 1461; Mir Muhammad alias Miro v. The State 2009 SCMR 1188 and Ansar Ahmad Khan Barki v. The State and another 1993 SCMR 1660 rel.

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

----S. 417---Appeal against acquittal---Principle---When accused person is acquitted by Trial Court, he enjoys double presumption of innocence and to dislodge that presumption very strong and convincing reasons are required.

Haji Amanullah v. Munir Ahmad and other 2010 SCMR 222 ref.
Muhammad Farooq Bedaar for Appellants (in Criminal Appeals Nos. 1447, 1676 of 2005).
Ch. Muhammad Mustafa, Deputy Prosecutor-General for the State.
Muhammad Akram Javed for the Complainant.
Date of hearing: 8th February, 2011.

JUDGMENT

MUHAMMAD ANWAARUL HAQ, J.---Muhammad Ramzan (appellant in Criminal Appeal No. 1447 of 2005), Muhammad Rasheed, Muhammad Gulzar, Muhammad Khalid and Zafar Iqbal (respondents Nos. 1 to 4 in Criminal Appeal No. 1676 of 2005) were tried in case F.I.R. No. 483 of 2004 dated 4-8-2004, registered at Police Station Ferozewala District Sheikhupura in respect of offences under sections 302, 109, 148, 149, P.P.C. After conclusion of trial, learned trial Court vide its judgment dated 1-8-2005 has convicted appellant Muhammad Ramzan under section 302(b), P.P.C. and sentenced him to death as Ta'zir with compensation of Rs.50,000 under section 544-A, Cr.P.C. payable to legal heirs of the deceased and in default thereof to further undergo six months' R.I., whereas accused Muhammad Rasheed, Muhammad Gulzar, Muhammad Khalid and Zafar Iqbal have been acquitted of the charge.

Murder Reference No.03 of 2006 for confirmation or otherwise of death sentence awarded to appellant Muhammad Ramzan and Criminal Appeal No.1676 of 2005 filed by the complainant against acquittal of accused Muhammad Rasheed, Muhammad Gulzar, Muhammad Khalid and Zafar Iqbal as well as Criminal Revision No.816 of 2006 for enhancement of compensation of Rs.50,000 shall also be disposed of through this single judgment.

2. Prosecution story in brief un-folded in the F.I.R. (Exh.PA/1) got registered by complainant Muhammad Siddique (P.W.8) is that on 4-8-2004 at 7-00 a.m. he along with Mushtaq Ahmad and Mehmood Ahmad (deceased) in routine went to their land situated at Ali Nagar near Gulshan-e-Farid Town, Ferozewala on Tractor No.5424/GAB for ploughing the fields and Mehmood Ahmad (deceased) started to plough the fields, whereas he and Mushtaq Ahmad started to clean the watercourse near the Peter Engine situated at a distance of two acres from that fields., that at about 8-00/8-30 a.m. they heard hue and cry raised by Mehmood Ahmad (deceased) that he be saved, upon which they rushed towards Mahmood Ahmad (deceased) and saw that Abdul Rasheed and Muhammad Ramzan accused having `Chhurris' in their hands were inflicting repeated blows with `Chhurris' on the person of Mehmood Ahmad (deceased), who fell : down on the ground and on seeing them the accused fled away from the scene of occurrence by brandishing `Chhurris' and raising Lalkaras, that they took Mehmood Ahmad in injured condition to Mayo Hospital where he succumbed to his injuries.

Motive behind the occurrence, as stated by the complainant, was that on 3-8-2004 at 11-00 a.m. a quarrel took place between Mehmood Ahmad (deceased) and Gulzar Ahmad accused regarding an employee, as Gulzar Ahmad accused forbade that employee to work with Mehmood Ahmad (deceased); that residents of `Deh' patched up the matter and on the same day after `Maghrib' prayer Mehmood Ahmad (deceased) for the purpose of effecting compromise sent Asghar Ali and Muhammad Yousaf to the house of Gulzar Ahmad 'where Gulzar Ahmad,' Zafar Iqbal, Muhammad Ramzan, Abdul Rasheed 'and Khalid were present and Asghar Ali asked them that we should not quarrel with each other because of our employees, therefore, we should compromise as it would be better for both the parties, upon which Abdul Rasheed said that Mehmood Ahmad had disgraced and abused his father Gulzar Ahmad, so he will kill him, brothers of Abdul Rasheed also endorsed the same, whereas Gulzar Ahmad supported his sons and threatened of dire consequences as well as refused to compromise the matter, hence deceased Mehmood Ahmad was murdered by Gulzar Ahmad and his four sons in furtherance of their common intention.

3. It is pertinent to mention here that in the report submitted by the police under section 173, Cr.P.C, accused Muhammad Gulzar, Zafar Iqbal and Muhammad Khalid were placed in column No.2, whereas accused Muhammad Ramzan and Abdul Rasheed were placed in column No.3 of the challan.

4. On submission of challan and after completing the procedural formalities, the accused were formally charge sheeted by the learned trial Court on 11-1-2005 under sections 302, 148, 149, P.P.C., to which they pleaded not guilty and claimed trial. The prosecution examined as many as 16 witnesses to prove the charge against the accused persons. Dr. Muhammad Sarwar (P.W.15) provided medical evidence; Ramzan Ali, Inspector (P.W.13), Muhammad Shahbaz, S.I. (P.W.14) and Mukhtar Ahmad, S.I. (P.W.16) conducted investigation of this case, whereas Muhammad Siddique, complainant (P.W.8) and Mushtaq Ahmad (P.W.9) had furnished the ocular account.

5. On 4-8-2004, Dr. Muhammad Sarwar (P.W.15) conducted post-mortem examination of Mehmood Ahmad deceased and found the following injuries:-

(i) An incised wound 2 cm x 0.5 cm x cavity deep, on front of chest (in the middle and right side), 2 cm from mid line.

(ii) An incised wound 2 cm x 0.8 cm x cavity deep on right side of abdomen, 6 cm right to umbilicus.

(iii) An incised wound 2 cm x 0.8 cm x muscle deep on lower part of right forearm.

(iv) An incised wound 2.8 cm x 0.5 cm on inner and upper part of right forearm.

(v) An incised wound 1.5 x I cm x muscle deep on front, lower 1/3rd of right forearm (Injuries Nos.4 and 5 were through x through).

(vi) An incised wound 0.8 cm x 0.5 cm on inner and upper part of right upper arm.

(vii) An incised wound 2 cm x 0.5 cm on outer aspect of lower part of right upper arm (injuries Nos.6 and 7 were through x through).

(viii) An incised wound 1.5 cm x 0.5 cm x muscle deep on outer aspect of upper part of right forearm.

(ix) An incised wound 2 cm x 0.8 cm x muscle deep on back of right forearm in the middle.

In his opinion, cause of death in this case was extensive haemorrhage, shock and damage to heart due to injury No.1 and other Utilities mentioned above and these were sufficient to cause death in ordinary course of nature; that injuries were ante-mortem and were caused by sharp-edged weapon and that duration between injuries and death was within one to two hours and between death and postmortem within 12 to 14 hours.

6. Learned SPP after tendering in evidence the reports of Chemical Examiner as Exh.PK and Exh.PK/I closed the prosecution case.

7. Thereafter, statements of the accused as required under section 342, Cr.P.C. were recorded, in which they refuted all the allegations levelled against them and professed their innocence. While answering to question (Why this case against you and why the P.Ws. have deposed against you?), appellant Muhammad Ramzan replied as under:-

> I have been implicated in this case falsely, due to mala fide and suspicion. I have" nothing to do with the occurrence. I was not present at the time and place of occurrence. It was an unseen and un-witnessed occurrence. The occurrence was committed by the unknown person during the night and I was implicated just to blackmail and usurp my land. F.I.R. was registered after due deliberation and consultation at belated stage, with the connivance of the' police after stopping the roznamcha. The P.Ws. are related to the deceased so they have deposed falsely.
>
> Accused Muhammad Rasheed, Muhammad Khalid, Zafar Iqbal and Muhammad Gulzar adopted the same stance as taken by accused Muhammad Ramzan.

All the accused persons neither appeared as their own witness under section 340(2), Cr.P.C. in disproof of the allegations levelled against them nor produced any evidence in their defence.

8. After conclusion of the trial, co-accused namely Muhammad Rasheed; Muhammad Khalid, Zafar Iqbal and Muhammad Gulzar were acquitted from the charges, whereas appellant Muhammad Ramzan was convicted and sentenced by the learned trial Court, as mentioned above.

9. Learned counsel for the appellant in support of Criminal Appeal No.1447 of 2005 contends that matter was reported to police after due deliberations and consultations; that both the eye-witnesses namely Muhammad Siddique (P.W.8) and Mushtaq Ahmad (P.W.9) were not present at the place of occurrence at the relevant time and in fact it was an un-witnessed occurrence; that P.Ws. are highly interested witnesses as Muhammad Siddique (P.W.8) is real brother of the deceased whereas other witness namely Mushtaq Ahmad (P.W.9) is paternal cousin of the deceased, therefore, their testimony cannot be relied unless and until same are corroborated by any strong piece of other evidence; that there are material contradictions in the statements of eye-witnesses such as, P.W.8 has denied his relationship with Mushtaq Ahmad (P.W.9) whereas Mushtaq Ahmad has admitted this relationship; that police station falls on the way if one has to go to Mayo Hospital from the place of occurrence, but nobody has informed the police about this occurrence and the matter was reported with a considerable delay. As far as recovery of `Chhurri' is concerned, learned counsel contends that said recovery has lost its value because `Chhurri' was not sent to the Serologist and as such the origin of blood on the `Chhurri' could not be ascertained; that even otherwise, this recovery has not been proved because same was not witnessed by any independent witness; that P.W.11 Babar Ali has not been able to state any reason as to why on the day of alleged recovery he was present at the police station; that even Investigating Officer has not given any plausible reason for presence of P.W.11 at the relevant time at the police station. About the motive part, learned counsel contends that prosecution has miserably been failed to prove motive and' even learned trial Court has disbelieved the motive; that prosecution case is full of doubts and the appellant is entitled to the benefit of doubt. Learned counsel for the appellant further contends that if this Court is not persuaded with the arguments of acquittal then it is not a case of capital punishment for the reasons that the motive, which was specifically alleged, has not been proved; that three persons from the appellant's side i.e. accused of conspiracy were acquitted by the learned trial Court and appeal against their acquittal has also been dismissed by this Court; that it is alleged by the prosecution that the appellant along with accused Muhammad Rasheed caused injuries, but no specific injury was attributed to anybody and only injury No.1 i.e. on the chest of the deceased was declared as fatal and it is not borne out as to who caused this injury and that occurrence took place on 4-8-2004 and as per statement of the appellant under section 342, Cr.P.C, which was recorded on 27-7-2005, he was around 18 years old.

10. On the other hand, learned Deputy Prosecutor-General assisted by learned counsel for the complainant contends that in the circumstances of this case, matter was promptly reported to police as first priority of the complainant's side was to make all possible efforts to save life of the injured, and then to report the matter, therefore, there is no delay in this context; that the appellant is nominated in the F.I.R., with a specific role of causing injuries on the person of the deceased and both the eye-witnesses are natural witnesses of the incident, who are residents of the same village where occurrence took place; that there was no suggestion from the appellant's side that said witnesses had any enmity with the

appellant; that ocular account in this case is fully supported by medical evidence on the record as the deceased as per postmortem examination (Exh.PJ) received as many as nine injuries; that ocular account is further corroborated by recovery of `Chhurri', taken into possession vide recovery memo. (Exh.PD) and as per report of Chemical Examiner said `Chhurri' was blood-stained.

11. As far as the appeal against acquittal i.e. Criminal Appeal No.1676 of 2005 is concerned, learned counsel contends that eye-witness account remained consistent against respondent Muhammad Rasheed and convict Muhammad Ramzan, but the learned trial Court has not given any valid reason for acquittal of respondent Muhammad Rasheed, who is fully involved in this case; that non-recovery of weapon of offence is not material and conviction of capital charge can be maintained without recovery if ocular account is confidence inspiring and supported by the medical evidence, which is case of the prosecution in the instant matter.

12. In support of Criminal Revision No.816 of 2005, learned counsel contends that sentence of compensation awarded to convict Muhammad Ramzan is inadequate, which may be enhanced.

13. Learned counsel for respondent No.1 Muhammad Rasheed opposed the appeal against acquittal on the ground that case of said respondent is distinguishable from convict Muhammad Ramzan as no recovery was effected from him and that now he enjoys double presumption of innocence in his favour as he has been acquitted by the learned trial Court and the reasons given by the learned trial Court for his acquittal are valid and convincing.

14. We have heard the learned counsel for the parties at length, have given anxious consideration to their arguments and have also scanned the record with their able assistance.

15. We have noticed that occurrence took place on 4-8-2004 at about 8-00/8-30 a.m. in the fields situated in Ali Nagar near Gulshan-e-Farid Town, Ferozewala, whereas the matter was reported to police at 10-30 a.m. on the same day at Mayo Hospital, Lahore. It is clearly mentioned in the F.I.R. that when the deceased Mehmood Ahmad received injuries he was taken to hospital and on his way he died. It is known to everybody that in such like situation first priority of the complainant's side is to save life of the injured instead of reporting the matter to police. Therefore, considering this aspect of the matter, we are of the view that about two hours delay in reporting the matter to police, in the circumstances of the case is not of much importance.

16. The ocular account in this case has been furnished by P.W.8 Muhammad Siddique and P.W.9 Mushtaq Ahmad. They both are residents of the place where the occurrence took place. It is in the cross-examination of P.W.8 that his house is just at a distance of one kilometer from the place of occurrence and same is the case of other witness i.e. P.W.9. There was no suggestion to these P.Ws. that they were not residents of the area where occurrence took place. Mere relationship of the complainant (P.W.8) and the eye-witness (P.W.9) with the deceased is not a ground to disbelieve their evidence, which is confidence

inspiring on all material aspects of the case and especially when there was no deep-rooted enmity between the complainant party and the accused. It is by now well settled that mere relationship of the witnesses is not a ground itself to discredit their testimony. In this respect, we place reliance on the judgment reported as Haji v. The State (2010 SCMR 650) wherein the Hon'ble Supreme Court has observed as under:-

> "Both the ocular witnesses undoubtly are inter se related and to the deceased but their relationship ipso facto would not reflect adversely against the veracity of the evidence of these witnesses in absence of any motive wanting in the case, to falsely involve the appellant with the commission of the offence and there is nothing in their evidence to suggest that they were inimical towards the appellant and mere inter se relationship as above noted would not be a reason to discard their evidence which otherwise in our considered opinion is confidence-inspiring for the purpose of conviction of the appellant on the capital charge being natural and reliable witnesses of the incident."

Therefore, we do not find any reason to doubt the testimony of P.W.8 and P.W.9 qua the appellant, which otherwise is fully supported by medical evidence available on the record, as the doctor who conducted postmortem examination of the deceased has observed nine incised wounds on his person and it is the case of the prosecution that the appellant along with his co-accused (since acquitted) caused injuries to the deceased, with `Chhurris'.

17. So far as the recovery of `Chhurri' at the instance of the appellant is concerned, we are of the view that prosecution remained fail to establish the fact that blood found on the `Chhurri' was human blood as no report of the Serologist is available on the record.

18. Motive part of the occurrence as per F.I.R. and statements of the witnesses, before the learned trial Court was that one day prior to the occurrence, a quarrel took place between Muhammad Gulzar, father of the appellant (since acquitted) and Mehmood Ahmad deceased due to which, conspiracy for murder of the deceased was hatched. But the story of conspiracy has not been believed by the learned trial Court and even appeal against acquittal to the extent of three accused namely Muhammad Gulzar, Muhammad Khalid and Zafar Iqbal was also dismissed by this Court vide order dated 2-3-2006. No independent witness in this respect has been examined and we are of the view that learned trial Court has rightly disbelieved the motive part. But, even if the motive and recovery of `Chhurri' are excluded from consideration, there remains sufficient evidence in the form of ocular account fully supported by medical evidence. Therefore, we maintain the conviction of appellant Muhammad Ramzan under section 302(b), P.P.C., which in our view is based upon well settled principles of appreciation of evidence.

19. As far as quantum of sentence is concerned, we have noted certain extenuating circumstances, which are as under:

(i) It is the case of the prosecution that appellant and his acquitted co-accused namely Muhammad Rasheed caused injuries to the deceased, but there is no specific injury attributed to either of them and as per postmortem

examination, it was only injury No.1 which was fatal and it is not known as to who caused that injury. In this context, we respectfully refer the judgments of the Honourable Supreme Court of Pakistan reported as Allah Dad and another v. The State (1995 SCMR 142), and Shehruddin v. Allah Rakhio and 5 others (1989 SCMR 1461), wherein it has been held that when it is not ascertainable with certainty in the circumstances of the case that who' caused fatal injury to the deceased, the death sentence is liable to be modified.

(ii) The prosecution alleged a specific motive which was to the effect that there was a quarrel taken place between the deceased and fattier of the appellant, but that motive has not been believed by the learned trial Court and even the story of conspiracy has also been disbelieved, which creates doubt as far as the motive part is concerned.

(iii) Statement of the appellant under section 342, Cr.P.C. was recorded on 27-7-2005 wherein he is mentioned to be 19 years old, which means that at the time of occurrence he was around 18 years of age.

Therefore, we are convinced that the appellant in the peculiar circumstances of this case deserves benefit of doubt to the extent of his sentence one out of two provided under section 302 (b), P.P.C. It is well-recognized principle by now that accused is entitled for the benefit of doubt as an extenuating circumstance while deciding his question of sentence. Reliance is placed on the judgment reported as Mir Muhammad alias Miro v. The State (2009 SCMR 1188) and case of Ansar Ahmad Khan Barki v. The State and another (1993 SCMR 1660).

20. Resultantly, while maintaining the conviction of appellant Muhammad Ramzan under section 302(b), P.P.C., his sentence is altered from death to imprisonment for Life with the benefit of section 382-B Cr.P.C, however, the penalty of compensation and the sentence in default thereof as ordered by the learned trial Court are maintained; accordingly with this modification in the sentence Criminal Appeal No.1447 of 2005 is dismissed. Death sentence of convict Muhammad Ramzan is not confirmed and Murder Reference No.03 of 2006 is answered in the Negative.

21. As far as Criminal Appeal No.1676 of 2005 against acquittal of accused/respondent No.1 Muhammad Rasheed is concerned, we have gone through the judgment passed by the learned trial Court and find that there was no recovery of `Chhurri' from the said respondent and we are in agreement with the learned trial Court as far as the acquittal of respondent Muhammad Rasheed is concerned. It has been held by the Honourable Supreme Court of Pakistan in the judgment reported as Haji Amanullah v. Munir Ahmad and others (2010 SCMR 222) that when an accused person is acquitted by the trial Court, he enjoys double presumption of innocence and to dislodge that presumption very strong and convincing reasons are required, but no such reasons are reflected from the record, therefore, the acquittal of respondent No. 1 Muhammad Rasheed as ordered by the learned trial Court is maintained and Criminal Appeal No. 1676 of 2005 stands dismissed. In the light of our

above findings, we do not find any reason to enhance the compensation awarded by the learned trial Court, so Criminal Revision No, 816 of 2005 is also dismissed.

M.H./M-89/L Order accordingly.

2011 P Cr. L J 815
[Lahore]
Before Manzoor Ahmad Malik and Muhammad Anwaarul Haq, JJ
USMAN alias KALOO and another-Appellants
Versus
THE STATE and another---Respondents

Criminal Appeal No. 1981 of 2005 and Murder Reference No. 76 of 2006, decided on 27th January, 2011.

(a) Penal Code (XLV of 1860)---
----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Sentence, reduction in---Benefit of doubt---Promptly lodged F.I.R. with all the necessary details of the occurrence had ruled out the possibility of any concoction or deliberation on behalf of the prosecution---Accused had been apprehended at the spot and got medically examined by the police immediately on the same night---Concessional statement of a Foot Constable was of no help to the accused in view of the overwhelming prosecution evidence available on record---Complainant, and other eye-witnesses being residents of the same village were natural witnesses of the occurrence---Ocular testimony was consistent on all material aspects of the case---Eye-witnesses had no enmity of any sort with the accused and their close relationship with the deceased was not sufficient to- discard their testimony---Medical evidence had substantially supported the ocular account qua the fatal shot received by the deceased---Conviction of accused having been based on well recognized principles of appreciation of evidence was maintained---Deceased according to F.I.R. had received a single fire-arm injury, but seven other blunt weapon injuries on his person, as mentioned in the postmortem report, had not been explained---No crime empty was recovered from the spot, no bullet was taken into possession by the Investigating Officer and even the pistol, so recovered, was. not sent to the Fire-arm Expert for opinion---Specific motive alleged in the F.I.R. was not substantiated in court---What had exactly happened between the accused and the deceased just prior to the incident, had remained a mystery---Case was of single fire at the back of the deceased---Accused in view of the said mitigating circumstances deserved the benefit of doubt to the extent of his sentence, one out of the two provided under S. 302(b), P.P.C.---Death sentence of accused was altered to imprisonment for life in circumstances.
Muhammad Sharif v. Muhammad Javed alias Jeda Tedi and 5 others PLD 1976 SC 452; Bagu v. State- PLD 1972 SC 77; Haji v. The State 2010 SCMR 650; Khalid Saif Ullah v. The State 2008 SCMR 688; Mir Muhammad alias Miro v. The State 2009 SCMR 1188 and Ansar Ahmad Khan Barki v. The State and another 1993 SCMR 1660 ref.
(b) Penal Code (XLV of 1860)---
----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Concessional statement made by formal witnesses---Value---Obliging concessions made by formal witnesses such as police constables cannot be of any value.

Muhammad Sharif v. Muhammad Javed alias Jeda Tedi and 5 others PLD 1976 SC 452 and Bagu v. State PLD 1972 SC 77 ref.

(c) Penal Code (XLV of 1860)---
----S. 302(b)---Qatl-e-amd---Sentence---Benefit of doubt---Accused is entitled to benefit of doubt in the matter of his sentence, if any mitigating circumstance is found in his favour.
Mir Muhammad alias Miro v. The State 2009 SCMR 1188 ref.

(d) Penal Code (XLV of 1860)---
----S. 302(b)---Qatl-e-amd---Burden of proof---Prosecution is bound by law to exclude all possible extenuating circumstances in order to bring the charge home to the accused for the award of normal penalty of death.

Ansar Ahmad Khan Barki v. The State and another 1993 SCMR 1660 ref.
Abdul Hameed Rana and Ijaz Ahmad Bajwa (Defence Counsel at State Expense) for Appellants.
Chaudhry Muhammad Mustafa, Deputy Prosecutor-General for the State.
Nazir Ahmad Shami for the Complainant.
Dates of hearings: 26th and 27th January, 2011.

JUDGMENT

MUHAMMAD ANWAARUL HAQ, J.---Usman alias Kaloo appellant was tried in case F.I.R. No. 108, dated 6-3-2005, registered at Police Station Tandlianwala, District Faisalabad in respect of offences under section 302, P.P.C. read with section 13 of the Arms Ordinance XX of 1965. After conclusion of trial, learned trial Court vide its judgment dated 30-11-2005 has convicted the appellant under section 302(b), P.P.C. and sentenced him to `Death' for committing Qatl-e-amd of Noor Ahmad, (deceased). He was also ordered to pay Rs.50,000 (rupees fifty thousand only) as compensation to the legal heirs of the deceased under section 544-A, Cr.P.C. and in default thereof to further undergo S.I. for six months.

2. Feeling aggrieved, the appellant while challenging his conviction and sentence has filed Criminal Appeal No. 1981 of 2005, whereas learned trial Court has transmitted Murder Reference No. 76 of 2006 for confirmation or otherwise of the Death sentence of Usman alias Kaloo appellant. Both these matters being integrated are being disposed of together.

3. Prosecution story in brief unfolded in the F.I.R. (Exh.PB) by Zahoor Ahmad complainant (P.W.3) is that on 5-3-2005 at about 11-30 p.m. he along with his brother Manzoor Ahmad and one Ghulam Farid was sitting with his mother, in the meantime, his other brother Noor Ahmad arrived there and called his wife at the house of his door, upon which his wife Mst. Parveen Bibi opened the door and Usman alias Kaloo (appellant) came out from the house, Noor Ahmad caught hold Usman alias Kaloo from his legs, Usman alias Kaloo fired a shot from his pistol .30 bore which hit on the back of Noor Ahmad (deceased), who succumbed to the injury at the spot. The complainant along with P.Ws. apprehended Usman alias Kaloo accused and Manzoor Ahmad caused him some injuries with a Sota. Motive behind the occurrence as mentioned in the F.I.R. (Exh.PB) was that Mst. Parveen Bibi had illicit

relations with the appellant Usman alias Kaloo and due to this reason, he has committed this occurrence.

4. On 6-3-2005, on receipt of information about this occurrence, Nazar Hussain S.I. (P.W.10), along with other police officials, reached at the spot and recorded statement of the complainant (Exh.PH) at 12-55 a.m. (same night). Zahoor Hussain complainant (P.W.3) along with Manzoor Ahmad and Ghulam Farid P.Ws. handed over custody of Usman alias Kaloo (appellant) along with a pistol .30 bore (P-l) to him which pistol was taken into possession by the Investigating Officer vide recovery memo (Exh.PC) and he sent the complaint (Exh.PH) to the police station for registration of formal F.I.R, then, he prepared injury statement (Exh.PF) and inquest report (Exh.PG) of the deceased, sketched the rough-site plan of the place of occurrence (Exh.PJ) and sent the dead body of Noor Ahmad (deceased) for autopsy. He collected blood-stained earth from the spot and secured the same vide recovery memo (Exh.PD). He recorded statements of the P.Ws. under section 161, Cr.P.Code. He took Usman alias Kaloo (appellant) in injured condition to Tehsil Headquarter Hospital, Tandliaidwala and got him medically examined.

5. After completion of investigation, challan against the appellant was submitted before the learned trial court, charge was framed against him to that he pleaded not guilty and claimed trial.

6. To substantiate the charge the prosecution had examined ten witnesses in total. Dr. Nasir Mehmood (P.W.9) and Dr. Abdul Sattar (C.W.1) provided medical evidence, Nazar Hussain S.I. (P.W.10) conducted investigation of this case, whereas Zahoor Ahmad, complainant (P.W.3), Ghulam Farid (P.W.6) and Manzoor Ahmad (P.W.7) had furnished the ocular account.

7. On 6-3-2005 Dr. Nasir Mehmood (P.W.9) conducted post-mortem examination on the dead body of Noor Ahmad and found as under:

(1) (i) An inverted margin lacerated wound 0.6 cm x 0.3 cm on the backbone in lower thoracic region (wound of entry).
(ii) An everted marginlacerated wound 1.5 cm x 1.2 cm on the lateral side of left chest 10 em below the axilla.
(2) An abrasion 2 cm x 1.6 cm on the upper back of right forearm.
(3) An abrasion 3 cm x 0.4 cm on the mid front surface of right forearm.
(4) An abrasion 0.6 cm x 0.3 cm on the front of right elbow.
(5) An abrasion 0.3 cm x 0.3 cm on the lowest front of right arm.
(6) Two abrasions 2 cm x 0.3 cm and 1.3 cm x 0.3 cm on the upper most part of front surface of right forearm.
(7) Two abrasions 1.6 cm x 0.5 cm and 0.8 cm x 0.4 cm on the medial side of right knee.
(8) An abrasion 0.3 cm x 0.2 cm on the front surface of left great toe.

In his opinion, the cause of death was injury No.1, which damaged left lung and its vessels, that caused haemorrhage and shock which was sufficient to cause death in

ordinary course of nature. Injury No. 1 was inflicted by firearm while injuries Nos.2 to 8 were simple in nature, ante mortem, caused by blunt weapon.

Probable time elapsed between injuries and death was half to one hour and between death and post mortem about 12 hours.

On the same night at about 2-00 a.m. Dr. Abdul Sattar (C.W.1) conducted medical examination on the person of Usman alias Kaloo (appellant) on the application of police (Exh.C-2) and observed as under:--

(1) A lacerated wound 3 cm x 0.2 cm on back of head: Advised X-ray K.U.O
(2) A lacerated wound 2 cm x 0.5 cm on back of right elbow.
(3) A contused swelling on lower abdomen.
(4) A lacerated wound on right lower leg 2 cm x 1 cm inner side.
(5) A lacerated wound on left lower leg 2 cm x 1 cm outer side.
(6) A contused swelling on left buttock.2 cm.x 4 cm.

He declared injury No.1 under section 337-A(ii), P.P.C., Injuries Nos. 3 and 6 under section 337-L(2), P.P.C., Injuries Nos. 2, 4 and 5 under section 337-F(iii), P.P.C.

In his opinion, all the injuries were caused by blunt weapon, fresh in duration and the injured was vitally stable with normal B.P. and temperature.

8. The appellant was examined under section 342, Cr.P.C. He denied the allegation and professed his innocence. While answering to question (Why this case against you and why the P.Ws. have deposed against you?), he replied as under:--

"I am innocent. P.Ws. are related inter se while P.W. Ghulam Farid is Zimindar of the locality. The deceased was his driver. Under suspicion prosecution involved me in this false case; actually it was a blind murder. I have no any enmity with the deceased."

In reply to question No. 4 regarding his arrest from the spot and recovery of crime weapon he replied as under:--

"It is incorrect. It was a blind murder. I was called from my house, police and complainant party tortured me and gave a severe beating only under suspicion and forced me to confess the crime and on my refusal police gave me severe beating and recorded a false story posing it to explain by me. Mother of deceased, wife of deceased and other inmates of the deceased did not appear before me and made any statement against inc. It is a false case".

The appellant did not make statement under section 340(2), Cr.P.C. however, on his application Dr. Abdul Sattar appeared as (C.W.1). Learned trial Court vide its judgment-dated 30-11-2005 found the appellant guilty and convicted and sentenced him as mentioned above, hence, these matters before this Court.

9. Learned counsel for the appellant, in support of this appeal, contends that case against the appellant is totally false, it was a night time blind murder and nobody had witnessed the incident; that the most natural witnesses of this incident were the mother, wife and children of the deceased but none of them were examined during the course of investigation; that ocular account furnished by the ,prosecution is not supported by medical evidence and there are material contradictions between ocular and medical evidence as in the F.I.R. and in other documents prepared by the police, there was only one firearm injury on the person of the deceased whereas in the postmortem report (Exh. PE) there were eight wounds on the person of the deceased, one was caused by firearm weapon whereas other seven wounds by blunt weapon but there is no explanation by the prosecution regarding those injuries; that there was no blackening around injury No.1; that it is the case of the prosecution that the appellant was arrested at the spot, which fact is belied by Muhammad Arif 1473/C-1 (P.W.8), who has categorically stated that he remained along with Investigating Officer (P.W.10) for a considerable time and the appellant was not in the custody of the police, Dr. Abdul Sattar (C.W.1), who medically examined the appellant nowhere mentioned in the M.L.R. (Exh.'C-1) that the appellant was brought by the police; that nothing was recovered from the appellant and the prosecution has miserably been failed to prove the motive as it has been admitted by the Investigating Officer (P.W.10) that no witness in this respect was examined during the course of investigation; that there is no allegation of repetition of fire- by the appellant; that the pistol allegedly recovered from the appellant by the complainant and his P.Ws., was handed over to the Investigating Officer (P.W.10) but the same was not sent to the Forensic Science Laboratory for expert opinion and no crime-empty was recovered from the spot and even no bullet was recovered from the appellant and there is no explanation for non-recovery of crime-empty and all these circumstances make the prosecution story Highly doubtful. Learned counsel in the alternative submits that there was no previous enmity between the parties and it remained shrouded in mystery as to what exactly had happened between the deceased and the appellant immediately prior to the occurrence and that prosecution has not been able to prove the ease against the appellant beyond reasonable doubt, even otherwise it's the case of the prosecution that appellant, if fired, he diddle same in his self defence, therefore,' he deserves lesser penalty in the circumstances of the case.

10. On the other hand, learned Deputy Prosecutor-General assisted by learned counsel for the complainant opposes this appeal on the grounds that the appellant being a single accused in this case is duly nominated in a promptly lodged F.I.R. with specific role of making fatal fire shot hitting the deceased on his back; that prosecution case has fully been proved through ocular account supported by medical evidence hence, the appellant does not deserve any leniency and is not entitled to any exception.

11. We have heard the learned counsel for the parties at length, and have given anxious consideration to their arguments and have also scanned the record with their able assistance.

12. In this case, occurrence took place on 5-3-2005 in the night time at about 11-30 p.m. matter was promptly reported to the police by Zahoor Ahmad complainant (P.W.3) on the same night at 12-55 a.m. and formal F.I.R. (Exh.PB) was registered at 1-15 a.m. whereas the distance between the police station and place of occurrence is about five k.m. post-mortem examination on the dead body of the deceased was also conducted on 6-3-2005 at

10-00 a.m. We have noticed that it is a promptly lodged F.I.R. with all the necessary details of this unfortunate occurrence that rules out the possibility of any concoction or deliberation on behalf of the complainant/prosecution.

13. The main question for determination before us in this case is whether the appellant was arrested by the prosecution witnesses at the spot and whether he was got medically examined by the police, the learned counsel for the appellant has strongly argued that the appellant was not arrested at the spot rather he was called upon from his house and thereafter was arrested. We have noted that in this case statement of the complainant was recorded at the spot at 12-55 a.m. formal F.I.R. (Exh.PB) was recorded by the police at 1-15 a.m. and thereafter the appellant was taken to the hospital for his medical examination. Though, in the Medico-Legal Report (Exh. C-1) it is not mentioned that the appellant was brought by the police yet at the same time there is a `document on the record i.e. application for medical examination (Exh.C-2) which was prepared by Nazar Hussain S.I. (P.W.10) and said application was signed by the doctor, who medically examined the appellant and that doctor when appeared before the Court as C.W.1 has categorically stated that he has signed that application, he was not cross-examined on behalf of the appellant on this aspect of the matter, therefore, we have come to the conclusion that the appellant was apprehended at the spot and was got medically examined by the police at 2-00 a.m. on the same night. Concessional statement of Muhammad Arif 1473/C-I (P.W.8) in view of the overwhelming evidence available in this regard is of no help to the accused. It is well settled by the Hon'ble Supreme Court of Pakistan that obliging concessions made by formal witnesses such as police constables cannot be of any value. We respectfully refer the case of Muhammad Sharif v. Muhammad Javed alias Jeda Tedi and 5 others (PLD 1976 Supreme Court 452) wherein Hon'ble Supreme Court has emphasized as under:

> "Experience has shown that this type of modus operandi by unscrupulous and successfully tackled patwaris and F.Cs. has become quite usual. Although in the instant case, this part of the evidence of the Constable is not worth a moment's consideration in damaging concessions are elicited by the defence from formal witnesses in accordance with a previous understanding".

In the case of Bagu v. State (PLR 1972 SC 77) Hon'ble Supreme Court has emphasized as under:

> "Before parting with this case, we cannot help observing that the frequency with which cases are coming up before us wherein formal witnesses, particularly foot constables, are found to be obliging the defence in cross-examination with regard to matters wholly unconnected with the part the witnesses took in the investigation, is causing us some concern. We entirely agree with the observations of one of the learned Judges of the Peshawar High Court in the case of Sikandar Shah v. The State that the obliging concessions made by such witnesses in cross-examination cannot be considered to be of any value. We also hope that the Provincial Governments will take note of these observations and take steps to check such propensities on the part of their own subordinate police Constables".

14. All the P.Ws. are the residents of the same village where occurrence took place. Zahoor Ahmad complainant (P.W.3) and Manzoor Ahmad (P.W.7) are real brothers of the deceased and in view of the Site Plan (Exh. PA) it is not disputed that house of the mother of the deceased was adjacent to the house of the deceased, therefore, presence of P.W.3 and P.W.7, who are real brothers of the deceased, in the house of their mother is quite natural and similarly, Ghulam Farid (P.W.6) is also resident of the same village where occurrence took place, they remained consistent on all material aspects of the case that the deceased tried to apprehend the appellant when he came out of his house and thereafter he fired a shot at the deceased. Though, Zahoor Ahmad complainant (P.W.3) and Manzoor Ahmad (P.W.7) are very closely related to the deceased yet we do not find any reason of false implication of the appellant by them in this case, even otherwise, there is no reason to doubt their testimonies because they have no enmity of any sort with the appellant. Mere relationship of the witness is not sufficient to discard his testimony. In this respect, we respectfully refer the case of Haji v. The State (2010 SCMR 650). Even otherwise, substitution in such like cases where two eye-witnesses are real brothers of the deceased, is a rare phenomenon because it is impossible that real brothers of the deceased would let off the real culprit and shall substitute some innocent, person in a murder case. Here, we refer the case of Khalid Saif Ullah v. The State (2008 SCMR 688). We are of the considered view that ocular account is substantially supported by medical evidence qua the fatal shot received E by the deceased.

15. As regards evidence of recovery of pistol .30 bore (P-1) taken into possession by the Investigating Officer vide recovery memo (Exh.PC) from the appellant, it is evident from the record that no crime-empty was recovered from 'the spot and even the recovered weapon was not sent to the Forensic Science Laboratory for expert opinion and no convincing evidence in this regard was produced by the prosecution, we are of the view that it does not help to the prosecution. But even if the evidence of motive and recovery of pistol is excluded from consideration, for maintaining the conviction of the appellant there remains sufficient and convincing evidence against the appellant in the form of ocular account supported by medical' evidence and the appellant's arrest at the spot by the P.Ws. In view of the above, we are satisfied that finding of conviction of the appellant recorded by the learned trial court is quite in accordance with law and is based upon well recognized principles of appreciation of evidence in a criminal case, I hence, conviction of the appellant under section 302(b), P.P.C. recorded by the learned trial court is maintained.

16. So far as the question of quantum of sentence of the appellant is concerned, we have noticed certain mitigating/extenuating circumstances in his favour:--

(i) that according to the F.I.R. (Exh.PB), there was a single firearm injury on the person of Noor Ahmad (deceased) but in the post mortem report (Exh.PE) seven other injuries, caused by blunt weapon, were mentioned but there is no explanation available on the record regarding those injuries.

(ii) that no crime-empty was recovered from the spot, no bullet was taken into possession by the Investigating Officer and even the pistol (P-1), so recovered, was not sent to the Firearm Expert for expert opinion.

(iii) that prosecution has alleged a specific motive in the F.I.R. that Mst. Parveen Bibi had illicit relations with the appellant Usman alias Kaloo, but in this respect, it did not produce any witness and the Investigating Officer while appearing before the Court as P.W.10 has admitted that he has not investigated this aspect of the case, therefore it remained shrouded in mystery that what exactly had happened between the appellant and the deceased.

(iv) That it is a case of single fire at the back of the deceased.

In view of all above, we are convinced that appellant in the peculiar circumstances of this case deserves benefit of doubt to the extent of his sentence one out of two provided under section 302(b), P.P.C. It is well-recognized principle by now that accused is entitled for the benefit of doubt as an extenuating circumstance while deciding his question of sentence. Here, we very respectfully refer the case of Mire Muhammad alias Miro v. The Sate (2009 SCMR 1188).

In another case Ansar Ahmad Khan Barki v. The State and another (1993 SCMR 1660), Hon'ble Supreme Court of Pakistan has held that the prosecution is bound by law to exclude all possible extenuating circumstances in order to bring the charge home to the accused for the award of normal penalty of death.

17. We therefore, while maintaining conviction of Usman alias Kaloo, appellant under section 302(b), P.P.C., alter his sentence of Death into Imprisonment for Life. The amount of compensation and sentence in default thereof as ordered by the learned trial court shall remain intact. Benefit of section 382-B, Cr.P.Code is also extended to the appellant. Criminal Appeal No. 1981 of 2005 is disposed of with the above modification in the quantum of sentence.

18. Murder Reference No. 76 of 2006 is answered in the Negative and death sentence awarded to Usman alias Kaloo is Not confirmed.

N.H.Q./U-2/L Sentence reduced.

2011 P Cr. L J 1540
[Lahore]
Before Manzoor Ahmad Malik and Muhammad Anwaarul Haq, JJ
MUHAMMAD RAFIQUE SHAH alias HEERA---Appellant
Versus
THE STATE---Respondent

Criminal Appeal No. 4-J of 2008 and Murder Reference No. 614 of 2006, heard on 9th June, 2011.

Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-e-amd---Appreciation of evidence---No time of occurrence was mentioned in the F.I.R.---Prosecution witnesses while appearing before the court had made

dishonest improvements on material aspects of the case---Draftsman, who had prepared the site plan, had admitted that no source of light was seen or mentioned by him; and that neither the premises was electrified nor any such source was mentioned by the prosecution witnesses---Fact that there was no source of light at place of occurrence at relevant time was established---Prosecution witnesses could easily overpower accused, who was not carrying any weapon, but despite that they did not try to intercept accused---Prosecution had failed to prove the motive part of the occurrence---Recovery of bricks at the instance of accused also carried no value as it was the case of the complainant himself that at the time of occurrence accused was holding single brick in his hand, which was thrown by him at the spot---Investigating Officer had offered a very novel excuse for non-recovery of the bricks at the time of his first inspection---Recovery of two blood-stained bricks, in circumstance, at the instance of accused and report of chemical examiner, were of no avail for the prosecution---Medical evidence could confirm the ocular evidence with regard to the receipt of the injury, kind of weapon, duration between the injury and the death, but it could not connect accused with commission of crime---Medical evidence alone could not corroborate as he injury could not speak of its author; and it did not establish the identity of accused---Prosecution story as narrated in the F.I.R., did not appeal to reasons and was doubtful in nature---Single instance causing a reasonable doubt in the mind of the court, would entitle accused to the benefit of doubt, not as a matter of grace, but as a matter of right-Conviction and sentence recorded by the Trial Court against accused through impugned order, were set aside and accused was acquitted of the charge.

Liaquat Ali v. The State 2008 SCMR 95; Mst. Shamim and 2 others v. The State and another 2003 SCMR 1466: Muhammad Akram v. The State 2009 SCMR 230 and Muhammad Luqman v. The State PLD 1970 SC 10 ref.
Maqbool Ahmad Qureshi for Appellant.
Shahid Bashir, Deputy Prosecutor-General for the State.
Date of hearing: 9th June, 2011.

JUDGMENT

MUHAMMAD ANWAARUL HAQ, J.---Appellant Muhammad Rafique Shah alias Heera was tried in case F.I.R. No.53 of 2006 dated 20-1-2006, registered at Police Station Saddar District Pakpattan Sharif in respect of offence under section 302, P.P.C. After conclusion of trial, learned trial Court vide its judgment dated 15-7-2006 has convicted the appellant under section 302(b), P.P.C. and sentenced him to DEATH with a compensation of Rs.100,000 under section 544A, Cr.P.C. to the legal heirs of the deceased and in default thereof to further undergo six months' S.I. Benefit of section 382-B, Cr.P.C. has been extended to the appellant.

Murder Reference No.614 of 2006 for confirmation or otherwise of death sentence awarded to appellant Muhammad Rafique Shah alias Heera shall also be disposed of through this single judgment.

2. Prosecution story in brief unfolded in the F.I.R. (Exh.PC) got registered by the complainant Muhammad Anwar (P.W.7) is that on 19-1-2006 at about 7-00 p.m. the accused

Muhammad Rafique Shah visited the house of the complainant and took along with him his brother Muhammad Yaqoob (deceased), who did not return back till late hours of the night, upon which, the complainant, in search of his brother, reached at the tea shop of Muhammad Rafique and inquired about his brother, who apprised him that one hour before, his brother after taking the tea has proceeded towards Railways Line along with Muhammad Rafique Shah; in the meantime, Muhammad Aslam and Muhammad Amin came there and told the complainant that they had seen Muhammad Yaqoob and Rafique Shah while going towards 'MUCHH' of Rafique Shah situated at Mughalpura Dakhli Tiba Sher Kot; the complainant along with Muhammad Aslam and Muhammad Amin reached at that place and saw that Muhammad Rafique Shah alias Heera was inflicting brick blows on the head, face and eyes of Muhammad Yaqoob deceased; on raising 'lalkara' by the complainant his companions the accused Muhammad Rafique Shah made his escape good taking advantage of darkness of the night and Muhammad Yaqoob succumbed to his injuries at the spot.

Motive behind this occurrence, as stated by the complainant, was that there was a money dispute between the accused Muhammad Rafique Shah and the deceased Muhammad Yaqoob, due to which, few days prior to this occurrence, an altercation also took place between both of them, however, the matter was patched up, but the accused Muhammad Rafique Shah nourished a grudge and committed the murder of Muhammad Yaqoob.

3. On submission of challan and after completion of procedural formalities, the accused/appellant was formally charge-sheeted by the learned trial Court under section 302, P.P.C., to which he pleaded not guilty and claimed trial. The prosecution examined as many as 10 witnesses to prove the charge against the accused. Dr. Muhammad Farooq Malik (P.W.1) provided medical evidence; Muhammad Iqbal, Inspector (P.W.10) conducted investigation of this case, whereas Muhammad Anwar (P.W.7) and Muhammad Amin (P.W.8) have furnished the ocular account.

4. On 20-1-2006 at 10-30 p.m., Dr. Muhammad Farooq Malik (P-. W.1) conducted post-mortem examination of Muhammad Yaqoob deceased and found the following injuries:--

(i) Multiple lacerations on the face. Maxiliary, mandibular and nasal bones were fractured. Eyes were depressed. Nose was also depressed.

(ii) Multiple lacerations on the head. Forehead was depressed. Skull bones were fractured and brain matter was visible.

In his opinion, cause of death was head injury resulting into severe damage .to the brain tissues and haemorrhage and shocks due to injuries Nos. 1 and 2, which were ante mortem, caused by blunt weapons and collectively sufficient to cause death in ordinary course of nature; probable time elapsed between the injuries and death was immediate and between the death and postmortem within 12 to 24 hours.

5. Learned ADA after tendering in evidence the reports of Chemical Examiner (Exh.PJ and Exh.PK) and that of the, Serologist (Exh.PK/1) closed the prosecution case.

6. Thereafter, statement of the accused as required under section 342, Cr.P.C. was recorded, in which he refuted all the allegations levelled against him and professed his innocence. While answering to question (Why this case against you and why the P. Ws. have deposed against you?), appellant Muhammad Rafique Shah alias Heera replied as under:--

> "This case has been falsely made" against me. I am a 'Malang' type of man. I came from Multan in order to attend ceremonies of Urs Hazrat Baba Farid-ud-Din (R.A), but with mala fide intention, the police implicated me falsely in this case in order to show the efficiency. The P. Ws. are interested witnesses. They have falsely deposed against me."

The accused/appellant neither appeared as his own witness under section 340(2), Cr.P.C. nor produced any evidence in his defence.

After conclusion of the trial, the appellant has been convicted and sentenced by the learned trial Court, as mentioned above.

7. Learned counsel for the appellant in support of this appeal contends that no specific time of occurrence is mentioned in the F.I.R; that the matter was reported to the police on the next day i.e. 20-1-2006 at 11-00 a.m. and the explanation offered for this delay is neither probable nor convincing as both the Police Stations are situated in the same vicinity; that even otherwise, story of the prosecution narrated in the F.I.R is highly improbable because as per the prosecution case the complainant along with two grownup persons while entering the place of occurrence had seen the appellant while giving brick blows to the deceased in a compound which had only one gate, but even then they remained unable to apprehend the appellant at the spot; that the recovery of two bricks at the instance of the appellant has no value as the complainant has stated that the accused had caused injuries with one brick which was thrown by him at the spot and was also lying there when the police inspected the spot; that motive is of "general nature that there was a money dispute between the appellant and the deceased and no evidence in this regard has been produced by the prosecution, rather the complainant has admitted that he was informed by the police that the appellant borrowed an amount of Rs.10,000 from the deceased; that the eye-witnesses have improved' their statements while appearing before the court and in the circumstances the appellant is entitled for acquittal.

8. On the other hand, learned Deputy Prosecutor-General opposes this appeal on the grounds that the appellant is nominated in the F.I.R, he has been fully implicated by the eye-witnesses Muhammad Anwar (P.W.7) and Muhammad Amin (P.W.8) who have no enmity with the appellant; that the delay in lodging of the F.I.R has reasonably been explained by the complainant in the F I R itself. Further contends that the ocular account is confidence-inspiring; that two blood-stained bricks were recovered by the police at the instance of the appellant and there is a positive report of the Serologist in this regard and that the prosecution has proved its case against the appellant beyond any shadow of doubt.

9. We have heard the learned counsel for the parties at length and have also scanned the record with their able assistance.

10. We have noted that for the following reasons the prosecution case against the appellant is doubtful:

(i) No time of occurrence is mentioned in the F.I.R, but in the statements of P.W.7 and P. W. 8 they have mentioned that occurrence took place at about 11-00 p.m. on 19-1-2006, but surprisingly the matter was reported to the police on 20-1-2006 at 11-00 a.m. and the explanation for this delay offered by the complainant that firstly he had approached Police Station Farid Nagar for reporting the matter, but afterwards came to know that the place of this incident falls within the jurisdiction of Police Station Saddar Pakpattan, is not convincing as both the said Police Stations were situated in the same city within an area of two kilometers inter se as stated by the complainant himself during the cross-examination.

(ii) P.W.7 and P.W.8 while appearing before the court have made dishonest improvements on material aspects of the case, to which they were duly confronted during their cross-examination, and this creates a serious dent in the prosecution case.

(iii) As per the prosecution case, place of occurrence was a `MUCHH' (a compound where people sit around fire in 'winter); but no other source of light has been shown and it has also been admitted by the draftsman (P.W.2), who has prepared the site plan, that no source of light was seen or mentioned by him and that neither the premises was electrified nor any such source was mentioned by the P.Ws. Investigating Officer (P. W.10), at page-32 of the paper book, has categorically denied the presence of any burnt or unburnt woods or even the ash at the place of occurrence. Police even did not join into investigation owner of the `MUCHH', the compound where the occurrence took place. Investigating Officer has frankly conceded that he even did not probe regarding the ownership of the compound.

(iv) Site plan (Exh.PB) reveals that after entering the gate the witnesses were standing at Point No.2, whereas the appellant has allegedly caused injuries to the deceased at Point No.1. There is no other exit except the door at Point No. 3 from where the C witnesses claim to have entered and the appellant is alleged to have escaped after the occurrence; therefore, if the appellant had fled away through Point No.3 then certainly he would have been intercepted by the P.Ws. and in such a situation they could easily overpower the appellant when admittedly he was not carrying any weapon. Complainant in this case has stated his non-intervention in the following words:--

"The accused inflicted 3 or 4 brick blows on the person of the deceased in our presence. He was holding a single brick in his hand. We did not try to apprehend the accused at that time. The accused managed to escape after throwing the brick at the spot."

Another unnatural conduct shown by P.W.7 we observed with concern is at page-23 of the paper book, in the following words:--

> "My clothes were not stained with blood and nor those of the P.Ws., as we did not touch the deceased. It is incorrect that we were not present at the spot and that to same reason our clothes were not stained with blood."

Here we respectfully refer the case of Liaquat Ali v. The State (2008 SCMR 95), wherein the Hon'ble Supreme Court has observed as under:

> "Having heard learned counsel for the parties and having gone through the evidence on record, we note that although P.W.7 who is first cousin and brother-in-law of Fazil deceased claims to have seen the occurrence from a distance of 30 ft. (as given in cross-examination) and two other witnesses namely Musa and Ranjha were also attracted to the spot but none rescued Fazil deceased and appellant had a free hand to inflict as many as 9 injuries on his person. The explanation given by these witnesses that since Liaquat Ali had threatened them therefore, they could not go near Fazil deceased to rescue him is repellant to common sense as Liaquat Ali was not armed with a fire-arm which could have scared the witnesses away. He was a single alleged assailant and if the witnesses were there at the spot they could have easily overpowered him. This makes their presence at the spot doubtful."
>
> (v) Motive part of the occurrence as per F.I.R and statements of the witnesses before the learned trial court was that prior to this occurrence, an altercation took place between the deceased and the appellant on some money dispute. However, no independent witness in this respect has been examined and the complainant/P.W.7 in his cross-examination has stated that it was told to him by the police that the accused borrowed an amount of Rs.10,000 from the deceased. Therefore, we are of the view that the prosecution has failed to prove the motive in this case.
>
> (vi) Recovery of bricks at the instance of the appellant also carries no value as it is the case of the complainant himself that at the time of occurrence the accused/appellant was holding single brick in his hand, which was thrown by him at the spot and the same was lying there when the police has inspected the spot. In this regard, P.W.8 Muhammad Amin also confirmed the stance of the complainant that accused was causing injuries to the deceased with one brick only. Investigating Officer offered a very novel excuse for non-recovery of the bricks at the time of his first inspection, in the following words:--
>
> "The blood stained bricks were not taken into possession on the very first visit because being weapon of offence same were to be taken into possession on the pointation of the accused after his arrest."

In such a situation, recovery of two blood-stained bricks at the instance of the appellant and reports of the Chemical Examiner (Exh.PK) and of the Serologist (Exh.PK/1) are of no avail for the prosecution.

(vii) As far as the medical evidence is concerned, suffice it to say that the medical evidence may confirm the ocular evidence with regard to the receipt of the injury, kind of weapon, duration between the injury and the death, but it cannot connect the accused with the commission of the crime. It has been held in the case of Israr Ali v. The State (2007 SCMR 525) that medical evidence alone cannot corroborate, as the injury cannot .speak of its author, and it does not establish the identity of the accused.

11. In a criminal case, the most important point for determination for a court is, whether the prosecution story is probable and a prudent man believes the same on the face of it. Here we respectfully refer the observation of the Hon'ble Supreme Court in the case of Mst. Shamim and 2 others v. The State and another (2003 SCMR 1466), which reads as under:--

"The prosecution story being the foundation on which edifice of the prosecution case is raised occupies a pivotal position in 'a criminal case. It should, therefore, stand to reason and must be natural, convincing and free from any inherent improbability. It is neither safe to believe a prosecution story which does not meet these requirements nor a prosecution case based on an improbable prosecution story can sustain conviction."

Keeping in view the above observation of the Hon'ble Supreme Court in this case, we are of the considered view that the prosecution story as narrated in the F.I.R. does not appeal to reason and is doubtful in nature. It is cardinal principle of criminal jurisprudence that a single instance causing a reasonable doubt in the mind of the court entitles the accused to the benefit of doubt not as a matter of grace but as a matter of right. In this context, we respectfully rely on the case of Muhammad Akram vs. The State (2009 SCMR 230), wherein the Hon'ble Supreme Court has held as under:--

"The nutshell of the whole discussion is that the prosecution case is not free from doubt. It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

In the case of Muhammad Luqman v. The State (PLD 1970 SC 10), it was held that "a finding of guilt against an accused person cannot be based merely on the high probabilities that may be inferred from evidence in a given case. The finding as regards

his guilt should be rested surely and firmly on the evidence produced in the case and the plain inferences of guilt that may irresistibly be drawn from that evidence. Mere conjectures and probabilities cannot take the place of proof. If a case was to be decided merely on high probabilities regarding the existence or non-existence of a fact to prove the guilt of a person, the golden rule of "benefit of doubt" to an accused person, which has been a dominant feature of the administration of criminal justice in this country with the consistent approval of the Superior Courts, will be reduced to a naught."

12. Therefore, Criminal Appeal No.04-J of 2008 is allowed, the conviction and sentence recorded by the learned trial Court against the appellant through the impugned judgment dated 15-7-2006 are set aside and he is acquitted of the charge. The appellant is in jail, he shall be released forthwith if not required in any other case. Death sentence of convict Muhammad Rafique Shah alias Heera is not confirmed and Murder Reference No.614 of 2006 is answered in the Negative.

H.B.T./M-901/L Appeal allowed.

2011 P Cr. L J 1716
[Lahore]
Before Muhammad Anwaarul Haq, J
IMDAD HUSSAIN and another---Petitioners
Versus
THE STATE and others---Respondents

Criminal Miscellaneous No. 7856-B of 2011, decided on 13th July, 2011.

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

----S. 498---Penal Code (XLV of 1860), Ss.302/324/148 & 149---Qatl-e-amd and attempt to commit qatl-e-amd---Pre-arrest bail, grant of---Surrendering of accused and remanding him to judicial custody before granting pre-arrest bail---Deputy Prosecutor-General had argued that accused could not be allowed bail and they had to surrender and were required to be remanded to judicial custody---Argument of Deputy Prosecutor-General was misconceived as an accused, summoned in a private complaint, could validly move an application for bail; and same could be decided on merits within the parameters prescribed under Ss.497/498, Cr.P.C., keeping in view the guiding principles in that regard set up by apex Court.

Luqman Ali v. Hazaro and another 2010 SCMR 611 ref.

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

----S. 498---Penal Code (XLV of 1860), Ss.302, 324, 148 & 149---Qatl-e-amd and attempt to commit qatl-e-amd---Pre-arrest bail, grant of---Principles---Case was of two versions, one given by the complainant in the F.I.R. implicating accused persons; and the second given by the real brother of deceased through a separate private complaint against another set of

accused, but exonerating the accused persons---Injury attributed 'to accused on the elbow of deceased had not been declared fatal, whereas injury attributed to other accused on the person of prosecution witness, had been attributed to the co-accused---Accused persons during the investigation, were found innocent---Possibility of false implication of accused persons, could not be ruled out, in circumstances---While deciding a pre-arrest bail, some expected advancement in its investigation in the form of some recovery etc., after the arrest of accused was a relevant consideration, but in the present case accused persons had already been declared innocent during the investigation and there was no question of any recovery involved to their extent---Sending accused persons behind the bars only for the reason that they could be released on bail after their arrest, was unjustified--,Ad interim pre-arrest bail already allowed to accused persons was confirmed by High Court, in circumstances.

Muhammad Ramzan v. Zafar Ullah and another 1986 SCMR 1380 and Muhammad Aslam v. The State 2000 YLR 1341 rel.
Syed Ijaz Qutab for Petitioners.
Mirza Abid Majeed, Deputy Prosecutor-General for the State.
Ch. Muhammad Farid-ul-Hassan for the Complainant.
Safdar Ali, S.-I. with record.

ORDER

MUHAMMAD ANWAARUL HAQ, J.---Through this petition, petitioners Imdad Hussain and Ijaz Ahmad seek pre-arrest bail in a Private Complaint titled "Mazhar Farid v. Ahmad Khan etc.", under sections 302, 324, 148, 149, P.P.C., Police Station Haveli Lakha, District Okara.

2. Learned counsel for the petitioners contends that it is a case of two versions, one given in the F.I.R and second given by Shabbir Ahmad, real brother of the deceased Muhammad Tufail, through a separate private complaint totally exonerating the present petitioners; that no recovery was effected from the petitioners and during all the investigations in the State case they have been found innocent; that injury attributed to the petitioner Imdad Hussain in the F.I.R, hitting the left elbow of the deceased Muhammad Tufail, is not on the vital part of the body and was not found fatal; that no injury on the person of the deceased has been attributed to the petitioner Ijaz Ahmad. Further contends that the learned trial Court has already summoned the set of accused mentioned in the private complaint filed by Shabbir Ahmad and they are facing trial; that private complaint against the petitioners has been filed by the complainant with an inordinate delay of more than two months; that the stance taken by an eye-witness of the occurrence (real brother of deceased Muhammad Tufail) exonerating both the petitioners makes the case against them one of further inquiry into their guilt and that summoning order of the learned trial Court does not contain any reason whatsoever.

3. On the other hand, learned counsel for the complainant vehemently opposing this bail petition contends that petitioners are nominated in a promptly lodged F.I.R. with the specific role of causing firearm injuries; that the petitioner Imdad Hussain has been attributed injury on the person of the deceased, whereas petitioner Ijaz Ahmad has

been attributed injury on the person of the injured P.W. Zafar Iqbal; that version of the complainant in the F.I.R is substantially supported by the medical evidence and if there is any doubt that cannot be appreciated at this stage; that the petitioners even otherwise are responsible for the every act of their co-accused and are vicariously liable for the murder of two innocent persons. Also contends that pre-arrest bail is an extraordinary relief and cannot be granted in routine without the proof of mala fide on the part of the complainant or of the police and there is no such mala fide of the complainant to falsely involve the petitioners in this case. Learned Deputy Prosecutor-General emphasized that in view of the judgment of the Hon'ble Supreme Court of Pakistan in the case of Leqman Ali v. Hazaro and another (2010 SCMR 611), the petitioners cannot be allowed bail and they have to surrender and are required to be remanded to judicial custody, as desired in the dictum, referred above.
4. Arguments heard. Record perused.

5. The argument of the learned Deputy Prosecutor-General that in view of Luqman Ali's case (2010 SCMR 611) the petitioners have to surrender and are required to be remanded to judicial custody, is misconceived. For ready reference, Paras-I1 and 13 of the verdict are reproduced below:--

> "11. In such a situation when the accused appears in pursuance of process under section 204, Cr.P.C. either through summons or warrants or bailable warrants or on his own and if the offence is non-bailable then the provisions of section 497, Cr.P.C. would be attracted and accused could only be released after moving such application and grant of the same. If no such application is moved or no bail is granted by any competent Court either under section 497 or 498, Cr.P.C, as the case may be, then the accused is required to be remanded to judicial custody till the time a proper order is passed either by the trial Court or by the superior Court.
>
> 13. In the light of what has been discussed above, the impugned order passed by the learned High Court is set aside and the remarks recorded against the learned Additional Sessions. Judge are expunged. The respondent is directed to surrender before the trial Court immediately. However, he may move an application for grant of bail under section 497 or 498, Cr.P.C, as the case may be, which shall be decided in accordance with law and merits of the case."

It is clearly emphasized by the Hon'ble Supreme Court of Pakistan in the judgment supra that an accused, summoned in a private complaint, can validly move an application for bail and the same can be decided on merits within the parameters prescribed under section 497/498, Cr.P.C. keeping in view the guiding principle in this regard set up by the Hon'ble Supreme Court of Pakistan.

6. On merits, admittedly it is a case of two versions, one given by the complainant in the F.I.R implicating the petitioners and the second given by the real brother of the deceased Muhammad Tufail (an eye-witness in the F.I.R) through a separate private complaint against another set of accused but, totally exonerating the present

petitioners. The injury attributed to the petitioner Imdad Hussain on the elbow of the deceased Muhammad Tufail has not been declared fatal, whereas injury attributed to the petitioner Ijaz Ahmad on the person of P.W. Zafar Iqbal at the same time has been attributed to his co-accused Muhammad Khan. During the investigation, petitioners were found innocent. It is true that in the private complaint the petitioners have been summoned by the learned trial Court, but at the same time the same learned trial court, after preliminary inquiry, has also summoned the other set of the accused in the complaint filed by Shabbir Ahmad. In this view of the matter, possibility of false implication of the petitioners cannot be totally ruled out and I am of the considered view that in the peculiar circumstances of this case issuance of process under section 203, Cr.P.C. may be a 'sufficient ground' for proceeding against the petitioners, but it cannot be equated with the `existence of reasonable grounds' to believe that accused are guilty of an offence as contemplated under section 497(1), Cr.P.C.

Needless to mention that while deciding a pre-arrest bail, some expected advancement in the investigation in the form of some recovery etc. after the arrest of the accused is a relevant consideration, but in this case petitioners have already been declared innocent during the investigation and there is no question of any recovery involved to their extent. Therefore sending them behind the bars only for the reason that they may be released on bail after their arrest is altogether unjustified. In this context, I respectfully refer the case of Muhammad Ramzan v. Zafar Ullah and another (1986 SCMR 1380) where the Hon'ble Supreme Court has observed as under:--

> "After hearing the learned counsel we feel that prima facie, at this stage, the case of the petitioner is not distinguishable from that of others to whom bail has been allowed. No useful purpose would be served if the bail of Zafar Ullah Khan respondent is cancelled on any technical ground because after arrest he would again be allowed bail on the ground that similarly placed other accused are already on bail. We, therefore, in the circumstances of this case, do not consider it a fit case for grant of leave to appeal. This petition accordingly, is dismissed."

In the case of Muhammad Aslam vs. The State (2000 YLR 1341) this Court has observed as under:

> "The petitioner appears to have a reasonably good case for post-arrest bail on the basis of suddenness of the occurrence, lack of premeditation on the part of the accused party, divergent findings of different Investigating Officers of this case and admission of a co-accused to post-arrest bail. Thus, it shall have a colour of ludicrousness if he is sent behind the bars for a few days by dismissing his application for pre-arrest bail so as to enable him to cone out of jail after a few days on post-arrest bail. I for one would not like to be a party to such a mockery of the system."

7. In view of all above, this petition is accepted and ad interim pre-arrest bail already allowed to the petitioners by this Court vide order dated 30-6-2011, is hereby

confirmed subject to their furnishing fresh bail bonds in the sum of Rs.100,000 (Rupees one hundred thousand only) each with one surety each in the like amount to the satisfaction of the learned trial Court within a period of fifteen days from today.

8. It is, however, clarified that the observations made hereinabove are just tentative in nature and strictly confined to the disposal of this bail petition.

H.B.T./I-35/L Bail confirmed.

2011 P Cr. L J 1971
[Lahore]
Before Muhammad Anwaarul Haq and Sh. Ahmad Farooq, JJ
NAVEED alias NAVIDI---Petitioner
Versus
THE STATE---Respondent

C.M. No.1 of 2011 in Criminal Appeal No. 336 of 2007, decided on 10th August, 2011.

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

----S. 426(1-A)---Penal Code (XLV of 1860), Ss. 302(b)/337-F(iii)/34---Suspension of sentence---Statutory delay---Accused was convicted and sentenced by Trial Court and appeal against the conviction and sentence had been pending decision before High Court since 27-2-2007---Plea raised by complainant was that two earlier applications for suspension of sentence filed by the accused had already been dismissed---Validity---Seeking suspension of sentence in view of amended S.426(1-A), Cr.P.C. was an independent right and accused could validly apply for the relief even after dismissal of his petitions on merits under S.426, Cr.P.C.---Accused was not responsible for delay in decision of his appeal in any manner and his case did not fall within the proviso to S.426(1-A), Cr.P.C.---High Court, without touching merits of appeal, suspended the sentence---Petition was allowed accordingly.

Liaqat and another v. The State 1995 SCMR 1819 **fol.**

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

----S. 426(1-A)---Suspension of sentence---Word "shall"---Effect---Legislature has inserted the word "shall" purposely to make the same mandatory and in case falling within the purview of S.426(1-A) Cr.P.C., suspension of sentence is a rule and its refusal is an exception---Court can refuse suspension of sentence if the case of accused falls within the proviso to S. 426(1-A), Cr.P.C.

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

----S. 426(1-A)---Suspension of sentence---Pre-condition---Appellate Court, deciding such application is under obligation to ascertain that delay in decision of appeal has not been occasioned by any act or omission of appellant or any person acting on his behalf.

Rana Maqsood-ul-Haq for Petitioner.

Muhammad Naeem Sheikh, Deputy Prosecutor-General for the State.

ORDER

C.M. No.1 of 2011

Through this criminal miscellaneous, Navid alias Navidi, petitioner-appellant seeks suspension of his sentences on the statutory ground i.e. non-disposal of his appeal within the stipulated period mentioned in the latest amendment in section 426, Cr.P.C. The petitioner/appellant has been convicted and sentenced by the learned Additional Sessions Judge, Faisalabad vide impugned judgment dated 19-2-2007, as under:--

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

Life Imprisonment with a compensation amounting to Rs.50,000 to be paid to the legal heirs of Muhammad Younus (deceased) or in default thereof to undergo Simple Imprisonment for six months.

Under section 337-F(iii)/34, P.P.C.

Rigorous imprisonment for one year and to pay an amount of Rs.5,000 as Daman to Muhammad Din alias Manna injured/P.W.

Both the sentences were ordered to run concurrently and benefit of section 382-B, Cr.P.C. was also extended to the accused/petitioner.

2. Learned counsel for the petitioner contends that the petitioner/appellant was arrested on 30-3-2006 and has been convicted and sentenced by the learned trial court on 19-2-2007; he has preferred appeal before this Court on 27-2-2007, but even after the lapse of more than four years his appeal has not been decided, therefore, in view of the amendment in section 426, Cr.P.C, he deserves suspension of his sentence.

3. Conversely, learned Deputy Prosecutor-General assisted by learned counsel for the complainant opposes this petition on the grounds that case against the petitioner has been proved beyond any shadow of doubt and he has been convicted and sentenced after a regular trial by the learned trial court; that two petitions on the same subject filed on behalf of the petitioner, have already been dismissed by this Court. Further add that there is a fair chance of early fixation of the appeal of the petitioner as it relates to the year 2007 and this Court is dealing with such like appeals filed in the year 2006.

4. Heard. Record perused.

5. Prior to the promulgation of Act No.VIII of 2011, two petitions of the petitioner for suspension of sentence were dismissed by this Court on 19-3-2009 through Criminal Miscellaneous No. 1 of 2009 and on 4-6-2009 through Criminal Miscellaneous No.2 of 2009, respectively. The petitioner is behind the bars for the last about five years and four months. Appeal of the petitioner is pending since 27-2-2007 and it is not likely to be fixed in the near future for the reason that his co-accused Muhammad Aslam alias Nannha has been convicted and sentenced to death through the same judgment. As far as disposal of two earlier petitions of the petitioner seeking the same relief is concerned, suffice it to mention that seeking suspension of sentence in view of the amended section 426(1-A), Cr.P.C. is an independent right and an accused can validly apply for the relief even after the dismissal of his petition on merits under section 426, Cr.P.C. Here we respectfully refer the case of **Liaqat and another v. The State (1995 SCMR 1819)**

wherein the Hon'ble Supreme Court, in view of the insertion of old subsection (1-A) in section 426, Cr.P.Code has observed as under:--

> "The effect of 'insertion of subsection (1-A) after subsection (1) of section 426, in the Code of Criminal Procedure in our view, is that the appellant/convict has been conferred a right to ask for bail pending his appeal, if the Court is unable to dispose of his case within the periods specified in sub-clauses (a) to (c) of section 426(1-A), Cr.P.C. This right of the convict/appellant is independent of his right to seek suspension of his sentence by the appellate Court on merits under section 426(1), Cr.P.C. The right conferred on the appellant/convict under section 426(1-A), Cr.P.C, therefore, can be exercised by him, notwithstanding the fact that the appellate Court, in exercise of its discretion had earlier declined his prayer for suspension of his sentence on merits under section 426(1), Cr.P.C. As a necessary corollary, therefore, it follows that the appellate Court cannot decline to suspend the sentence of an appellant under section 426(1-A), Cr.P.C. on the ground the appellant has no case on merits or that he would not be entitled to bail on merits or that he has been declined bail earlier on merits".

It is pertinent to mention here that subsection (1-A) of section 426, Cr.P.C. referred in the judgment of the Hon'ble Supreme Court was omitted on 10-10-2001 by the Ordinance LIV of 2001 but on 21-4-2011 by the Act No. VIII of 2011. It has been re-enacted as follows:--

> **426(1-A), Cr.P.C.**
>
> An Appellate Court shall, except where it is of the 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) to imprisonment for a period not exceeding three years and whose appeal has not been decided within a period of six months of his conviction;
>
> (b) to imprisonment for a period exceeding three years but not exceeding seven years and whose appeal has not been decided within a period of one year of his conviction; or
>
> (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 the Appellate Court, is a hardened, desperate or dangerous criminal or is accused of an act of terrorism punishable with death or imprisonment for life.

The above quoted latest amendment is the same (except the proviso) as was introduced in section 426, Cr.P.C. by the Law Reforms Ordinance, 1972, therefore, the rule laid down in the case of Liaqat Ali (supra) shall apply stricto senso to give effect to the reenacted provision in section 426 mentioned above. As far as proviso to the newly-

added subsection (1-A) is concerned, it is mentioned in the proviso that Court while dealing with the petition for suspension of sentence, can refuse to exercise its discretion if the convict is previously convicted offender or in the opinion of the Court is a hardened, desperate or dangerous criminal or is an accused of an act of terrorism punishable with death or imprisonment for life. The plain reading of the provision of law shows that the legislature has inserted the word **"shall"** purposely to make the same mandatory and in the case falling within the purview of subsection (1-A) of section 426, Cr.P.C., suspension of sentence is a rule and its refusal is an exception, however, Court can refuse the same if the case of the convict falls within the proviso referred above. Needless to add that an appellate court while deciding such an application, is under obligation to ascertain that delay in decision of the appeal has not been occasioned by any act or omission of the appellant or any person acting on his behalf.

Keeping in view the facts and circumstances of this case, we are of the considered view that petitioner is not responsible for the delay in decision of his appeal in any manner whatsoever and further that case of the petitioner does not fall within the proviso of subsection (1-A) referred above, therefore, without touching the merits of the case, we allow this petition and suspend the sentence of the petitioner till the final disposal of his criminal appeal, subject to his furnishing bail bond in the sum of Rs.200,000 (Rupees two hundred thousand only) with one surety in the like amount to the satisfaction of the Deputy Registrar (Judicial) of this Court. However, the petitioner shall remain present before this Court on each and every date of hearing fixed in the main appeal.

M.H./N-69/L Petition allowed.

P L D 2011 Lahore 76
Before Manzoor Ahmad Malik and Muhammad Anwaarul Haq, JJ
TARIQ MAHMOOD and another---Appellants
Versus
THE STATE and another---Respondents

Criminal Appeal No.304-J of 2005 and Criminal Revision No.468 of 2009, heard on 30th November, 2010.

Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Benefit of doubt---F.I.R. had clearly mentioned that it was an unknown person who had committed the murder---Even in the inquest report story of prosecution was the same, but accused had been impleaded through a supplementary statement---Widow ofdeceased, firstly had stated that it wassome unknown person who killed her husband, but later on she. stated that she had come to know subsequently that said unknown person was the accused---Trial Court declared accused as proclaimed offender and recorded prosecution evidence under S.512, Cr.P.C. wherein statement ofcomplainant was recorded and even in that statement complainant had not named the accused---Evidence furnished by widow ofdeceased as prosecution witness and complainant had lost its intrinsic value and same was not confidence-inspiring---Other

two witnesses had stated that they saw accused while he was carrying a kalashinkov in his hand---Such evidence itself was not of any importance as it did not connect accused with the crime mentioned in the F.I.R.---Klashnikov and crime empties allegedly recovered, having not been sent to the Forensic Science Laboratory for comparison carried no value---Prosecution had failed to prove motive against accused---Medical evidence and abscondance of an accused were supporting evidence and a person could not be convicted on the basis of the fact that accused remained absconder for sometime---Prosecution having failed to prove its case, mere abscondence of accused was of no avail to the prosecution---Prosecution was bound to prove its case beyond any shadow of doubt and that burden would never shift, if any reasonable doubt would arise regarding culpability of an accused and accused was always entitled for its benefit—Prosecution had failed. to prove its case against accused which was full of doubts—While extending benefit of doubt, conviction and sentence recorded by the Trial Court against accused, was set aside; he was acquitted of the charge leveled against him and was released.

Noor Muhammad v. The State and another 2010 SCMR 97; Muhammad Sadiq v. Muhammad Sarwar 1979 SCMR 214; Hakim Ali v. The State 1971 SCMR 432; Ameenullah v. State PLD 1976 SC 629; Muhammad Zaman v. Muhammad Afzaal and others 2005 SCMR 1679; Muhammad Akram v. The State 2009 SCMR 230 and Tariq Pervez v. The State 1995 SCMR 1345 ref.

Ejaz Ahmad Bajwa for Appellants (Defence Counsel at State expense).

Ch. Muhammad Mustafa, Deputy Prosecutor-General for the State.

C.M. Sarwar for the Complainant.

Date of hearing: 30th November, 2010.

JUDGMENT

MUHAMMAD ANWAARUL HAQ, J.---Tariq Mahmood, appellant was tried in case F.I.R. No. 444, dated 27-8-2001, registered at Police Station Saddar, District Gujrat for an offence under section 302, P.P.C. At conclusion of the trial, the learned trial Court, vide its judgment dated 14-5-2005, convicted the appellant under section 302(b), P.P.C. and sentenced him to life imprisonment for the Qatl-e-Amd of Muhammad Munir. He was also directed to pay Rs.1,00,000 (rupees one hundred thousand only) as compensation to the legal heirs of the deceased under section 544-A; Cr.P.C. or in default whereof to undergo rigorous imprisonment for six months. He was also extended benefit of section 382-B, Cr. P.C.

2. Feeling aggrieved, the appellant Tariq Mehmood has filed instant appeal through jail i.e. Criminal Appeal No. 304-J of 2005, whereas Muhammad Rafique, complainant has filed Criminal Revision No.468 of 2005 for enhancement of sentence of the appellant. Both these interlinked matters are being disposed of together through this single judgment.

3. Prosecution story in brief un-folded by Muhammad Rafique, complainant (P.W.9), according to the F.I.R. (Exh. PE/ 1) is that on 27-8-2001 at about 8-15 p.m. complainant went to the house of his brother located at Chak Meero where his Bhabhi Mst. Bushra Bibi, Abdul Razaq and Ghulam Rasool were present. Meanwhile, his brother, Muhammad Munir came back from Gujrat on hiss Tonga, he tethered the horse along with the wall of school

building and when he turned towards his house to take Horse Food (Toori Dana), a duly armed unknown person already sitting behind the school wall, started firing at him. On hearing the fire-shots, the complainant and others, present in the house, rushed towards Muhammad Munir, who sustained severe injuries on different parts of his body. Muhammad Munir succumbed to the injuries at the spot.

The motive behind this occurrence, subsequently introduced by Mst. Bushra Bibi P.W.8 is that, about 1-1/2 year prior to the occurrence, the appellant committed theft in their house, her husband suspecting him, had reported the matter to the police, upon which, Tariq Mehmood appellant was arrested by the police and due to that grudge he had committed the murder of Muhammad Munir.

4. On 27-8-2001, after receiving information about the occurrence, Ralaqat Ali S.-I. (P-W-16) along with other police officials proceeded at the place of occurrence where he recorded statement of Muhammad Rafique, complainant (Exh.PE) and sent the same for recording of formal F.I.R. He inspected the dead body of Muhammad Munir (deceased), prepared inquest report (Exh.PH), injury statement (Exh.PP) drafted application for post mortem examination (Exh.PJ) and sent the dead body for autopsy. Then, he inspected the place of occurrence, collected blood stained earth and secured the same vide recovery memo. (Exh. PA), he also collected crime-empties of Kalashnikov and secured the same vide recovery memo. (Exh.PB) and recorded statements of the P.Ws. under section 161 Cr.P.C. He also recorded supplementary statements of Muhammad Rafique complainant and Mst. Bushra Bibi wife of the deceased. Thereafter, investigation of this case was transferred to Muhammad Yunis Inspector (P.W.14) who got declared the appellant proclaimed offender from the Court of learned area Magistrate.

On 24-3-2003 Muhammad Nazir S.-I. (P.W.15) had arrested Tariq Mehmood appellant and a Kalashnikov (P-3) along with 25 bullets was also recovered from his possession.

5. After submission of challan charge was framed against the appellant to that he pleaded not guilty and claimed trial.

6. To substantiate the charge, prosecution has examined sixteen witnesses, Dr. Muhammad Tariq (P. W.12) provided medical evidence, Muhammad Sadiq (P.W.1) and Muhammad Aslam (P.W.2) provided evidence of Waj Takkar, Mst. Bushra Bibi (P.W.8) and Muhammad Rafique (P.W.9) provided ocular account whereas Muhammad Younas Inspector (P.W.14), Muhammad Nazir S.-I. (P.W.15) and Rafaqat Ali S.-I. (P.W.16) have conducted investigation of this case.

7. Dr. Muhammad Tufail, Medical Officer (P. W.12) conducted the post mortem examination on the dead body of Muhammad Munir and observed as under:

> (1) Fire-arm wound of entry 1 x 1 cm margins inverted and black on posterior lateral aspect on the top of right shoulder.

(b) Fire-arm wound of exit 1-1/2 x 1 cm margins everted on anterior lateral aspect of right upper front of chest.

(2) Fire-arm wound of entry 1 x 1 cm on right temporal region.

(b) Fire-arm exit 8 x 5 cm on left cheek and orbit of left eye with missing of left eyeball.

(3) Fire-arm wound of entry 6 x 3 cm on right side of neck. (b) Fire-arm wound of exit 6 x 5 cm on front of neck.

(4) Fire-arm wound of entry 1 x 3 cm on medial side of left lower 1/3rd of arm.

(b) Fire-arm wound of entry 2 x 3 cm on posterior lateral aspect of the left arm.

(5) Fire-arm wound of entry 3 x 1 cm. on lower one third of right buttock.

(b) Fire-arm wound of exit on medial aspect of right thigh.

In his opinion, all the injuries were ante mortem, caused by fire-arm, death occurred due to injury on the vital organs i.e. brain, main vessels of the neck of right side leading to massive haemorrhage and shock.

The probable time elapsed between injuries and death was immediate and between death and post mortem 6 to 8 hours.

8. Tariq Mehmood, appellant when examined under section 342, Cr. P.C. had denied the allegations and professed his innocence. While answering to Question "Why this case against you and why the P.Ws. have deposed against you?" the appellant replied as under:--

"My submission is that the occurrence took place in the darkness of the night. None had witnessed the occurrence. The case was got registered by the complainant against unknown culprits. I have been later on falsely involved in this case after due consultations and deliberations. The real facts are that deceased Muhammad Munir had illicit liaison with wife of one Hameed Mahajar and one Shada Badmash used to forbid the deceased from visiting her house, as he considered it the insult of whole of the village and therefore, Shada above mentioned committed the murder of Muhammad Munir deceased. Due to fear of Shada, he was not nominated as an accused in this case, and I was falsely involved due to suspicion. The P.Ws. are closely related to the deceased. They had not witnessed the occurrence. They have made false statement before the Court and have made dishonest improvements in order to support their version."

The appellant did not make statement under section 340(2), Cr.P.C, however, he produced some documents (Exh. DA to Each. DE) in his defence. The learned trial Judge vide

judgment dated 14-5-2005 found Tariq Mehmood, appellant guilty and convicted and sentenced him as mentioned above.

9. Learned counsel for the appellant in support of this appeal contends that appellant is not named in the F.I.R. and vas implicated through a supplementary statement which, though was shown to be recorded immediately after the occurrence, on the same day yet this is belied from the facts that name of the appellant is not even mentioned in the inquest report; that Mst. Bushra Bibi (P.W.8) wife of the deceased, stated that she identified the appellant at the time of occurrence but she has stated that person as unknown, in her statement recorded under - section 161, Cr.P.C. moreover, it is not believable that if Mst. Bushra Bibi (P.W.8) and Muhammad Rafique complainant (P.W.9) were present at the house and the appellant was seen by Mst. Bushra Bibi, why they opted to lodge F.I.R. against some unknown accused; that complainant has not stated any thing in the F.I.R. regarding the motive of the occurrence and even otherwise, motive set out in his statement recorded before the learned trial Court as P.W.9, is not proved as the appellant had already been declared innocent regarding that allegation; that recovery of Kalashnikov (P-3) at the instance of the appellant is not helpful for the prosecution because the said Kalashnikov and the empties recovered from the spot were not sent to the Forensic Science Laboratory for comparison; that initially statement of the complainant (P.W.9) was recorded on 20-7-2002 by the learned Additional Sessions Judge, Gujrat under section 512, Cr.P.C. in the absence of the appellant and even in that statement (Exh.DD) he has not named the appellant as the person who had fired at his brother and he has simply stated an accused/culprit after firing ran away, he was duly confronted with that statement and it was brought on the record that both the witnesses have made dishonest improvements in their statements to implicate the appellant. As far as evidence of witnesses of Waj Takkar i.e. Muhammad Sadiq (P.W.1) and Muhammad Aslam (P.W.2) is concerned, they have simply stated that they saw the appellant going along with a Kalashnikov and they have not stated anything regarding the incident, moreover, their evidence is belied from the fact that they informed the complainant about this fact but the complainant even on 20-7-2002 while appearing before the Court as P.W.3 did not state, anything regarding the appellant, in these circumstances, case against the appellant is totally doubtful in nature and he is entitled for acquittal.

10. On the other hand, learned Deputy Prosecutor-General assisted by learned counsel for the complainant while opposing this appeal contended that Tariq Mehmood appellant was immediately named in the supplementary statement of the complainant which was recorded just after the occurrence and similarly he has also been named in the statement of Mst. Bushra Bibi (P.W.8) wife of the deceased who is most natural witness of the occurrence as she is inmate of the house; that the prosecution case is supported by evidence of Muhammad Sadiq (P.W.1) and Muhammad Aslam (P.W.2) witnesses of Waj-Takkar, who have stated that they saw the appellant while carrying a Kalashnikov in his hand coming from Chak Meero; that recovery of Kalashnikov (P-3) from the possession of the appellant and crime-empties collected by the Investigating Officer from the spot further strengthen the prosecution case; that absconding of appellant about one year provides corroboration to the prosecution allegations levelled against him. Lastly contends that the prosecution has proved its case and there is no substance in this appeal, therefore, the appellant is not entitled to any exception, hence, appeal of the appellant deserves dismissal.

11. As far as Criminal Revision No. 468 of 2005 is concerned, learned counsel for the petitioner in support of this petition contends that since the prosecution has proved its case against Tariq Mahmood/respondent beyond any shadow of doubt, therefore, normal penalty for Qatl-e-amd i.e. death, should have been awarded to the respondent. Learned Deputy Prosecutor-General also supports the arguments advanced by learned counsel for the petitioner while adding that learned trial Court has not given any cogent reason for lesser sentence in this case that was a legal requirement under section 367, Cr.P.C.

12. We have heard the arguments from both the sides at length and have given anxious consideration to their arguments and have also scanned the record with their able assistance.

13. We have noticed that in the F.I.R. (Exh. PE/1) it has clearly been mentioned that it was an unknown person who had committed this murder and even in the inquest report story of the prosecution is the same but surprisingly the appellant has been implicated through a supplementary statement. Statedly Mst. Bushra Bibi (P.W.8) wife of the deceased, was present in her house when this occurrence took place and she attracted to the spot but she even in her statement has firstly stated that it was some unknown person who killed her husband but later on she has stated that subsequently she came to know that unknown accused was the appellant. It has been admitted by Mst. Bushra Bibi during cross-examination that appellant was living at a very small distance from her house and was known to her even prior to the occurrence. Moreover, learned trial Court had declared the appellant as proclaimed offender and recorded prosecution evidence under section 512, Cr. P.C. wherein statement of Muhammad Rafique complainant was recorded which is available on the file as Exh. DD and even in that statement he has not named the appellant. In this view of the matter evidence furnished by Mst. Rushra Bibi (P.W.8) and Muhammad Rafique (P.W.9) has lost its intrinsic value and is not confidence inspiring.

14. As far as statements of Muhammad Sadiq (P.W.1) and Muhammad Aslam (P.W.2) witnesses of Waj Takkar, are concerned, they both stated that they saw the appellant while carrying a Kalashnikov his hand coming from Chak Meeru, this evidence itself it is not of any importance as it does not connect the appellant with the crime mentioned in the F.I.R. Moreover, even after a span of about eleven months when statement of the complainant was recorded under section 512, Cr.P.C. he has not uttered anything about this aspect. Therefore, we are of the view that evidence of both these P.Ws is of no avail to the prosecution case.

15. As far as recovery of Kalashnikov (P-3) and crime-empties from the spot is concerned, admittedly these were not sent to the Forensic Science Laboratory for comparison hence, this evidence carries no value.

16. The motive set out by Mst. Bushra Bibi and Muhammad Rafique complainant while appearing before the Court as P.W.8 and P.W.9, respectively, was that the appellant had committed theft in the house of the deceased and Muhammad Munir (deceased) while suspecting him as thief reported the matter to the police, but we do not find any such motive in the F.I.R. and even Mst. Bushra Bibi (P.W.8) has admitted that this matter was settled between them, therefore, we hold that the prosecution has failed to prove motive against the

appellant. In the case of Noor Muhammad v. the State and another (2010 SCMR 97), Hon'ble Supreme Court of Pakistan held 'as under:--

> "It has been held in the case of Muhammad Sadiq v. Muhammad Sarwar 1979 SCM 214 that when motive is alleged but not proved then the ocular evidence required to be scrutinized with great caution. In the case of Hakim Ali v. The State 1971 SCMR 432 it, has been held that the prosecution though not called upon to establish motive in every case, yet once it has set up a motive and failed to establish it, the prosecution must suffer consequence not the defence. In the case of Ameenullah v. State PLD 1976 SC 629 it has been held that where motive is an important constituent and is found by the Court to be untrue, the Court should be on guard to accept prosecution story."

17. Medical evidence and absconding of an accused are supporting evidence and a person cannot be convicted merely on the basis of the fact that he remained absconder for some period. As the prosecution has failed to prove its case, therefore, mere abscondence of the appellant is of no avail to the prosecution. In the case of Muhammad Zaman v. Muhammad Afzaal and others (2005 SCMR 1679) the Hon'ble Supreme Court of Pakistan has observed as follows:

> "The only fact that remains to be considered is the abscondence of some of the accused. In the absence of any other evidence as discussed earlier, the abscondence loses its significance."

18. It is the ditty of the prosecution to prove its case beyond any shadow of doubt and this burden never shifts, if any reasonable doubt arises regarding culpability of an accused he is always entitled for its benefit. We respectfully refer here the case of Muhammad Akram v. The State (2009 SCMR 230) wherein Hon'ble Supreme Court of Pakistan has emphasized as under:--

> "It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

19. For the reasons mentioned above, we are of the considered view that prosecution has miserably been failed to prove its case against the appellant being full of doubts; We, therefore, while extending benefit of doubt to him, allow his Criminal Appeal No. 304-J of 2005, the conviction and sentence recorded by the learned trial court against Tariq Mehmood, appellant is set-aside, he is acquitted of the charge levelled against him. He is in jail, he be released forthwith if not required to be detained in any other case.

20. Consequent upon the reasons mentioned above Criminal Revision No. 468 of 2005 filed by the complainant-seeking enhancement of the sentence of the appellant is dismissed.

H.B.T./T-55/L Appeal allowed.

P L D 2011 Lahore 84
Before Manzoor Ahmad Malik and Muhammad Anwaarul Haq, JJ
HAQ NAWAZ---Appellant
Versus
THE STATE---Respondent

Criminal Appeal No.410-J and Murder Reference No.599 of 2005, heard on 11th November, 2010.

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

----S. 302(b)---Qatl-e-amd---Appreciation of evidence---F.I.R. was promptly registered with full details of the incident---Motive had been established through the evidence of the complainant, who had stated that when he reached in the house of deceased she told him that accused wanted to develop illicit relations with her, but she did not agree---Presence of eye-witnesses at the spot was quite natural as deceased was real daughter of the complainant and their presence in view of their consistent, coherent and straight forward evidence had been proved---Defence remained unable to shake their evidence, even after lengthy cross-examination---Both witnesses had no enmity or ill-will of their own to falsely involve accused in the case---Mere relationship of the witnesses was not at all a ground itself to discredit their testimony in a murder case---Minor variations in minute details of the incident were insignificant and did not affect their natural narration of the whole incident---Medical evidence and recovery of weapon of offence, coupled with positive reports of Chemical Examiner and that of Serologist, further corroborated ocular account---Accused pleaded that he had killed the deceased when he found her in a compromising position with a man, but accused had not been able to produce any evidence in that respect, except the statement of husband of the deceased who was in jail at that time; and he had simply stated that his deceased wife was not of a good moral character; but he conceded that they were living happily for the last about twelve years---Accused, in circumstances, had failed to prove that plea---No reason of false implication of accused who was a single accused in a promptly lodged F.I.R. was available---Finding of conviction of accused recorded by the Trial Court was quite in accordance with law and was based upon well recognized principles of appreciation of evidence in a criminal case.?

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

----S. 302(b)---Criminal Procedure Code (V of 1898), S.367(5)---Qatl-e?-amd---Sentence, quantum of---Counsel for accused remained unable to point out any circumstance in the case calling for any mitigation in favour of accused---Act of accused and in the manner he committed cold blooded murder of deceased, was shocking---Accused at the time of occurrence was not of immature mind; and he fully knew the consequence of cutting throat

of innocent victim with a chhuri in such a brutal manner---Normal sentence in qatl-e-amd was death and court was required to give reasons under S.367(5), Cr.P.C. for not awarding the same---Question of sentence in a murder case was of very vital importance and all the care and caution was required to be maintained in that regard and it was also equally important aspect of the matter that sentence of death could not be altered on basis of flimsy grounds and principle of proportionality could not be lost sight---No extenuating circumstance was available in favour of accused for extending him any benefit regarding his sentence; his conviction and sentence under S.302(b), P.P.C. was maintained, in circumstances.?

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

----Art. 121---Burden of proof---Under Art.121 of Qanun-e-Shahadat, 1984 if any accused took up any specific plea, then burden to prove same would shift upon him.?

Mian Abdul Qayyum Anjum for Appellant.
Chaudhry Muhammad Mustafa, Deputy Prosecutor-General for the State.
Chaudhary Rizwan Hayat for the Complainant.
Date of hearing: 11th November, 2010.

JUDGMENT

MUHAMMAD ANWAARUL HAQ, J.--Feeling aggrieved by the impugned convictions and sentences, Haq Nawaz appellant has filed appeal through jail i.e. Criminal Appeal No. 410-J of 2005, whereas the trial Court has sent Murder Reference (M.R. No. 599 of 2005) seeking confirmation of death sentence awarded to the appellant. Both these matters being integrated are being disposed of together through this single judgment.

2. Haq Nawaz, appellant was tried by learned Additional Sessions Judge, Sargodha in case F.I.R. No. 52, dated 31-3-2005 for an offence under section 302, P.P.C. registered at Police Station Shahpur Sadar, District Sargodha. The learned trial Court vide judgment dated 2-9-2005 convicted the appellant under section 302(b), P.P.C. and sentenced him to 'Death' for committing Qatl-e-amd of Mst. Irshad Bibi. He was also ordered under section 544-A Cr. P.C. to pay compensation of Rs.50,000 (Rupees fifty thousand only) to the legal heirs of the deceased or in default thereof to further undergo Simple Imprisonment for six months.

3. Prosecution case in brief un-folded by Muhammad Khan, complainant (P.W.6), according to the F.I.R. (Exh. PE) is that on 30-3-2005 he along with Ahmad Khan his brother, Muhammad Ramzan came to Chah-Korra. On the fateful night the complainant along with his brother Ahmad Khan and Muhammad Ramzan slept in front of residential room of Mst. Irshad Bibi whereas Mst. Irshad Bibi along with children slept in a room where electric bulb was on. At about 3-00 a.m. on hearing some noise Muhammad Khan and Ahmad Khan awoke up, at that time door of the room was open, they saw Haq Nawaz appellant sitting on Mst. Irshad Bibi on the cot and was cutting

her throat with a chhuri, on their hue and cry Haq Nawaz while brandishing his chhuri ran away. In result of the injuries Mst. Irshad Bibi died at the spot.

Motive behind the occurrence as per F.I.R. is that Haq Nawaz used to force Mst. Irshad Bibi for illicit relations and on her refusal this incident took place.
4. After registration' of F.I.R. Shah Nawaz Khan, S.-I. (P.W.10) inspected the place of occurrence, conducted formal investigation, prepared injury statement Exh.PG and inquest report Exh.PC, collected blood-stained earth vide recovery memo Exh.PD, prepared rough cite plan of place of occurrence Exh.PI and recorded the statements of P.Ws under section 161, Cr.P.C. On 3-4-2005 he arrested Haq Nawaz appellant who while in custody led to the recovery of chhuri (P-4) which was taken into possession by the Investigating Officer vide recovery memo Exh.PG.

5. After completion of investigation, challan against the appellant was submitted before the learned trial Court, charge was framed against him, he pleaded not guilty and claimed trial.

6. To substantiate the charge prosecution has examined ten witnesses in total out of which Dr. Humira Batool (P.W.3) provided medical evidence, Shah Nawaz Khan, S.-I. (P.W.10) conducted investigation of this case, whereas Muhammad Khan complainant (P.W.6) and Ahmad Khan (P.W.7) have furnished ocular account.

7. Dr. Humira Batool (P.W.3) medically examined Mst. Irshad Bibi (deceased) on 31-3-2005 at about 1-00 p.m., and observed the following injuries on her person:--

> (1) An incised wound about 14 x 5 cm in front of the neckextending both side of neck up to the angle of jaw. All muscle blood vessels trachea and esophagus were cut through and through;
>
> (2) An incised wound about 4 x 0.25 cm on middle part of the nose. Cutting both nostrils through and through. Other thoraces abdominal viscera were normal and no abnormality was found in skull vertebrate membrane brain and spinal cord.
>
> In the opinion of the doctor, cause of death was injury No.1 which led to severe haemorrhage shock and death. This injury was ante-mortem in nature and caused by sharp-edged weapon. The time elapse between injury and death was immediate and between death and Post-mortem was 9/10 hours.

8. After recording of prosecution evidence, learned trial Court examined Haq Nawaz, appellant under section 342, Cr.P.C., who while answering to Question No. 10 "Why this case against you and why the P.Ws have deposed against you?", replied as under:

> "All the P.Ws namely Fateh Muhammad, Imam Bakhsh, Muhammad Khan and Ahmad Khan are inter se relatives and are resident of village Khanpur Wadhra which is away from Chah Kaurra the place of occurrence. None of the witnesses

had witnessed the alleged occurrence and are thus false witnesses, deposing intentionally all untrue facts. The reality is that Mst. Irshad Bibi deceased firstly eloped from Karachi when she was residing there with Abdul Khalid when both were unmarried came both to Chah Korra and hereafter some time got married. This elopement became a bone of contention for her parents and thereafter for these stained relations either of the parties families were not on visiting terms inter se till her death. Unfortunately Abdul Khalid having indulged in narcotics and was confined to bar at Faisalabad forever period of one year. I am a labourer and resides at Karachi. I shall produce my I. D Card in its confirmation. In the absence of her husband, Irshad Bibi also indulged nefarious activities and lastly with one Sher Muhammad Chachar who used to visit her of and on being sound financially so nothing could be done against him at a local level. Mst. Irshad Bibi became pregnant and upon this fact, when she was apprised of the situation she got herself aborted a few days prior to the occurrence with the help of aforesaid Sher Muhammad sarruptiously through one female quaker. To my misfortune I happened to be at Chah Kourra from Karachi two days earlier to the occurrence and on the alleged night of occurrence at about 2/3 A.M. I learnt (رسھپرسھک) in the room where Irshad Bibi deceased was present along with kids. I stood up from the cot lying in the courtyard upon which I was sleeping came to the room and saw in compromising position Mst. Irshad Bibi with Sher Muhammad Chachar. I lost my control due to this sudden incident giving me grave provocation ipso facto and thereform I picked up domestic chhuri lying therein and thus injured Mst. Irshad Bibi and then and there but Sher Muhammad Chachar made his escape good from there. Ultimately I went to the police station on the same night and reported the matter to the Investigating Officer but to my surprise Sher Muhammad Chachar happened to be already present there. The contents of the F.I.R. arranged and managed at the instance of Sher Muhammad which are fabricated and these true facts have been concealed. Sher Muhammad Chachar had indulged illicit relations to which Irshad Bibi was consenting one and she became pregnant as well. Abortion was also carried on by the consent of both aforesaid a few days prior to the occurrence and again on the eventful night both were gather in compromising position. Sher Muhammad disgraced us as well as get himself saved by this fornication on account of his being sound in wealth this had happened as I had lost my control unintentionally due to Ghairat we have been giving all the provisions of maintenance through our labourer, but Irshad Bibi did not refrain herself from her nefarious activities and had become approve one bad character lady. Whatever it was, it was as I had not seen any of the events earlier but on the relevant time of occurrence it became unbearable for me when I actually witnessed this compromising position. Hence, I lost my control and I could do nothing otherwise. I swear on the Holy Book Quran-i-Pak that allegation of motive and the factum of P.Ws having witnessed the so-called occurrence is incorrect, as well as false. None of the witnesses had witnessed the occurrence thus their deposition is false and cannot be believed. We are labourers as I have narrated the true story as it happened. So none of the residents of locality has come forward to confront or contradict. It rather of the resident have taken it as pious act eradicating

the source of a from the society/village due to strained relations with us and (یئاربد) being relative inter se P.Ws. have made false deposition against me."

9. The appellant opted not to make statement under section 340(2) Cr. P. C. but he produced his real brother and husband of the deceased, Abdul Khaliq (DW-1) in his defence. Learned trial Court after appraisal of evidence vide impugned judgment dated 2-9-2005 convicted and sentenced the appellant as narrated earlier, hence these matters.

10. The learned counsel for the appellant, in support of this appeal, contends that motive alleged in the F.I.R. has not been proved as the complainant has stated that he received message from her daughter that the appellant was quarreling with her but the person through whom the said message was' received has not been produced and the complainant (P.W.6) has also admitted in cross-examination that at present he does not know the name of that person who given him the message; that all the witnesses of this case are closely related with each other and are chance witnesses and the reason given by them for their presence at the place of occurrence is not probable and does not appeal to reason, as both the eyewitnesses are the residents of Khanpur Wadhra which is at a distance of more than six kilometers from the place of occurrence; that there are material contradictions in the statements of the witnesses; that the appellant has taken a specific plea that he killed Mst. Irshad Bibi when she was in compromising position with Sher Muhammad and even he has produced the husband of the deceased as DW-1 in support of his plea; that keeping the plea of appellant during the trial and prosecution version in juxta position, the version of the appellant appears to be more plausible; that the prosecution has failed to prove its case and in any case it was not a case of capital punishment because it is not known and shrouded in mystery as to what exactly happened prior to the occurrence.

11. On the other hand, learned Deputy Prosecutor-General assisted by learned counsel for the complainant while opposing this appeal contended that the F.I.R. in this case was promptly lodged with all the details of the incident; that both, the eye-witnesses P.W.6 and P.W.7 are the most natural witnesses; and their presence is fully established from the fact that they remained consistent on all the material particulars mentioned in the F.I.R.; that chhuri P-4 was recovered at the instance of the appellant which was taken into possession through Exh. PG and that the report of the Chemical Examiner and Serologist are positive; that the appellant has not been able to give any reason for his false implication; that as far as specific plea of the appellant is concerned that cannot be believed because of the reason that he has not produced any evidence in support thereof and that there was no mitigating circumstance in this case, therefore, this appeal be dismissed and the Murder Reference be answered in the affirmative.

12. We have heard the learned counsel for the parties at length, and have given anxious consideration to their arguments and have also scanned the record with their able assistance.

13. Occurrence in this case took place on 31-3-2005 at about 3-00 a.m. and the matter was reported to the police at 5-30 a.m. thereafter F.I.R. was registered at the Police Station, promptly and with full details of the incident.

14. Motive has been established through the evidence of the complainant who has stated that when he reached .in the house of Mst.Irshad Bibi she told him that appellant wanted to develop illicit relations with her but she did not agree.

15. Presence of eye-witnesses at the spot is quite natural considering the fact that the deceased was real daughter of P.W.6. Even otherwise they are resident of Khanpur Wadhra which is at a distance of around 6/7 kilometers from the place of occurrence and their presence in view of their consistent, coherent and straightforward evidence has been proved. Defense remained unable to shake their evidence even after lengthy cross-examination. They both had no enmity or ill will of their own to falsely involve the petitioner in this case, mere relationship of the witnesses is not at all a ground itself to discredit their testimony in a murder case and that is so held by the honourable Supreme Court in plethora of judgments.
?
Minior variations in minute details of the incident are insignificant, and do not effect their natural narration of the whole incident. The medical evidence and recovery of weapon of offence coupled with positive reports of Chemical Examiner and that of Serologist further corroborate ocular account. We, therefore, hold that the eye-witnesses were present at the time of occurrence and have witnessed the occurrence.

16. As far as plea of the appellant is concerned that he killed Mst. Irshad Bibi when he found her in a compromising position with one Sher Muhammad, we have noted, that after post-mortem examination the doctor handed over the' last-worn clothes of the deceased to the police which consist of shirt P-1, Shalwar P-2 and Dopatta P-3 that negate the plea taken by the appellant. Moreover, the appellant has not been able to produce any evidence in this respect except the statement of Abdul Khaliq husband of the deceased who was admittedly in jail at that time and he has simply stated that his deceased wife was not of a good moral character but he conceded that they were living happily for the last about twelve years. Even otherwise the most natural witnesses in this respect were the real father and the brother of the appellant who were residing in the same house as admitted by D.W.1. It is well-settled principle of criminal jurisprudence that under Article 121 of the Qanun-e-Shahadat Order, 1984 if an accused takes up any specific plea then burden to prove the same shifts upon him. We have noticed in this context that the appellant has miserably been failed to prove this plea. Keeping the plea of appellant during the trial and prosecution version in juxta position, the version of the prosecution appears to be more plausible and also there is c no reason of false implication of the petitioner who is a single accused in a promptly lodged F.I.R. Presence of father of the deceased at the time of occurrence further excludes any possibility of substitution in the circumstances of the case.

17. In view of the above, we are satisfied that finding of conviction and sentence of the appellant recorded by the learned trial Court is quite in accordance with law and is based upon well-recognized principles of appreciation of evidence in a criminal case.

18. As far as quantum of sentence of the appellant is concerned the learned counsel for the appellant remained unable to point out any circumstance in this case calling for any mitigation in favour of the appellant. Act of the appellant and in the manner he committed this cold-blooded murder is shocking. Appellant at the time of occurrence was not of

immature mind and he fully knew the consequence of his cutting throat of his innocent victim with a chhuri in such a brutal manner. Normal sentence in Qatl-e-amd is .death and Court is required to give reasons under section 367(5), Cr.P.C. for not awarding the same. The question of sentence in a murder case is of course a question of very vital importance and all the care and caution is required to be maintained in this regard, but it is equally important aspect of this matter that sentence of death cannot be altered on the basis of flimsy grounds and principle of proportionality cannot be lost sight. Another important feature while considering sentence one out of two in a case of Qatl-e-amd is section 382-C, Cr.P.C. We reproduce the same for ready reference:--

> Section 382-C, Cr.P.C.--In passing a sentence on an accused for any offence, a court may take into consideration any scandalous or false and frivolous plea taken in defence by him or on his behalf.

?

The plea taken by the appellant in his defence is not only false but on the face of it scandalous as well and while taking into consideration section 382-C, Cr.P.C. we are of the considered view that there is no extenuating circumstance available in favour of the appellant for extending him any benefit regarding his sentence, hence his conviction and sentence under section 302(b), P.P.C. is maintained and his Criminal Appeal No. 410-J of 2005 is, dismissed.

19. Resultantly death sentence awarded to Haq Nawaz, appellant is confirmed and murder reference (M.R. No. 599 of 2005) is answered in affirmative.

H.B.T./H-43/L Appeal dismissed.

P L D 2011 Lahore 92
Before Manzoor Ahmad Malik and Muhammad Anwaarul Haq, JJ
ABDUL REHMAN alias GAGI and 2 others---Appellants
Versus
THE STATE---Respondent

Criminal Appeal No.990 and Murder Reference No.629 of 2005, heard on 28th October, 2010.

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

----Ss. 302(b), 324 & 148---Qatl-e-amd, attempt to commit Qatl-e-amd---Appreciation of evidence---Opinion of Police---Evidentiary value--Opinion of Police regarding guilt or innocence of accused, was not admissible in evidence.
Muhammad Ahmad (Mahmood Ahmed) v. The State 2010 SCMR 660 rel.

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

----Ss. 302(b), 324 & 148---Qatl-e-amd, attempt to commit Qatl-e-amd---Appreciation of evidence---If evidence of the prosecution was disbelieved qua one accused, it could not be

believed against the other, unless there was a strong and independent corroboration, especially when the witnesses were inimical and interested.
Akhtar Ali and others v. The State 2008 SCMR 6 and PLD 1975 SC 588 ref.

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

----Ss. 302(b)/324/148 & 149---Qanun-e-Shahadat (10 of 1984), Art.129(g)---Qatl-e-amd, attempt to commit Qatl-e-amd---Appreciation of evidence---Benefit of doubt---No empty having been recovered from the spot, mere report of the Forensic Science Laboratory that two pistols recovered from co-accused were in working order, was of no avail to the prosecution---Motive set up in the F.I.R. was directly against co-accused who had been acquitted by the Trial Court and no appeal against his acquittal had been filed either by the State or the complainant party---Motive in the case, in circumstances,could not be treated as a corroborative piece of evidence against accused persons---One person was also injured in the occurrence and complainant had categorically stated that said person had received injury on his chest by an acquitted co-accused; but whole record was silent about that most important witness; and even his Medico-legal Report was not available on the file---Counsel for accused persons, in circumstances, was rightly of the view that adverse inference within the meaning of Art.129(g) of Qanun-e-Shahadat, 1984 should be drawn against prosecution---Prosecution had failed to prove its case against accused persons and ocular account was not in line with the medical evidence---Prosecution had to prove its case beyond any shadow ofdoubt; and if any doubt would arise from the circumstances of the case, its benefit had to go to accused---Prosecution case being full of doubts, accused were entitled to the benefit of the same not as a matter of grace, but as a matter of right---Extending benefit of doubt, conviction and sentence recorded by the Trial Court against accused persons were set aside and they were acquitted of the charge levelled against them and were released, in circumstances.

Riaz Ahmed v. The State 2010 SCMR 846; Muhammad Akram v. The State 2009 SCMR 230 and Ayub Masih v. The State PLD 2002 SC 1048 ref.
Malik Akhtar Saeed Bhatti and Hamid Ali Mirza for Appellants.
Ch,audhary Muhammad Mustafa, Deputy Prosecutor-General for the State.
Date of hearing: 28th October, 2010.

JUDGMENT

MUHAMMAD ANWAARUL HAQ, J.---Abdul Rehman alias Gagi, Abdul Rashid and Muhammad Ishfaq appellants along with Nasir Ali and Saif-ur-Rehman co-accused were tried in case F.I.R. No.465, dated 3-10-2003, registered at Police Station Sadar Samundari, District Faisalabad in respect of offences under sections 302, 324, 148, 149, P.P.C. After conclusion of the trial, learned trial Court vide its judgment dated 29-3-2005 while acquitting co-accused namely Nasir Ali and Saifur-Rehman has convicted and sentenced the appellants as under:--

Muhammad Ishfaq

Under section 302(b), P.P.C. to 'Death' as Ta'zir for committing Qatl-e-amd of Muhammad Sajjad deceased. He was also ordered to pay Rs.1,00,000 (rupees one hundred thousand only) as compensation to the legal heirs of the deceased under section 544-A, Cr.P.C.

Abdul Rehman alias Gagi and Abdul Rasheed

Under section 302(b), P.P.C. to 'Imprisonment for Life' as Ta'zir each for committing Qatl-e-Amd of Muhammad Sajjad deceased. They were also directed to pay Rs.50, 000 (rupees fifty thousand only) each as compensation to the legal heirs of the deceased under section 544-A, Cr.P.C. or in default to suffer simple imprisonment for six months each.

2. Feeling aggrieved, the appellants have challenged their convictions and sentences through Criminal Appeal No. 990 of 2005, whereas learned trial Court has transmitted Murder Reference No. 629 of 2005 for confirmation or otherwise of the Death sentence of Muhammad Ishfaq appellant. Both these matters being integrated are being disposed of together.

3. Succinctly, the case of prosecution in the F.I.R. (Exh.PA/1) is that on 3-10-2003 at about 7-00 pm Muhammad Iftikhar (P.W.10) complainant, Mujahid Ali, Abid Ali and Muhammad Sajjad were taking cold drinks outside the shop of one Muhammad Hussain, Muhammad Sajjad deceased was returning after making a phone call, suddenly, Muhammad Ishfaq armed with pistol 30 bore, Abdul Rashid armed with gun .12 bore, Saif-ur-Rehman armed with pistol .30 bore, Abdul Rehman alias Gagi armed with pistol .30 bore and Nasir Ali armed with gun .12 bore, double barrel emerged from the Baithak of Nasir Ali appellant, Saif-ur-Rehman raised a lalkara that Muhammad Sajjad be taught a lesson for injuring him, then Muhammad Ishfaq fired from his pistol which hit on the chin of Muhammad Sajjad, Abdul Rashid made fire shot with .12 bore gun which hit Muhammad Sajjad at the back of his rights ankle and on the right thigh, Abdul Rehman alias Gagi fired from his pistol .30 bore which hit Muhammad Sajjad near his anus, Nasir Ali made successive firing with his gun .12 bore double barrel and raised lalkaras to the effect that if anybody came near, he would be killed. Upon receipt of those injuries Muhammad Sajjad fell down and died at the spot. It was alleged in the F.I.R. that in result of indiscriminate firing of the appellants one Asif was also injured.

The motive set-forth in the F.I.R. was that Muhammad Sajjad a month and a half, prior to the present occurrence, had injured Saif-ur-Rehman for which he nourished a grudge, and he along with his co-accused with a common intention has killed Muhammad Sajjad, by causing him fire-arm injuries.

4. On 3-10-2003, after receiving information about the occurrence, Muhammad Aslam, S.-I. (P.W.12) reached at the place of occurrence, recorded oral statement of the complainant (Exh.PA) and sent the same for registration of formal F.I.R.; inspected the dead body, prepared injury statement, inquest report and dispatched the dead body to the mortuary for autopsy. He also sketched site-plan of the place of occurrence without scale, secured bloodstained earth, and recorded the statements of the P.Ws. He also summoned the

draftsman who prepared scaled site-plan of the place of occurrence. On 30-11-2003 he arrested Abdul Rehman alias Gagi appellant, who on 11-12-2003 led to the recovery of two Pistols P-3 and P-5 along with bullets.

5. After completion of investigation, challan against all the accused was submitted before the learned trial Court, charge was framed against them to which they pleaded not guilty and claimed trial.

6. To substantiate the charge the prosecution has examined twelve witnesses in total out of which .Dr. Sadiq Ali Arshad (P.W.4) provided medical evidence, Muhammad Aslam S.-I. (P.W.12) conducted investigation of this case, whereas Muhammad Iftikhar complainant (P.W.10) and Mujahid Ali (P.W.11) have furnished ocular account.

7. On 4-10-2003 Dr. Sadiq Ali Arshad (P.W.4) conducted the post mortem examination on the dead-body of Muhammad Sajjad and observed as under:--

> (1) Fire-arm lacerated wound of entry 3 x 2 cm oval in shape on the right upper leg, 4 cm below the root of penis and a lacerated fire-arm wound of exit oval in shape 4 x 3 cm on the right upper leg about 4 cm outer and lower to the wound of entries.
>
> (2) Fire-arm wound of entry 2 cm x 2 cm rounded in shape on the inner and back side of right lower leg, back on the right knee joint. Blackening was present around the wound.
>
> (3) A lacerated fire-arm wound (grazing) on the right side of upper leg (perinium) 2 cm right from the midline.
>
> (4) Lacerated fire-arm wound of entry 5 x 3 cm on the left back side of chest, 5 cm below the shoulder bone. No blackening was present.
>
> (5) An abrasion 2 x 3 cm, 'skin deep on the left side of chin, 1 cm outer to the midline.
>
> In his opinion death was caused due to Injury No. 4 causing damage to both the lungs. All the injuries were ante-mortem. Injury No. 5 was result of fall, rest of the injuries were inflicted by fire-arm weapon.
>
> The probable time between injury and death was sudden while the time elapsed between death and post-mortem about 14 to 18 hours.

8. The appellants and their co-accused were examined under section 342, Cr.P.C. They denied the allegations and professed their innocence. While answering to question (Why this case against you and why the P.Ws. have deposed against you?), they replied as under:

> Muhammad Ishfaq

"Due to enmity and to save the skin of actual culprits. The factual position is that the P.Ws Mujahid Ali along with Sami Ullah both, were closely related to the deceased and complainant and on the day of alleged occurrence Mujahid Ali and Sami Ullah fired at deceased and Muhammad Asif, because deceased Sajjad was a notorious and criminal person who was involved in murder, hudood zina and other criminal cases and all his family members were against Sajjad deceased due to his immoral, indecent and criminal activities."

Abdul Rehman alias Gagi

"This is a false case against me. P.Ws deposed against me due to enmity and to save the skin of actual culprits. The factual position is that the P.Ws Mujahid Ali along with Sami Ullah both, were closely related to the deceased and complainant and on the day of alleged occurrence, Mujahid Ali and Sami Ullah fired at deceased and Muhammad Asif, because deceased Sajjad was a notorious and criminal person who was involved in murder, hudood zina and other criminal cases and all his family members were against Sajjad deceased due to his immoral, indecent and criminal activities."

Abdul Rashid appellant adopted almost the same plea as taken by his co-accused Muhammad Ishfaq.

Neither the appellants made statements under section 340(2), Cr.P.C. nor they produced any evidence in their defence. Learned trial Court vide its judgment, dated 29-3-2005 found the appellants guilty and convicted and sentenced them as mentioned above, hence, these matters before this Court.

9. The learned counsel for the appellants, in support of this appeal, contended that there is a conflict between ocular account and the medical evidence because as per the allegation of the eye-witnesses the deceased received injury on his left flank whereas there is no injury on the flank rather injury is on the backside of the deceased; that there is a specific attribution to Saif-ur-Rehman co-accused of the appellant (since acquitted) that he fired with his pistol and the bullet hit on the chin of the deceased whereas in the Post-Mortem Report (Exh. PB) injury No.5 on the chin is result of fall; that as per site-plan the assailants were at a distance of 13 feet from the deceased whereas there is a blackening around injury No. 2 in the post-mortem report; that as per the site-plan Exh.PF there was insufficient light at the time of occurrence, as only one bulb has been shown in the site plan that too at a distance of 79 feet from the place of occurrence; that as per F.I.R. and the statement of the eyewitnesses one Asif was injured in this occurrence but he never appeared before the learned trial Court to support the allegation levelled by the complainant; that prosecution did not produce even the MLR of said Asif; that the best evidence available with the prosecution has been withheld, as such a presumption under Article 129(g) of Qanun-e-Shahadat Order, 1984 is to be drawn against the prosecution; that no crime-empty was recovered from the spot, therefore, recovery of two pistols at the instance of Abdul Rehman alias Gagi is of no avail to the prosecution; that Muhammad Ishfaq has been attributed an injury with the pistol at the flank of the deceased and if at all that is Injury No.4, its dimension is 5 cm x 3 cm which clearly

suggests that this injury cannot be caused with a pistol that doctor (P.W.4) during the cross-examination has admitted that two metallic pieces were recovered from the dead body but these led were not sent to the Fire-arm Expert; that four persons namely Abdul Rehman alias Gagi, Abdul Rashid, Muhammad Ishfaq and Saif-ur-Reliman (acquitted co-accused) fired at the deceased with different weapons and even specific injuries were attributed to each of the four persons but Saif-ur-Rehman was acquitted by the learned trial court and against his acquittal no appeal has been preferred either by the State or the complainant and if this evidence is disbelieved qua Saif-ur-Rehman it cannot be believed qua the appellant unless there is a strong and independent corroboration which is not available in this case; that the deceased was a man of questionable character; that motive is double-edged weapon and it can cut both ways; that it is on the record that Saifur-Rehman co-accused who has been acquitted got registered a case against the deceased and Saif-ur-Rehman is business partner of Ishfaq; lastly, the learned counsel for the appellants have vehemently contended that all the accused named in the F.I.R. except Abdul Rehman alias Gagi were declared innocent by four different Investigating Officers, i.e. Ahmad Khan, S.-L/S.H.O., Masroor Ahmad D.S.P./S.D.P.O., Ghulam Akbar Sial, Inspector 'and Muhammad Aslam, S.-I. and they all concluded that Nash, Ishfaq, Abdul Rashid and Saif-ur-Rehman were innocent, therefore; the appeal be allowed and the appellants be acquitted.

10. On the other hand, learned Deputy Prosecutor-General opposed this appeal on the grounds that the F.I.R. in this case was promptly lodged wherein all the details of incident are mentioned; that the ocular account is furnished by the 'natural witnesses who were residents of the village where this incident take place and that is also supported by the medical evidence; that both the eyewitnesses are very closely related to the deceased and in this view of the matter substitution of a real culprit with some innocent is a rare phenomenon; that motive has fully been established by the prosecution; that there was sufficient light and the witnesses could have witnessed this occurrence in the light shown in, the site-plan; that opinion of police is net binding on the Court and in proof of their innocence no witness has been produced, therefore, this appeal be dismissed and the Murder Reference be answered in the affirmative.

11. We have heard the learned counsel for the parties at length, have given anxious consideration to their arguments and have also scanned the evidence on record with their able assistance.

12. In this case five persons namely Abdul Rehman alias Gagi, Abdul Rashid, Muhammad Ishfaq, Nasir Ali and Saif-ur-Rehman were implicated. Specific allegation of firing was levelled against Muhammad Ishfaq, Abdul Rehman alias Gagi, Abdul Rashid appellants and Saif-ur-Rehman whereas the allegation against Nasir co-accused was that he also resorted to firing and kept on raising lalkara. However, during the trial Muhammad Iftikhar (P.W.10) had levelled an allegation against Nasir that his fire had injured Asif (not produced). The learned counsel has vehemently contended that this case was investigated by four different police officers and they all have concluded that all the accused named in the F.I.R. except one Abdul Rehman alias Gagi were innocent. He has referred the statements made by Muhammad Iftikhar (P.W.10) and Muhammad Aslam (P.W.12) who have admitted that accused were declared innocent by the police during all four investigations. The question for

determination before us is whether the opinion of police officers regarding guilt or innocence of the accused is relevant and admissible in evidence? we, are of the view that the opinion of the police regarding guilt or innocence of the accused is not admissible in evidence and in holding so we are fortified by the judgment of the Supreme Court of Pakistan in the case of Muhammad Ahmad (Mahmood Ahmed) v. The State (2010 SCM.R 660) where the Hon'ble Supreme Court was pleased to observe as under:--

> "It may be mentioned here, for the benefit and guidance of all concerned, that determination of guilt or innocence of the accused, persons was the exclusive domain of only the Courts of law established for the purpose and the said sovereign power of the Courts could never be permitted to be exercised by the employees of the police department or by anyone else for that matter. If the tendency of allowing such-like impressions of the Investigating Officer to creep into the evidence was not curbed them the same could lead to disastrous consequences. If an Investigating Officer was of the opinion that such an accused person was innocent then why could not, on the same principle, another accused person be hanged to death only because the', Investigating Officer had opined about his guilt".

13. As far as merits of this case are concerned, it is the case of the prosecution that three appellants along with their acquitted co-accused Saif-ur-Rehman fired at the deceased and had caused injuries to him. It is mentioned in the F.I.R. that the fire shot by Saif-ur-Rehman had hit near the chin of the deceased and stand remained the same by both the eyewitnesses while appearing before the Court as P.W.10 and P. W .11, but the Post-Mortem Examination on the dead body of the deceased reflects Injury No.5 was caused by fall. Another important aspect is, blackening around Injury No. 2 allegedly caused by appellant Abdul Rashid, whereas site-plan (Exh.PF) shows the distance between the said appellant and the deceased about 13 feet, much beyond the blackening range. Another lapse in this case is regarding two metallic pieces recovered from the dead body, and then handed over to the police, but these two metallic pieces were not sent to the Forensic Science Laboratory along with two pistols allegedly recovered at the instance of Abdul Rehman alias Gagi appellant for any expert opinion, that could have been a very important piece of evidence in this case.

14. It is settled law that if evidence of the prosecution is disbelieved qua one accused it cannot be believed against the other unless there is a strong and independent corroboration, especially when the witnesses are inimical and interested. In this respect we seek guidance from the judgment reported as Akhtar Ali and others v. The State 2008 SCMR 6 the following principle has been highlighted by the Apex Court:

> "It is settled law that eye-witnesses build to have falsely implicated five out of eight accused then conviction of remaining accused on the basis of same evidence cannot be relied upon without independent corroboration. See Ghulam Muhammad's case PLD 1975 SC 588 Sheral alias Sher Muhammad's case (1999 SCMR 697) and Ata Muhammad's case (1995 SCMR 599). It is also a settled law that credibility of the ocular evidence is not divisible. See Faiz Bakhsh's case (PLD 1959 PC 24), Nadia's case (42 Cr.LJ 53), Muhammad's case (PLD 1954 FC 84), Sher Bahadar's case (1972 SCMR 651) and Muhammad Afsar's case (PLD 1954 FC 171) "

15. As far as recovery of two pistols from Abdul Rehman alias Gagi appellant is concerned, since no empty was recovered from the spot and as such mere report of the Forensic Science Laboratory that the pistols were in working order is of no avail to the prosecution.
16. The motive alleged in the F.I.R. is that about one and a half month prior to the present occurrence a quarrel took place between Sajjad deceased and Saif-ur-Rehman appellant, therefore, motive set up in the F.I.R. was directly against Saif-ur-Rehman who has been acquitted _ by the learned trial Court and no appeal against his acquittal has been filed either by the State or by the complainant party, therefore, the motive in this case cannot be treated as a corroborative piece of evidence against the appellants.

17. As per contents of the F.I.R. one Muhammad Asif was also injured in this occurrence, while appearing in Court Muhammad Iftikhar complainant (P.W.10) has categorically stated that Muhammad Asif also had received injury on his chest and that fire was shot by Nasir acquitted co-accused of the appellants, but surprisingly the whole file is silent about this most important witness, and even his Medico-legal Report is not available on the file and in these circumstances learned counsel for the appellants is rightly of the view that adverse inference within the meaning of Article, 129(g) of Qanun-e-Shahadat Order, 1984 shall be drawn against the prosecution. He has rightly placed reliance upon the case reported as Riaz Ahmed v. The State (2010 SCMR 846) wherein the Honourable Supreme Court has emphasized as under:

> "Therefore, his evidence was the best piece of the evidence, which the prosecution could have relied upon for proving the case, but for the reasons best known his evidence was withheld and he was not examined. So a presumption under Illustration (g) of Article 129 of Qanun-e-Shahadat Order, 1984 can fairly be drawn that had the eye-witness Manzoor Hussain been examined in the Court his evidence would have been unfavourable to the prosecution."

18. We are of the considered view that prosecution has miserably been failed to prove its case against the appellants and ocular account is not in line with the medical evidence, even otherwise prosecution has to prove its case beyond any shadow of doubt and if any doubt arises from the circumstances of the case its benefit has to go to the accused. We respectfully refer here the case of Muhammad Akram v. The State (2009 SCMR 230) wherein Hon'ble Supreme Court of Pakistan has emphasized as under:--

> "It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it- was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

In an other case Ayub Masih v. The State (PLD 2002 SC 1048), the Hon'ble Supreme Court of Pakistan has observed as under:--

"It is hardly necessary to reiterate that the prosecution is obliged to prove its case against the accused beyond any reasonable doubt and if it fails to do so the accused is entitled to the benefit of doubt as of right. It is also firmly settled that if there is an element of doubt as to the guilt of the accused the benefit of that doubt must be extended to him. The doubt of course must be reasonable and not imaginary or artificial. The rule of benefit of doubt, which is described as the golden rule, is essentially a rule of prudence which cannot be ignored while dispensing justice in accordance with law. It is based on the maxim, it is better that ten guilty persons be acquitted rather than one innocent person be convicted'. In simple words it means that utmost care should be taken by the Court in convicting an accused. It was held in The State v. Mushtaq Ishtaq Ahmad (PLD 1973 SC 418) that this rule is antithesis of haphazard approach or reaching a fitful decision in a case. It will not be out of place to mention here that this rule occupies, a pivotal place in the Islamic Law and is enforced rigorously in view of the saying of the Holy Prophet (P.B.U.H.) that the mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent."

19. For all what has been discussed above, in our view the prosecution case is full of doubts and the appellants are entitled to the benefit of the same not as a matter of grace but as a matter of right. Therefore, by extending them benefit of the doubt we, allow Criminal Appeal No.990 of 2005, the convictions and sentences p recorded by the learned trial Court against Muhammad Ishfaq, Abdul Rehman alias Gagi and Abdul Rashid appellants are set-aside. They are acquitted of the charges levelled against them. They are in jail. They be released forthwith if not required to be detained in any other case.

20. Murder Reference No. 629 of 2005 is answered in the Negative and sentence of the death of Muhammad Ishfaq is Not Confirmed.

H.B.T./A-265/L Appeal allowed

2011 Y L R 303
[Lahore]
Before Najam ul Hasan and Muhammad Anwaarul Haq, JJ
MUSHTAQ AHMAD alias MUSTAFA---Appellant
Versus
THE STATE---Respondent

Criminal Appeal No.445-J of 2006, Murder Reference No. 97 of 2005 and Criminal Revision No. 406 of 2007, heard on 1st July, 2010.

Penal Code (XLV of 1860)---

----Ss. 302, 148 & 149---Qatl-e-amd, rioting armed with deadly weapon, offence committed by member of unlawful assembly in prosecution of common object---Appreciation of evidence---Benefit of doubt---Complainant's argument that he could not

nominate the accused in F.I.R. due to shock and trauma was not convincing especially in view of delay of 8 hours in lodging of F.I.R. ---Had complainant and the eye-witnesses identified the real culprit at the time of occurrence they would have nominated him in the F.I.R.---Eye-witnesses were not present at the place of occurrence---Evidence of witnesses could not be believed as they made dishonest improvements by introducing availability of electric bulb which they omitted to mention in the F.I.R.---Prosecution had failed to substantiate the alleged motive--Where prosecution set up a motive but failed to prove the same, prosecution, and not the accused, would suffer the consequences---Report of the S.H.O. to Police high-ups for sniffer dogs and foot trackers to trace the real accused severely dented complainant's claim of nominating the accused in supplementary statement on the same day---Failure of prosecution to produce opinion of the doctor as to capability of the injured to record the statement and recovery of hatcket without blood stains created doubts about accused's involvement in the commission of crime---Benefit of doubt was extended to accused---Appeal was accepted and accused was acquitted of the charge---Murder Reference was answered in the negative and death sentence was not confirmed.

Khalid Javed and another v. The State 2003 SCMR 1419; Akhtar Ali and others v. The State 2008 SCMR 6; Noor Muhammad v. The State and another 2010 SCMR 97 and Muhammad Akram v. The State 2009 SCMR 230 fol.

Muhammad Anwar Khokhar Defence Counsel at State Expense for Appellant (in Criminal Appeal No.445-J of 2006).

Qazi Zafar Iqbal, Additional Prosecutor-General for the State.

Akhtar Hussain Bhatti for the Complainant (in Criminal Revision No.406 of 2007).

Date of hearing: 1st July, 2010.

JUDGMENT

MUHAMMAD ANWAARUL HAQ, J.---Mushtaq Ahmad alias Mustafa son of Allah Ditta was tried by learned Sessions Judge, Okara for committing Qatl-e-Amd of Rai Umar Hayat in case F.I.R. No.417, dated 22-9-2003, offences under sections 302, 148, 149, P.P.C., registered at Police Station Chuchak, District Okara. At conclusion of the trial, the learned trial Court vide judgment, dated 14-2-2005 convicted and sentenced the appellant as under: -

(i) Under section 148, P.P.C. sentenced to one year' R.I.

(ii) Under sections 302(b)/149, P.P.C. sentenced to death. Appellant was also directed to pay compensation of Rs.1,00,000 (Rupees one hundred thousands only) to the legal heirs of the deceased under section 544-A, Cr.P.C. in default thereof to undergo six months' S.I.

2. Feeling aggrieved by the impugned convictions and sentences the appellant has filed Criminal Appeal No.445-J of 2006 whereas learned trial Court has transmitted a Reference (M.R. No: 97 of 2005) seeking confirmation of his death sentence. Rai Shamsher Khan, complainant has filed Criminal Revision No.406 of 2007 for enhancement of compensation. All these matters being unified are disposed of through this single judgment.

3. Brief facts stated by the complainant Rai Shamsher Khan (P.W.5) in F.I.R. are that on 22-9-2003 he along with Shaukat Ali and Muhammad Khan were sleeping in the veranda of his Dera whereas his son Umar Hayat (deceased) was sleeping at a distance of about 5/6 Karams in a gallery. At about 3.30 am he woke up on the noise of footsteps and saw five persons, one of them armed with hatchet and others armed with firearms standing near the cot of Umar Hayat, accused armed with hatchet caused a blow, which hit his son on left side of the head, other accused started firing with their weapons and decamped from the place of occurrence while climbing over the back wall of the Dera. Complainant further stated that he could not identify the assailants but he would if see them again.

4. Complainant appeared in court as P.W.5, Improved his version stating therein that on the same day he made a supplementary statement before the I.O. and had nominated five accused including the appellant, he further stated that it was the appellant armed with hatchet who had inflicted the fatal blow on the head of his deceased son. He also stated the motive behind the occurrence was that one-week prior to the incident deceased had slapped Mushtaq alias Mustfa appellant and on that grudge accused had murdered his son.

5. Abdul Sattar S.-I. (P.W.8) after receiving application (Exh.PA) visited the spot, inspected the place of occurrence, secured blood stained earth, took into possession eight empties of .12 bore gun, fifteen empties of .7 mm rifle and five empties of .30 bore pistol from the spot. He also prepared rough site plan, inquest report and also recorded a supplementary statement of the complainant (not placed on record).

Noor Ahmad, S.-I. (P.W.9) arrested Mushtaq Ahmad appellant on 19-2-2004, appellant led to the recovery of hatchet (P.6), Police however, could not arrest the father and three brothers of the appellant and declaring them proclaimed offenders, submitted challan only against the appellant.

6. Dr. Ishtiaq Ali (P.W.7) conducted medical examination of Rai Umar Hayat on 22-9-2003 and found the following injury on his person:--

> "An incised wound 61 cm x 3 cm deep, going Brain matter out of the wound on left temporal region of head 2 cm above the left ear.
>
> He referred the injured to Lahore General Hospital but he succumbed to the injury."

On 9-10-2003 at about 11-30 pm he conducted postmortem examination on the dead body of the deceased and found the following injuries:

(i) A healed wound 13 cm x 1/2 cm on left side of head.

(ii) An incised wound 3 cm x 1/2 cm in continuity of Injury No.1.

In his opinion injuries were ante mortem caused by sharp edged weapon. Injury No.1 was sufficient to cause death in ordinary course of nature.

The probable time between injuries and death was within 17/18 days and between death and postmortem within six hours.

7. To substantiate the charge, prosecution has examined 9 witnesses out of which Dr. Ishtiaq Ali (P.W.7) provided medical evidence, ocular, account was furnished by Rai Shamsher Khan complainant (P.W.5) and Shaukat Ali (P.W.6) Abdul Sattar, S.-I. (P.W.8) and Noor Ahmad, S.-I. (P.W.9) appeared as Investigating Officers of the case.

8. The learned District Attorney after tendering in evidence report of Chemical Examiner (Exh.PV) closed the prosecution evidence, accused was examined under section 342, Cr.P.C. he denied the allegations, while answering the question (why this case against you and why the P.Ws have deposed against you) Mushtaq Ahmad appellant replied as under:-

> "It is a false case. I used to serve with complainant party and I was not paid my wages due to which I left their service and due to that grudge I was falsely involved in this case at belated stage. At the time of occurrence Umar Hayat deceased was sleeping alone. He had many enemies and the occurrence was committed by some of his unknown enemy but I was falsely involved in this case due to' the aforesaid grudge. The deceased had died due to the negligence of the Doctor in his treatment. After the occurrence the complainant party had called tracker dogs to trace out the real culprits who could not be traced out and as such I was falsely involved in this case. The P.Ws have deposed against me due to their enmity with me."

9. The learned trial Court vide judgment dated 14-2-2005 found Mushtaq Ahmad guilty, convicted and sentenced him as mentioned above.

10. Learned counsel for the appellant contends that occurrence took place at 3-30 a.m. at night, inside the house of the deceased but case was registered at 10-25 a.m. i.e. after the delay of eight hours without any plausible explanation; that appellant is not nominated in the F.I.R that occurrence has taken place at dark hours of the night and no source of light has been mentioned in the F.I.R. or in the site plan, while appearing in Court, eye-witnesses have dishonestly improved their case stating that an electric bulb was switched on at the place of occurrence; that deceased only received one injury and died after 18 days because of septicemia but no statement of the deceased or application of the Investigating Officer for getting opinion of the doctor that the deceased was not fit to make statement is available on the record, and as such non-recording of the statement of the injured makes the prosecution case highly doubtful; that appellant allegedly got recovered hatchet on 26-2-2004 from the village pond and the same was found not blood stained as such recovery of crime weapon is inconsequential; that prosecution alleged a dispute between the appellant and the deceased before the occurrence as a motive but no witness of that occurrence has appeared before the Court; that appellant belongs to a poor family whereas the complainant is a big landlord of the area and his brother was a sitting M.N.A. at the time of occurrence; that according to Medico Legal Report police brought the deceased to hospital and he was medically examined after four hours but the F.I.R. was registered after a delay of eight hours, this situation indicates that if the accused were known to the complainant he could have mentioned their names; that no supplementary statement of the complainant was placed on

record and even in the statement of the accused recorded under section 342, Cr.P.C. he was never asked regarding any supplementary statement of the complainant as such supplementary statement, if any, cannot be used against the appellant; that supplementary statement has got no legal value as observed by the Hon'ble Supreme Court of Pakistan; hat Muhammad Jameel S.-I. was given up by the prosecution who got prepared the site plan and partially investigated the matter as such investigation conducted, by him cannot be read against the appellant; that MLR of the deceased indicates that Shaban A.S.-I. took the injured for medico legal examination after the occurrence but he was not produced by the prosecution; that Mark-A placed on record is a Progress Report submitted by Muhammad Jamil, S.-I./S.H.O. during the investigation wherein it was admitted that after the occurrence sniff dogs and foot prints trackers were also hired to know the real assailant that is enough to prove that occurrence was un-witnessed.

11. On the other hand, the learned Additional Prosecutor-General assisted by learned counsel for the complainant contends that prosecution's case is based on ocular evidence corroborated by medical evidence, motive and the recoveries; that both the eye-witnesses were residents of the same house, as such their presence at the place of occurrence is natural; that the witnesses are not inimical to the appellant and had no reason to falsely implicate him; that complainant was not mentally fit because of injury sustained by his son and as such he later on made supplementary statement in which he implicated the accused; that Abdul Sattar, S.-I. (P.W.8) appeared before the Court and stated that he had recorded the supplementary statement of the complainant on the same day at the place of occurrence; that Shoukat Ali (P.W.6) got recorded his statement at very same day at the spot and had named the appellant as an accused with the specific role of giving injury at the head of the deceased; that there are no material contradictions in the statements of the witnesses and there is no reason to disbelieve them; that non-availability of the report of the Serologist regarding blood stained earth was not necessary because place of occurrence was not disputed by the defence that human blood on the hatchet was destroyed by the appellant by throwing hatchet into the pond; that non-availability of the motive does not provide any support to the defence because motive is always hidden in the mind of the accused and it is not necessary that the witnesses must know the exact motive and that , no reason for false implication of the appellant has come on record.

12. We have paid full attention to the arguments of the learned counsel for the parties and have perused the record.

13. First we shall examine the prosecution evidence regarding the presence of both the eye-witnesses at the time of occurrence, and to ascertain the same we lay emphasis on the following points:--

(i) Complainant claims that he had made a supplementary statement and we without going into the evidentiary value of the same have noticed that no such supplementary statement was made part of the file.

(ii) P.W.5 Father and P.W.6 a first cousin of the deceased claimed that they have seen the appellant along with his four other co-accused at the time of occurrence. In

their statements in the court they admitted that they already knew the appellant being their co villager, and they had identified him in the light of an electric bulb, in addition to that they have attributed a lalkara to the accused to further strengthen their identity.

(iii) Medico Legal Report, indicates that injured was examined at D.H.Q. Hospital, Okara at 7-00 am through Muhammad Shaban A.S.-I. but prosecution has not produced Muhammad Shaban A.S.-I. during the trial that could explain that why he did not record the F.I.R. at 7-00 a.m.

(iv) Inquest report was prepared 18 days after the occurrence, even that does not contain the name of any of the accused and is silent about any supplementary statement of the complainant.

(v) Injury on the person of the deceased was very serious in nature, his brain matter was oozing out from the wound on the left temporal region, complainant and the other witnesses claimed to be present at the time of occurrence took him to the doctor after a delay of more than 3-1/2 hours.

In view of the above, reason advanced by the complainant that he was mentally upset and that's why he did not nominate the accused in the F.I.R. is not convincing. Had the F.I.R. lodge with promptitude we could accept the excuse of the complainant but in this case F.I.R. was registered after a delay of either hours, that too in the shape of a written application to the Investigating Officer. It is also admitted in the F.I.R. that after issuing of the M.L.R. injured had already been referred to the General Hospital, Lahore. We are of the considered view that had the complainant identified the real culprits at the time of occurrence he could mention their names in the F.I.R. and likewise if Shoukat Ali (P.W.6) knew the details of the accused he could definitely inform the complainant about the names of the culprits within those eight hours. We therefore hold that both the eyewitness were not present at the time of occurrence. Claim of that complainant that on account of his disturbed mental condition he could not mention the real facts in the F.I.R. is just an afterthought, Hon'ble Supreme Court of Pakistan in the case of Khalid Javed and another v. The State (2003 SCMR 1419) has commented this common pretext of the witnesses in the following words:--

> "It, may be noted that for changing his version from Exh.P.O. to the version incorporated in supplementary statement Exh. DB the complainant had claimed allowance on account of his disturbed mental condition but without proving medically through expert evidence, therefore, it would be dangerous and against the interest of justice to accept his explanation without legal proof."

In the same esteemed judgment, honourable Supreme Court of Pakistan has emphasized the value of supplementary statement in the following words:--

> "As far as supplementary statement of a complainant is concerned its value is not more than a statement under section 161, Cr.P.C. in this behalf reference may be made to the case of Falak Sher alias Shen v. The State (1995 SCMR 1350). In this

report appellant Falak Sher was not nominated in the F.I.R. However, subsequently complainant involved him by making supplementary statement deposing therein that the unidentified person was appellant who had earlier served with him for two years and was on visiting terms. Accordingly he was put to trial and was convicted by the trial Court and sentenced the accused to life imprisonment. In appeal the Federal Shariat Court maintained the conviction and sentence. As such appellant and two others filed petition before this Court. Leave was, granted only to appellant Falak Sher whereas the same was refused to the co-accused. While evaluating the case of both the sides it has been laid down that F.I.R. is the document, which is entered into 154, Cr.P.C. book maintained at the police station at the complaint of the informant. It brings the law into motion. The police under section 156, Cr.P.C. start investigation of the case. Any statement or further statement of the first informant recorded during the investigation by police would neither be equated with First Information Report nor read as part of it. Consequently it was held that as the name of appellant does not appear in the F.I.R. resultantly he was acquitted of the charge."

In the case of Akhtar Ali and others v. The State (2008 SCMR 6), almost in a similar situation, honourable Supreme Court while considering the delay in the F.I.R. and nomination of the accused in a supplementary statement of the complainant, observed as under:--

"It is also an admitted fact that the F.I.R. was lodged by the complainant after considerable delay of 10/11 hours without explaining the said delay. The F.I.R was also not lodged at police station as mentioned above. 10/11 hours delay in lodging of F.I.R. provides sufficient time for deliberation and consultation when complainant had given no explanation for delay in lodging the F.I.R. it is enough time for complainant to fabricate the story even then the complainant did not nominate appellants and their acquitted co-convicts, therefore, possibility cannot be ruled out qua false implication of the appellants: It is also a settled law that delay of 10/11 hours in making F.1.R not explained leads to inference that the occurrence was un-witnessed. In the case in hand this fact is also established in view of supplementary statement and conduct of the eye-witnesses. It is also a settled law that unexplained delay in registration of F.I.R. specially in the circumstances of the case creates lot of doubt qua the story of the prosecution."

14. Both the eye-witnesses had improved their case introducing an electric bulb, switched on, at the time of occurrence but this fact has not been mentioned in the F.I.R. or in the site plan prepared by the investigating officer at the time of his first visit. Dishonest improvements made by the witnesses in their statements make their credibility further doubtful and their evidence can not be relied upon we, very respectfully referring the case of Akhtar Ali and others v. The State (2008 SCMR 6) wherein Hon'ble Supreme Court of Pakistan has observed as under:--

"It is also a settled maxim when a witness improves his version to strengthen the prosecution case, his improved statement subsequently made cannot be relied upon as the witness has improved his statement dishonestly, therefore, his credibility

becomes doubtful on the well known principle of criminal jurisprudence that improvements once found deliberate and dishonest cast serious doubt on the veracity of such witness."

15. The deceased had expired in this case after 18 days but there is no opinion of any doctor on the record that he was not fit to make statement. Investigating Officer (P.W.8) has stated that he made an application in this regard before Dr. Ishtiaq Ali (P.W.7) but neither that application is on record nor Dr. Ishtiaq Ali has mentioned any such application in his evidence.

16. As far as motive is concerned, prosecution had alleged a dispute between appellant and the deceased before the occurrence in which the deceased gave a slap to the appellant but we have noticed that prosecution has miserably been failed to substantiate this motive as there is no evidence to prove this part of the prosecution story. It is true that prosecution is not under obligation to establish a motive in every murder case but it is also well settled that if prosecution sets up a motive and fails to prove it, then, prosecution is to suffer and not the accused. We very respectfully rely on the case of Noor Muhammad v. The State and another (2010 SCMR 97) wherein Hon'ble Supreme Court of Pakistan accentuated as under:--

"It has been held in the case of Muhammad Sadiq v. Muhammad Sarwar (1979 SCMR 214) that when motive is alleged but not proved then the ocular evidence required to be scrutinized with great caution. In the case bf Hakim Ali v. The State (1971 SCMR 432) it has been held that the prosecution though not called upon to establish motive in every case, yet once it has set up a motive and failed to establish it, the prosecution must suffer consequence and not the defence. In the case of Ameenullah v. State (PLD 1976 SC 629) it has been held that where motive is an important constituent and is found by the Court to be untrue, the Court should be on guard to accept prosecution story."

17. Another aspect that makes the prosecution case further doubtful is Mark-A, a progress report written by Inspector Muhammad Jameel S.H.O. (P.W. given up being un necessary) referred in the evidence of P.W.9 that the concerned S.H.O. had sent Mark-A to high-ups stating therein hat for tracing of real accused, he sought help of Sniff Dogs and Foot Trackers. Although Mark-A is not a peace of evidence worth reliance itself but this document creates a serious dent on the claim of the complainant, regarding nomination of the accused by him on the same day through his supplementary statement.

18. Dubious demeanor of the complainant, Inordinate delay in F.I.R, without mentioning the name of the appellant, non-production of any so-called supplementary statement of the complainant, non-production of opinion of the doctor regarding condition of the injured about making of his statement, recovery of an ordinary hatchet that too without bloodstains and un proved motive all these facts are sufficient to hold that case against the appellant is not free from doubts and his conviction on the basis of evidence produced by the prosecution is not safe, we respectfully referring the case of Muhammad Akram v. The State (2009 SCMR 230) where Hon'ble Supreme Court of Pakistan has emphasized as under:

"The nutshell of the whole discussion is that the prosecution case is not free from doubt. It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State (1995 SCMR 1345) that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then E the accused would be entitled, to the benefit of doubt not as a matter of grace and concession but as a matter of right."

19. In view of the above while taking into consideration the rule of Safe administration of justice, we extend benefit of doubt to the appellant, accept his appeal (Criminal Appeal No. 445-J of 2006) acquit him of the charge. His conviction and sentence is set-aside. He be set at liberty it not required in any other case.

20. For the abovementioned reasons Criminal Revision No. 406 of 2007 filed by the complainant seeking enhancement of compensation amount, stands dismissed.

21. Murder Reference No.97 of 2005 is answered in the negative and death sentence of Mushtaq Ahmad alias Mustafa is not confirmed.

A.R.K./M-604/L Appeal accepted.

2011 Y L R 359
[Lahore]
Before Sh. Najam ul Hasan and Muhammad Anwaarul Haq, JJ
SHAHID alias KAKA CHAND---Petitioner
Versus
THE STATE---Respondent

Criminal Appeals Nos. 792 of 2009 331 and M.R. No. 336 of 2005, heard on 22nd September, 2010.

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

----S.302(b)---Qatl-e-amd---Appreciation of evidence---Sentence, reduction in---Specific plea of sudden provocation and self defence taken by accused was not proved by him, as required under Article 121 of the Qanun-e-Shahadat, 1984, and he even did not appear as his own witness to disprove the allegation levelled against him under S.340(2), Cr. P. C. --- Accused was specifically nominated in the promptly lodged F.I.R. with a specific role--- Ocular testimony was consistent, straight forward and had no material discrepancy or contradiction---Eye witnesses had no personal grudge or ill will for false implication of accused in the case and they had reasonably explained their presence at the scene of occurrence---Prosecution evidence was worth reliance and was corroborated by medical evidence---Recovery of "Chhuri" along with positive reports of Chemical Examiner and Serologist had further supported the prosecution version---Conviction of accused was

maintained in circumstance-F.I.R. itself contained a valid ground for mitigation in favour of accused, as he had acted on the instigation of his mother at the time of occurrence---Accused was 23/24 years of age and his action under the influence of his co-accused parents could not be ruled out in the peculiar circumstances of the case---Death sentence of accused was altered to imprisonment for life in circumstances.

Noor Muhammad v. The State 1988 SCMR 1640; Tariq and 2 others v. The State 1995 SCMR 168; Mst. Hafeezan Bibi v. Muhammad Tufail and others 1995 SCMR 256 and Nazeer Ahmad v. The State 1999 SCMR 396 ref.

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

----S.302(b)---Qanune-e-Shahadat (10 of 1984), Art. 121---Qatl-e-amd---Defence plea---Burden of proof---When an accused takes a special plea in his defence, he has !to prove the same under Article 121 of Qanune-e-Shahadat, 1984, but the basic burden to prove. its case beyond any shadow of doubt still remains on the prosecution.

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

----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Sentence reduction in---Mitigating circumstances---"Lalkara" of the father or the mother can be treated as a mitigating circumstance for lesser sentence, especially where accused is of young age.

Noor Muhammad v. The State 1988 SCMR 1640; Tariq and 2 others v. The State 1995 SCMR 168; Mst. Hafeezan Bibi v. Muhammad Tufail and others 1995 SCMR 256 and Nazeer Ahmad v. The State 1999 SCMR 396 ref.

Malik Saeed Hassan with Dr. Khalid Ranjha for Appellant (in Criminal Appeal No.792 of 2009).

Nazir Ahmad Ghazi for Appellant (in Criminal Appeal No.331 of 2005) for the Complainant (in Criminal Appeal No.792 of 2009).

Qazi Zafar Iqbal, Additional Prosecutor-General for the State.

Date of hearing: 22nd September, 2010.

JUDGMENT

MUHAMMAD ANWAARUL HAQ, J.---Appellant Shahid alias Kaka Chand and his two co-accused namely Muhammad Inayat and Mst. Robina (his parents) were tried by learned Additional Sessions Judge, Gujranwala for the murder of Muhammad Jamil in case F.I.R. No. 302 of 2004, dated 13-5-2004, for an offence under sections 302, 34 P.P.C., registered at Police Station Sahzi-Mandi, Gujranwala, who vide judgment dated 15-2-2005 while acquitting Mst. Robina, co-accused of the appellant had convicted and sentenced the appellant and Muhammad Inayat as under:

> (i) Appellant Shahid alias Kaka Chand, under section 302(b), P.P.C. to death. He was also directed to pay Rs.50,000 (Rupees fifty thousand only) to the legal heirs of the

deceased as compensation under section 544-A, Cr.P.C. or in default thereof to undergo six month's S.I.

(ii) Muhammad Inayat alias Makhan, under section 337-E, P.P.C. to under-go one year rigorous imprisonment with the benefit of section 382-B, Cr.P.C. however he was acquitted from the charge under section 302, P.P.C.

2. Feeling aggrieved by the impugned judgment the appellant filed Criminal Appeal No. 792 of 2009 whereas trial Court has made a reference (Murder Reference No. 336 of 2005) seeking confirmation of death sentence as required under section 374, Cr.P.C. Muhammad Irfan complainant has filed Criminal Appeal No. 331 of 2005, against the acquittal of Muhammad Inayat alias Makhan and Robina Bibi co-accused, which appeal to the extent of Robina Bibi was dismissed in limine on 10-5-2005 and notice was issued to the extent of Muhammad Inayat alias Makhan. All these interconnected matters are being disposed of together by this single judgment.

3. At the very outset learned counsel of the complainant and learned counsel for the defence confirm that in Criminal Appeal No. 331 of 2005 titled Muhammad Irfan Butt v. Muhammad Inayat, etc., the respondent Muhammad Inayat has died. In this view of the matter Criminal Appeal No. 331 of 2005 stands abated.

4. Prosecution's story in brief unfolded by Muhammad Irfan Bashir, complainant (P.W.4) in the F.I.R. (Exh. PC) is that on 13-5-2004 complainant along with Muhammad Jameel (deceased) went to Bazar situated at Mehr Noor Wala to see their friends, where complainant got engaged in talking with his friends Muhammad Shabir, Muhammad Iqbal and Muhammad Rizwan whereas Muhammad Jameel (deceased) asked them to stay there as he wanted to see his another friend. Suddenly at about 2-15 p.m. five accused, appellant Shahid alias Kaka Chand, Muhammad Inayat alias Makhan, both armed with Churri and Robina Bibi along with two un-known accused persons came there. Robina accused raised lalkara that Khan be done to death on which appellant Shahid alias Kaka Chand inflicted two Churri blows hitting on the back of Muhammad Jameel Khan, then, Muhammad Inayat alias Makhan, accused inflicted 2/3 Churi blows hitting on the back and left fire-arm of Jameel Khan who after receipt of these injuries became unconscious and fell down in front of the house of Muhammad Arif. All the accused persons while raising lalkara fled away from the scene of occurrence.

According to the F.I.R., motive behind the occurrence was that the deceased was running business of cable network and one-day prior the deceased and the appellant had a dispute over non payment of the fare of the same.

5. On 14-5-2004 at D.H.Q, Hospital, Gujranwala Dr. Muhammad Riaz Nadim conducted post-mortem examination on the dead body of Muhammad Jamil and found the following injuries:--

(1) Stab wound 4 cm x 2 cm into mussel deep at left arm 10 cm from axilla.

(2) Stab wound 4 cm x 2 cm into mussels deep at left upper arm 18 cm from tip of left shoulder. Injuries Nos.1 and 2 are communicating with each other.
(3) Stab would 10 cm x 4 cm into deep going at 18 cm below root of neck at mid line more at right side.
(4) Stab would 7 cm x 2 cm into deep going 5 cm below and towards left of Injury No.3 at left chest and vertebral column.
(5) Stab wound 3.5 cm x 1.5 cm into deep going at left flank 11 cm from posterior mid line and 19 cm.
(6) Incised would 6 cm x 2 cm into muscles deep at left forearm middle 1/3 medially.
(7) Abrasion 1 cm x 2 cm at right knee joint.

In the opinion of doctor, all the injuries were ante mortem caused by sharp edged weapon except Injury No.7 caused by blunt weapon. Injuries Nos.1, 2, 6 and 7 were simple while Injuries Nos.3, 4 and 5 were found grievous. Cause of death in this case was irreversible hypovolumic shock, damage of right lung, right lobe of liver mediastinal vessels esophagus left kidney vertebral column due to Injuries Nos.3, .4 and 5:

> Duration between injuries and death was within 30 to 60 minutes and between death and postmortem was within eleven hours.

6. After registration of F.I.R. Muhammad Javed, S.-I. (P.W.12) inspected the place of occurrence, and conducted formal investigation, prepared injury statement, inquest report and sent the dead body for autopsy, he collected blood-stained earth from the spot. He also sketched the rough site plan of the scene of occurrence. On 21-6-2004, he arrested appellant, Shahid alias Kaka and Muhammad Inayat, accused and during investigation on 3-7-2004 appellant, Shahid alias Kaka while in custody led to the recovery of Chhuri (P-5)

7. At trial, the prosecution examined as many as twelve witnesses to prove charge against the accused. Dr. Muhammad Riaz Nadeem (P.W.11) provided the medical evidence. Muhammad Iqbal (P.W.2), Muhammad Shabbir (P.W.3) and Muhammad Irfan Bashir (P.W.4) furnished the ocular account. The investigation of this case was conducted by Muhammad Javed, S.-I. (P.W.12).

8. After recording of the prosecution evidence, statements of the appellant and his co-accused were recorded under section 342, Cr.P.C. The appellant and his co-accused denied the prosecution's evidence, however, in reply to question (Why this case against you and why the P.Ws deposed against you), appellant Shahid alias Kaka replied as under:--

> "I have made a victim of fabricated evidence. The occurrence did not take place in the manner and at place as alleged by the prosecution. It did take place in front of the shop of Nadim. Butcher. P.Ws are deliberately interested, thoroughly drilled and beggared. Their villainous activities extended over injunctions of Islam and Sunna. They are members of self styled Cobra gang headed by complainant Muhammad Irfan against whom many criminal cases are pending at various police stations, attested copies are enclosed herewith:

(a) Attested copy of F.I.R. No.278 of 2004 dated 26-7-2004 under sections 186/325/337-L2 P.P.C. Police Station Wahndo, Gujranwala against Irfan etc. Mark Exh.DB.

(b) Attested copy of F.I.R. Nos.395 of 2004 dated 28-7-2004 under section 506-B P.P.C. Police Station Civil lines, Gujranwala Mark Exh. DC.

(c) Attested copy of F.I.R. No.472 dated 11-7-1997 under section 506, P.P.C. and 29 of Telegraph Act Police Station Sabzi Mandi, Gujranwala against Ifan, his brothers Muhammad Sarwar, Muhammad Imran etc. Mark Exh. DD.

(d) Attested copy of F.I.R. No.195 dated 4-5-1996 under sections 458/380, P.P.C. Police Station Sabzi Mandi, Gujranwala Mark Exh. DE

Deceased was a man of violent temperament. He was mischief maker, wrong doing and forward folk.

The occurrence originated and culminated in the manner as stated hereinafter:

"On the fateful day I came to my house from -my duty at about 1-30 p.m. I found deceased Jamil standing there and demanding cable fees from my mother Mst. Robina Bibi. I told him that we had paid all the cable fare and that he should not tease them any more. Deceased became violent and starting abusing me and my mother so much so that he caught my mother from her neck resulting in tearing of her shirt. While exchanging hot word and abuses, we came at Nadim Butcher's. shop. Deceased picked up a churri from there and assaulted me. Feeling imminent apprehension of death/grievous hurt. I also picked up a churri from Nadim Butcher's shop and gave churri bellows to deceased Jamil in self-defence. I could not modulate and systemist my defence step by step while exercising right of defence in state of panic and horror when tampers were high in armed confrontation. I had voluntarily appeared at Police Station Sabzi Mandi on the same day. Police kept me in wrongful confinement and showed my fictitious arrest on 21-6-2004.

Murder of deceased took place in sudden fight, in heat passion, upon a sudden quarrel and without premeditation. My father Inayat co-accused and my mother Mst. Robina co-accused are sick and infirm. They did not participate in the occurrence in any manner. They have been involved by the complainant Irfan with ovlique motive to extort money. Many inhabitants of the locality had appeared before the police to vouchsafe the defence."

9. Neither the appellant nor his co-accused opted to produce evidence in their defence nor deposed on oath under section 340(2), Cr.P.C. as their own witnesses in disproof of the allegation appearing against them in the prosecution evidence. The trial culminated into conviction and sentence of the appellant and Muhammad Inayat and acquittal of his co-accused as mentioned above.

10. Learned counsel for the appellant contends that the witnesses are' admittedly chance witnesses and they have not spoken the whole truth; that the injuries attributed to the appellant are on the back of the deceased and the injury which was more serious in nature was attributed to Inayat, co-accused who has not been convicted under section 302, P.P.C.; that the injury attributed to the appellant does not co ordinate with the ocular account; that even according to the prosecution the occurrence took place due to provocation of the deceased as he gave abuses to the mother of the appellant; that occurrence took place at the spur of the moment and was not premeditated; that the cause of death was Injures Nos. 3, 4 and 5 and only two injuries are attributed to the appellant which are on the lower part of body of the deceased and the appellant cannot be held responsible for causing fatal injury on the deceased; that the appellant was a young man of 23 years of age whereas the ,deceased was a criminal record holder. Learned counsel lastly contends, that circumstances of the case lead to a definite inference that something had happened at the spur of the moment and even otherwise, base of the prosecution itself is that the appellant acted under the instructions and order of his mother as such capital punishment in the peculiar circumstances of this case is not at all warranted.

11. Conversely, learned Law Officer assisted by the learned counsel for the complainant submits that the appellant was specifically named in the F.I.R. and specific role of causing injuries on the vital part of the deceased has been attributed to him which were found present by the doctor and thus medical evidence fully corroborates the ocular account; that seven injuries were found on the person of the deceased whereas there was not even a scratch on the body of the appellant and the deceased was not armed with any weapon at the time of occurrence as such there was no question of self-defence. Further contends that the occurrence did not take place in front of the house of the appellant and the version of the appellant that the deceased abused his mother is belied by the site plan; that the appellant was arrested after one month and eight days of the occurrence as such his first version before the investigation has lost its efficacy and cannot be relied; that there was no enmity between the parties and false implication in an occurrence which took place in the bazaar was not possible, it cannot be presumed that the occurrence was unseen and that recovery of blood-stained chhuri from the appellant also supports the prosecution version, therefore, the appellant is not entitled to any exception.

12. We have heard the learned counsel for both the parties, learned Additional Prosecutor-General and have perused the record.

13. The occurrence in this case has been admitted by the appellant during the cross-examination on P.W.4 complainant of this case in the following words:--

> "It is incorrect that there was a dispute about cable between Jameel deceased and Shahid accused and both quarreled in Bazar during which they both tried to get a Churri from nearby Butcher's shop namely Nadeem Qasai. It is further incorrect that Shahid accused picking up Churri and in the said quarrel injuries were caused to Jameel deceased"

Same was the stance of the appellant during the cross-examination of P.W.2 Muhammad Iqbal. P.W.12 Muhammad Javed S.-I./Investigating Officer of this case regarding the first version of the petitioner stated as under:--

> "I arrested Shahid accused on 21-6-2004 according to his first version he put Churri from the Butcher's shop which was nearby the place of occurrence and inflicted blow to the person of the deceased. It is correct that according to first version of Inayat accused, both Shahid accused and Jameel deceased ran to nearby Butcher's shop and insulted each other."

14. The above stand of the appellant regarding the occurrence is further elaborated in his statement under section 342, Cr.P.C. but if we accept his statement under section 342, Cr.P.C. that has to be accepted in totality, we therefore, shall only consider his stand taken by his learned counsel on his behalf during the trial.

15. The appellant after taking a specific plea of sudden provocation and self-defence in this case did not produce any evidence to substantiate his plea, he even did not opt to appear as his own witness to disprove the allegations levelled against him under section 340(2), Cr.P.C. It is well settled principle of law that accused if takes any special plea in his defence he is to prove the same under Article 121 of Qanun-e-Shahadat Order, I 1984, however, basic burden to prove still remains on the prosecution to prove its case beyond any shadow of doubt. In this view of the matter, first we shall examine the case of the prosecution whether that is proved against the appellant and thereafter we shall see the defence plea of the accused whether that spells out from the surrounding circumstances of the case or not.

15. We have noticed that prosecution in this case, to prove the charge against the petitioner has examined three eye-witnesses, Muhammad Iqbal P.W.2, Muhammad Shabbir P.W.3 and Muhammad Irfan Bashir P.W.4. The occurrence took place on 13-5-2004 at 2-15 pm and Exh.PC/2 reflects that matter was reported to the police at 3-20 p.m. at DHQ Hospital, Gujranwala. Formal F.I.R. in this case was recorded at 3-35 pm at the relevant police station, we therefore find that F.I.R. in this case is promptly lodged wherein appellant is specifically nominated with a specific role. All the three eyewitnesses are consistent on all material aspects of the case, their statements are straightforward and even after lengthy cross-examination defence failed to get any material discrepancy or contradiction in the same even otherwise these three P.Ws. have no previous enmity, grudge or ill will of their own against the appellant to falsely involve him in this case. The P.Ws. have reasonably explained their presence at the relevant time. Their statements before the police were immediately recorded after the occurrence and their evidence is worth reliance on all material particulars in this regard. Ocular account is further corroborated by medical evidence. Recovery of weapon of offence Churri (P5) is an added corroboration to the ocular account coupled with positive report of Chemical Examiner and Serologist.

16. We, therefore, do not see any reason to disagree with the finding of conviction of the appellant recorded by the learned trial Court after appraisal of evidence that is quite inconsonance with the basic principles of appreciation of evidence in a criminal trial. We,

however, are inclined to consider his plea of mitigation in the light of peculiar circumstances of this case.

17. In this regard the basic stone of prosecution case i.e. F . I . R . contains a valid ground in itself for mitigation in favour of the appellant. F.I.R. reflects that whatever happened at the time of this unfortunate occurrence was on the instigation of the mother of the appellant Mst. Robina, who made a Lalkara and asked the appellant to kill the deceased. Learned trial Court had already acquitted Mst. Robina and. to her extent appeal against her acquittal i.e. Criminal Appeal No. 331 of 2005 has already been dismissed in limine by this Court vide order dated 10-5-2005. According to police record, appellant was aged about 23/24 years at the time of occurrence and his action under the influence of his co-accused parents cannot be ruled out in the peculiar circumstances of the case. We respectfully refer the cases of Noor Muhammad v. The State (1988 SCMR 1640), Tariq and 2 others v. The State (1995 SCMR 168), Mst. Hafeezan Bibi v. Muhammad Tufail and others (1995 SCMR 256) and Nazeer Ahmad v. The State (1999 SCMR 396) wherein Hon'ble Supreme Court of Pakistan has observed that Lalkara of the father or the mother can be treated as a mitigating circumstance for F lesser sentence especially where the accused is of young age.

18. In view of the above we, alter the death sentence of the appellant into life imprisonment as admittedly he acted under the influence of his mother and further that his case according to F.I.R. is at par with his (father) acquitted co-accused Muhammad Inayat against whom, there is an allegation of three Chhuri blows on the person of deceased; Benefit of section 382-B, Cr.P.C. is also extended to him, however, order of learned trial Court regarding compensation to be paid to the legal heirs of the deceased shall remain intact on the same terms and conditions. With this modification in the sentence of the appellant Shahid alias Kaka Chanel, his Criminal Appeal No. 792 of 2009, is dismissed.

19. Murder Reference (M.R. No. 336 of 2005) is answered in the Negative and death sentence of the appellant Shahid alias Kaka Chand is Not Confirmed.

N.H.Q./S-188/L Sentence reduced.

2011YLR 566
[Lahore]
Before Muhammad Anwaar-ul-Haq, J
MUHAMMAD FAIZAN---Petitioner
Versus
THE STATE and another---Respondents

Criminal Miscellaneous No. 9697-13 of 2010, decided on 4th October, 2010.

Criminal Procedure Code (V of 1898)---

----S. 497(2)---Penal Code (XLV of 1860), Ss.496-A, 511, 427, 337-F(i), 337-L(2), 337-H(2) & 324---Enticing or taking away or detaining with criminal intent the woman, mischief, damiyah to any person, hurt, by rash or negligent act and attempt to commit qatl-e-

amd---Bail, grant of---Further inquiry---Accused was not named in the F.LR., no specific role had been attributed to him and only an ineffective fire had been alleged against him in the supplementary statement---Attached copy of Nikahnama; copy of statement recorded by the daughter of the complainant in a private complaint, against him and pendency of her suit for jactitation of marriage against accused, were sufficient to prove that accused was not unknown to the complainant---In such background, non-mentioning of his name in the F.I.R., was sufficient to make his case one of further inquiry as contemplated under S.497(2), Cr.P.C.---Two nominated accused in the F.I.R. had been declared innocent by the Police; and in that view of the matter, application of Ss.496-A/511 and 324, P.P.C. could validly be determined by the Trial Court after recording of evidence in that case---Accused was admitted to bail, in circumstances.

Ch. Rasheed Ahmad for Petitioner.
Muhammad Ishaq, Deputy Prosecutor-General for the State with Mubarak Ahmad S.-I. with record.
Muhammad Usman Riaz Gill for the Complainant.

ORDER

MUHAMMAD ANWAAR-UL-HAQ, J.---Through this petition Muhammad Faizan petitioner seeks -post-arrest bail in case F.I.R. No. 859, dated 7-8-2010, registered at Police Station Baghbanpura, Lahore in respect of offences under sections 496-A, 511, 427, 337-F(i), 337-L(2), 337-H(2) and section 324, P.P.C.

2. The learned counsel for the petitioner contends that the petitioner, who is son-in-law of the complainant, is not named in the F.I.R. rather his name was subsequently added through supplementary statement of the complainant and even in the supplementary statement no specific role has been attributed against the petitioner except an ineffective fire; that the complainant is not with clean hands and has concealed the basic factum of Nikah of her daughter namely Mst. Tayyaba Tanvir, with the petitioner, and the complainant who is very much annoyed on this marriage, has falsely involved the petitioner in this case. Learned counsel further contends that after the arrest of the petitioner complainant party made a murderous assault upon the petitioner and caused him seven firearm injuries in police custody; that F.I.R. No. 964, dated 12-8-2010, under sections 324, 186, P.P.C., has been registered on the statement of a police official; that application of sections 496-A and 324, P.P.C. is a matter of further inquiry in this case and that can only be determined after recording of evidence.

3. Conversely, learned Deputy Prosecutor-General assisted by learned counsel for the complainant while vehemently opposing this bail application maintains that petitioner is named in the supplementary statement of the complainant on the same day with a specific role of ineffective fire; that the complainant and her daughter Mst. Tayyaba Tanvir do not accept the story of marriage and that is just a fabrication of the petitioner to save his skin; that a suit for jactitation of marriage has already been filed against him by Mst. Tayyaba Tanvir; that the petitioner remained absconder for a long time and he is vicariously liable for the acts of his co-accused; that a pistol .30 bore has also

been recovered on the pointation of the petitioner during the investigation. Lastly maintains that case against the petitioner falls with in the prohibitory clause of section 497, Cr.P.C. and he is not entitled for the concession of bail. Investigating Officer present, however, confirms that two co-accused of the petitioner nominated in the F.I.R. Muhammad Farhan and Muhammad Usman have been declared innocent after thorough investigation.

4. Heard. Record perused.

5. Admittedly, petitioner is not named in the F.I.R., no specific role has been attributed to him and only an ineffective fire has been alleged against him in the supplementary statement. Attached copy of Nikahnama, copy of statement recorded by the daughter of the complainant in a privatecomplaint, against him and pendency of her suit for jactitation of marriage against the petitioner are sufficient to prove that petitioner was not unknown to the complainant, and in this background non-mentioning of his name in the F.I.R. is sufficient to make his case one of further inquiry as contemplated under subsection (2) of section 497, Cr.P.C. Two nominated accused in the F.I.R. have been declared innocent by the police and in this view of the matter, application of sections 496-A/511 and 324, P.P.C. can validly be determined by the trial Court after recording of evidence is this case.

6. In view of the above, I without going into further details of this occurrence, accept this petition and admit the petitioner to post-arrest bail subject to his furnishing , bail bond in the sum of Rs.2,00,000 (Rupees two hundred thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

7. It is however clarified that the observations made hereinabove are tentative in nature and strictly confined to the disposal of this bail petition.

H.B.T./M-559/L Bail granted.

2011 Y L R 576
[Lahore]
Before Manzoor Ahmad Malik and Muhammad Anwaarul Haq, JJ
NASIR alias NASRI---Appellant
Versus
THE STATE---Respondent

Criminal Appeal No.36-J of 2007, and Murder Reference No.769 of 2005, decided on 1st December, 2010.

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

----Ss. 302 & 393---Qatl-e-Amd and attempt to commit robbery---Appreciation of evidence---Benefit of doubt---Medical evidence and ocular account--Complainant alleged that four assailants armed with firearms fired at his car front left and right side of car but according to post mortem report deceased sustained injuries on her front, back and left side

of her body---Complainant himself did not receive even a scratch during occurrence---Doctor during post moment examination of deceased observed blackening of margins regarding one injury but there was no evidence to show that any fire was made from such a close range---Ocular testimony was not corroborated by medical evidence, which created doubt in prosecution story---Ocular account furnished by complainant and one prosecution witness that assailants resorted to firing front both the sides was further falsified by recovery memo of car which showed that firing was made only from the front side as all bullet marks were available on left side of front screen and not anywhere else on the car---Prosecution's case was doubtful in nature, did not inspire confidence and failed to bring home guilt of accused---Conviction and sentence of death awarded to accused by Trial Court was set aside by High Court and accused was acquitted of the charge---Appeal was allowed accordingly.
Muhammad Akram v. The State 2009 SCMR 230 rel.

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

----S.302--Qanun-e-Shahadat (10 of 1984), Art. 22---Qatal-e-amd---Appreciation of evidence---Identification parade---Non-mentioning of role---Effect---Description of assailants was not mentioned in F.I.R. and even during identification parade accused was not picked up with reference to the role allegedly played by him during occurrence and it was simply stated that witnesses had identified the accused--Evidentiary value of identification parade of accused in identification parade without attributing to his role in the crime had no evidentiary value.
Mehmood Ahmed and 3 others v. The State 1995 SCMR 127 rel.

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

----S.302---Qatl-e-amd---Appreciation of evidence---Recovery of weapon---Absence of report of firearms expert---Effect---Recovery of weapon at the instance of accused carries no value, if there is no report of firearms expert in that respect.

Tayyab Hussain v. Ansari Ali and others 2008 SCMR 90 rel.
M. Azfar Ali Malik and Ejaz Ahmad Bajwa for Appellants.
Ch. Muhammad Mustafa, Deputy Prosecutor-General for the State.
Nemo for the Complainant.
Date of hearing: 1st December, 2010.

JUDGMENT

MUHAMMAD ANWAARUL HAQ, J.---This judgment shall dispose of Criminal Appeal No.36-J of 2007 titled as "Nasir alias Nasri v. The State" and Murder Reference No. 769 of 2005 titled as "State v. Nasir alias Nasri" arisen out of case F.I.R. No. 48 of 2002, dated 29-3-2002 offence under sections 302 and 393, P.P.C. registered at Police Station City Renala Khurd, District Okara.

2. Nasir alias Nasri appellant has filed Criminal Appeal No.36-J of 2007 through jail against his conviction and sentence whereby he was convicted by the learned Additional Sessions Judge Okara vide judgment, dated 22-11-2005 and sentenced as under:--

> "Under section 302(b), P.P.C. sentenced to death, with compensation under section 544-A, Cr.P.Code of Rs.100,000 to the legal heirs of the deceased, in default to further undergo for 6 months. S.-I."

The learned trial Court has sent Murder Reference No.769 of 2005 for confirmation or otherwise of the sentence of death awarded to Nasir alias Nasri (convict).

3. Brief facts of the case as narrated in F.I.R. (Exh. PA/1) lodged on the written application (Exh. PA) of Mirza Muhammad 'Arshad Baig. complainant (P.W.10), are that the complainant is the resident of Chak No.23/2-L, on 28-3-2002, he, along with his wife after her medical checkup was returning home, at about 10-00 p.m. when they reached opposite to Gate of Aamir Fruit Farm, all of a sudden, four persons armed with firearms came in front of their car, on seeing them the complainant tried to turn his car left and then right side, but two accused from the left side whereas two from the right side started firing with their fire-arms, fires hit on the screen at left side and seriously injured his wife. On hearing the fire shots, Muhammad Afzaal Nazim real brother of the complainant, Sana Ullah P.W. and many others from the vicinity also attracted at the spot and all the accused while firing fled away. The complainant along with other prosecution witnesses escorted the injured to the hospital but she succumbed to the injuries on the way.

4. Muhammad Rafiq S.-I. received the information of the occurrence and went to the spot where Mirza Arshad Baig complainant (P.W.10) produced a written application (Exh. PA) to him; he forwarded the same to police station for registration of formal-F.I.R., on which F.I.R. (Exh.PA/1) was drafted. He prepared injury statement, application for postmortem examination on the dead body of Mst. Shazia Arshad and inquest report. He also sketched the rough site-plan of the place of occurrence. He took into possession six empties of rifle .222 bore and Car No.20/OKC. He also collected blood of the deceased from inside the car with cotton cloth. On 23-5-2002 appellant during the course of investigation led to the recovery of a gun .12 bore and twenty cartridges.

On 29-3-2002 Mirza Arshad Baig complainant (P.W.10) joined the investigation before Khalid Pervez Inspector (P.W.15) and made his supplementary statement (Exh.PA/2) nominating Shaukat and Mohabat accused in this case. Khalid Pervez Inspector also arrested the appellant on 27-4-2002.

On 14-5-2002 Hafiz Shaukat Ali, Special Judicial Magistrate, Okara (P.W.12) conducted the identification parade in Central Jail, Sahiwal and in his presence eye-witnesses namely Mirza Afzal Baig, Arshad Baig and Sana Ullah have identified the accused Nasir alias Nasri.

5. The appellant and his co-accused (since acquitted) were summoned to face trial. Formal charge was framed against the appellant and his co-accused to which they pleaded not guilty and claimed trial.

6. To substantiate the charge prosecution has examined fifteen witnesses in total out of which Lady Dr. Qaiser Tariq (P.W.8) provided medical evidence. Mirza Arshad Baig complainant (P.W.10) and Sana Ullah (P.W.11) have furnished the ocular account. Muhammad Rafiq S.-I. and Khalid Pervaiz, Inspector (P.W.15) conducted investigation of this case whereas Akbar Javed A.S.-I. (P.W.13) has furnished secondary evidence of Muhammad Rafique S.-I. who was not available after his retirement vide order of the learned trial Court dated 28-1-2005.

7. On 29-3-2002 Lady Dr. Qaiser Tariq (P.W.8) conducted post mortem examination on the dead body of Mst. Shazia Arshad (deceased) and observed as under:

(1) A lacerated wound 5 x cm 8 cm x deep going on the medial border of left scapula, on dissection injury to left lung, blood vessels of heart and lungs and out from the right of chest injury to the right arm (wound of entry).

(2) A lacerated wound 3 cm x 5 cm below the injury No. 1 (wound of entry).

(3) A lacerated wound 3-1/2 cm x 2-1/2 cm, approximately 6 cm below and left to injury No.2 (wound of exit to injury No. 2.

(4) A lacerated wound 2 1/2 cm x 1 cm on the right cheek deep going to oral cavity.

(5) A lacerated wound 21/2 cm x 6 cm x skin deep with blackening of margin (wound of entry 3 cm below the left nipple.

(6) A lacerated wound 1-1/2 cm 1/2 cm approximately 1 cm right injury No. 5 (wound of exit).

(7) A lacerated wound 2 cm x 1-1/2 cm approximately 1 cm right injury No.5 (wound of exit).

(8) A lacerated wound 4 cm x 4 cm x deep going with everted margin (wound of exit injury No. 1).

All the injuries were ante mortem and in ordinary course of nature were sufficient to cause death due to severe haemorrhage, blood loss and shock.

Probable time elapsed between injury and death was immediate and between death and postmortem 14-15 hours approximately.

8. Appellant and his co-accused (since acquitted) were examined under section 342, Code of Criminal Procedure. To a question as to why the case against him and why the prosecution witnesses had deposed against him Nasir alias Nasri appellant replied as under:--

> "All the P.Ws. are inter se related to each other and they have falsely deposed against me with ulterior motive and to suppress and dispose off the real facts of the case. The whole version of prosecution based on presumption, conjecture and surmises and is not plausible in ordinary course of nature. As no such occurrence took place as stated

by the prosecution. In fact, Muhammad Arshad husband of deceased wanted to marry with Sana sister of deceased as they have affair with each other and that in pursuance of that object he managed to get murder his wife. Mst. Shazia deceased was not pregnant and that a fake and fictitious version was introduced by the prosecution at very belated stage. I am known to complainant party since my birth. The complainant party is very influential persons and brother of the complainant is existing Nazim Union Council and has political influence over the police. The police joining the hands with the complainant party firstly kept me detained at P/S for a long time and then falsely challan me in this case for the purpose of fake and fictitious identification parade. The complainant and other so called P.Ws. used to visit me during my above-said detention as well. I am innocent and I have no concern with the alleged occurrence and that I have been made an escape goat by the police by concealing the true facts of the occurrence and that I have been falsely challaned in this case."

The appellant and his co-accused did not opt to appear as their own witnesses under section 340(2), Code of Criminal Procedure, nor did they produce any evidence in their defense. After conclusion of the trial, the learned trial Court vide impugned judgment while acquitting two co-accused namely Muhammad Akram alias Akari and Mohabbat alias Jaji, convicted the appellant as detailed above.

9. Learned counsel for the appellant, in support of this appeal, contends that admittedly the appellant is not named in the F.I.R. or in the supplementary statement (Exh. PA/2); that the story narrated in the F.I.R. is highly improbable; that surprisingly the complainant did not sustain even a scratch in the whole incident; that there is no allegation that anything was snatched from the complainant; that the complainant in his cross-examination stated that he had no enmity with the accused persons; that the complainant has made dishonest improvements while appearing before the learned trial Court to strengthen the case of prosecution; that the deceased sustained injuries on her front and back whereas according to the complainant all the four accused made firing from left and right side; that even there was blackening present around an injury which suggests that the deceased was fired from a very close range that falsifies the ocular account furnished by Mirza Arshad Baig (P.W.10) and Sana Ullah (P.W.11); that statement of Sanaullah (P.W.12) is of no avail to the prosecution as in his statement recorded before the Police under section 161, Code of Criminal Procedure he has not named any of the assailants, however, while appearing before the Court he named the appellant; that the identification parade (Exh. PK) is also of no help to the prosecution firstly because the complainant (P.W.10) and Sana Ullah (P.W.11) did not give any description of any of the assailants, secondly the witnesses did not assign any role whatsoever to the appellant with reference to his participation in the alleged occurrence and it was simply stated that they have identified the appellant; that no importance can be attached to the recovery of weapons of offence and empties from the place of occurrence as these were not sent to Forensic Science Laboratory for comparison.

10. On the other hand, learned Deputy Prosecutor-General, opposed this appeal on the ground that there is no contradiction in the ocular account and the medical evidence as it is the case of the complainant that on seeing the culprits he tried to turn his car to the left side

and right side and the assailants made firing, therefore, possibility cannot be ruled out that the deceased might have turned her body and in this way she sustained injury on her front and back; that the complainant had no enmity with the appellant to falsely implicate him in the murder of his wife; that the appellant was picked up during the course of identification parade which was conducted under the supervision of a learned Judicial Magistrate (P. W-12) and recovery of weapons of offence sufficiently connects him with the commission of crime; that the prosecution has proved its case against the appellant to the hilt and this appeal merits outright dismissal.

11. We have heard learned counsel for the appellant as well as the learned Deputy Prosecutor General for the State at a considerable length and have also gone through the record.

12. In this case the occurrence took place on 28-3-2002 at about 10-00 p.m. matter was reported to the Police at the place of occurrence through written application moved by the complainant and formal F.I.R. was recorded at 12-35 a. m. on 29-3-2002. Distance between the place of occurrence and the Police Station is 08 kilometers. In the F.I.R. admittedly none is named as accused despite the fact that the case was registered on the written application of Mirza Arshad Baig complainant (P.W.10). Even in the supplementary statement dated 29-3-2002 the appellant has not been nominated as an accused and suspicion has been shown against two other persons. It is the case of the complainant that four assailants armed with firearms fired at his car from left and right side of the car but according to post mortem report deceased sustained injuries on her front, back and left side of the body. Moreover, the complainant himself did not receive even a scratch during the whole occurrence. We have noticed that Lady Doctor (P.W.8) during post mortem examination of Mst Shazia Arshad (deceased) has observed blackening of margins regarding injury No. 5 but there is no evidence to show that any fire was made from such a close range. Thus, on this aspect of the case the ocular testimony is not corroborated by the medical evidence, which creates a reasonable doubt in the prosecution's story. Ocular account furnished by the complainant (P.W.10) and Sana Ullah (P.W.11) that the assailants resorted to firing from both the sides (left and right) is further falsified by the recovery memo of car (Exh. PJ) which shows that firing was made only from the front left side as all the bullet marks were available on left side of the front screen and not at anywhere else on the car.

13. We have noticed that P.W.10 and P.W. 11 have made conscious dishonest improvements to strengthen the case of prosecution during the trial. As far as Sanaullah (P.W.11) is concerned, his statement was recorded by the Police under section 161, Code of Criminal Procedure (Exh. DA) wherein he had not mentioned the name of the appellant but while appearing before the trial Court, he has improved his statement and named the appellant. The more glaring dishonest improvement in his statement is regarding showing himself as an eye-witness of the occurrence with all minute details whereas in his statement Exh. DA he had categorically stated that he learnt about the details of occurrence after reaching the spot along with other residents of the village. He had stated in his first statement before the police that complainant Arshad Baig can identify the assailants but he did not claim that he himself was an eye-witness and could identify the assailants.

14. So far as identification parade (Exh. PK) is concerned, suffice it to observe that in the F.I.R. description of the assailants has not been mentioned and even during the identification parade appellant was not picked up with reference to the role, allegedly played by him during the occurrence and it was simply stated that witnesses have identified the appellant. In the case of Mehmood Ahmed and 3 others v. The State (1995 SCMR 127) it was held that evidentiary value of identification of accused in the identification parade without attributing to his role in the crime has no evidentiary value.

15. Recovery of a gun and a pistol at the instance of the appellant carries no value, as there is no report of the Fire-arms Expert in this respect. In the case of Tayyab Hussain v. Ansari Ali and others (2008 SCMR 90) the Hon'ble Supreme Court has observed that recovery of weapon from the accused was of no consequence as the crime empty secured from the place of occurrence was not sent to the Forensic Science Laboratory for comparison.

16. Motive initially advanced by the prosecution was robbery but nothing was snatched from the complainant by the accused. Learned trial Court has framed charge against the accused only under section 302, P.P.C. and not under section 393, P.P.C. as mentioned in the F.I.R. Complainant has admitted that he had no enmity with the accused, in this view of the matter murder of his innocent wife is not understandable especially when he did not receive any injury during the occurrence and accused did not snatch any thing from him. We are of the considered view that complainant has concealed the real facts regarding this unfortunate incident.

17. In view of above we hold that prosecution case is doubtful in nature, does not inspire confidence and prosecution has failed to bring home the guilt of the appellant. In the case of Muhammad Akram v. The State (2009 SCMR 230), the Hon'ble Supreme Court of Pakistan has observed as under:--

> "It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in. a prudent mind about the guilt of the accused, the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

18. Therefore, this appeal is allowed and the appellant is acquitted of the charges levelled against him while extending him benefit of doubt. He is in jail. He be released forthwith if not required in any other case.

19. Murder Reference No. 769 of 2005 is answered in the NEGATIVE and the sentence of death awarded to Nasir alias Nasri (convict) is NOT CONFIRMED.

M.H./N-113/L Appeal allowed.

2011 Y L R 689
[Lahore]
Before Muhammad Anwaarul Haq, J
SAADI AHMAD---Petitioner
Versus
THE STATE and others-Respondents

Criminal Miscellaneous No. 12629-B of 2010, decided on 6th December, 2010.

Criminal Procedure Code (V of 1898)---

----S. 497(2)-Penal Code (XLV of 1860), Ss.392, 395 & 412---Robbery, dacoity, dishonestly receiving property stolen in the commission of a dacoity---Bail, grant of---Further inquiry---Delay of two months in lodging the initial F.I.R. without any explanation in which accused was not nominated, but was introduced through a supplementary statement of the complainant later on without disclosing any source of information regarding culpability of accused---Prima facie, recovery of mobile phone shown against accused was doubtful because the brand of mobile phone allegedly recovered at the instance of accused was different than mentioned in the F.I.R.---Mere recovery of unspecified cash of Rs.10,000, was not enough to keep accused behind the bars for an indefinite period---Evidentiary value of those recoveries could only be determined after recording of some evidence by the Trial Court---Identification parade conducted in the case had least significance because the complainant had nominated accused with all their details, much prior to the identification parade---Accused was behind the bars since 4-12-2009 without any substantive progress in the trial and his further detention in jail would not serve any beneficial purpose---Case against accused, prima facie, was one of further inquiry in his guilt and fell within purview of subsection (2) of S.497, Cr. P. C. ---Accused was admitted to bail, in circumstances.

Shahzad Hassan Sheikh for Petitioner.
Tasawar Ali Khan Rana, Deputy Prosecutor-General for the State with Muhammad Nawaz S.-I. with record.
Khan Talib Hussain Baloch for the Complainant.

ORDER

MUHAMMAD ANWAARUL HAQ, J.---Saadi Ahmad petitioner by way of instant petition has sought his post-arrest bail in case F.I.R. 414, dated 8-10-2009, under sections 392, 395 and 412, P.P.C. registered at Police Station Warburton, District Nankana Sahib.

2. Learned counsel for the petitioner contends that case against the petitioner is totally fake and fabricated; that there is an inordinate delay of two months in lodging of initial F.I.R. and even in that F.I.R. petitioner has not been nominated rather he was subsequently introduced through a supplementary statement of the complainant recorded on 22-10-2009 without disclosing any source of his information about culpability of the petitioner; that recovery of mobile phone shown against the petitioner is a fabrication and is of no avail to the prosecution because the mobile phone allegedly recovered at the instance of the petitioner is

not mentioned in the F.I.R.; that unspecified cash of Rs.10,000 is also not a valid evidence against the petitioner to connect him with the commission of offence. Further contends that as the petitioner is previous non-convict and non-record holder, therefore, the allegation levelled against the petitioner is a matter of further inquiry and that the petitioner is behind the bars since 4-12-2009 without any substantive progress in the trial.

3. On the other hand, learned Deputy Prosecutor-General assisted by learned counsel for the complainant vehemently contesting this bail application contends that the allegation against the petitioner is very heinous in nature and falls within the prohibitory clause of section 497, Cr.P.C; that there is no mala fide or ulterior motive on the part of the complainant or police to falsely implicate the petitioner in this case; that recovery of mobile phone and cash of Rs.10,000 is sufficient to connect the petitioner with the commission of crime, further more, he remained fugitive from law for a considerable period that attitude of the petitioner disentitles him for the concession of bail. However, learned Deputy Prosecutor-General after consulting the police record remained unable to point out any other criminal case registered against the petitioner.

4. Arguments heard. Record perused.

5. Admittedly, there is delay of two months in lodging the initial F.I.R. without any explanation in which petitioner was not nominated rather he was introduced through a supplementary statement of the complainant recorded on 22-10-2009 without disclosing any source "of information regarding culpability of the petitioner. Prima facie, recovery of mobile phone shown against the petitioner is doubtful because the brand of mobile phone allegedly recovered at the instance of the petitioner is different than mentioned in the F.I.R. Mere recovery of unspecified cash of Rs.10,000 is not enough to keep the petitioner behind the bars for an indefinite period. Evidentiary value of these recoveries can only be determined after recording of some evidence by the learned trial Court. Identification Parade conducted on 19-12-2009 has least significance because the complainant has nominated the accused with all their details on 22-10-2009 much prior to the identification parade. Petitioner is behind the bars since 4-12-2009 without any substantive progress in the trial and his further detention in jail would not serve any beneficial purpose.

6. In this .view of the matter, case against the petitioner falls within the purview of subsection (2) of section 497, Cr.P.C. and is prima-facie one of further inquiry into his guilt. I, therefore, admit the petitioner to post-arrest bail subject to his furnishing bail bond in the sum of Rs.2,00,000 (Rupees two hundred thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

7. It is, however, clarified that observations made herein are just tentative in nature and strictly confined to the disposal of this bail petition.

H.B.T./S-250/L Bail granted.

2011 YLR 705
[Lahore]
Before Manzoor Ahmad Malik and Muhammad Anwaarul Haq, JJ
QADIR KHAN---Appellant
Versus
THE STATE---Respondent

Criminal Appeal No.1281 and Murder Reference No. 635 of 2005, heard on 26th October, 2010.

Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Sentence, reduction in---Presence of prosecution witnesses at the place of occurrence had fully been established, their relations with the deceased, further suggested that their presence in the house with the deceased was quite natural---Witnesses remained consistent on all material aspects of the case, even after a lengthy cross-examination---Minor variations in minute details of the incident were insignificant; and did not affect their straightforward, coherent and natural narration of the whole incident---Medical evidence and recovery of weapon of offence coupled with positive reports of Chemical Examiner and that of Serologist, further corroborated ocular account--Prosecution, in circumstances had proved its case against accused beyond any shadow of doubt to maintain his conviction under S.302(b), P.P.C.-However, certain extenuating circumstances were in the case to take a lenient view--Case of prosecution was that accused had himself inflicted injuries on his person during the occurrence, whereas accused had attributed his injuries to other person---Accused had been medically examined on the same day through Police---Medicolegal report reflected that the injuries were fresh and were result of some fight---Record showed that deceased and said other persons were sleeping on one and the same cot, but said other person had not been produced---As to what exactly happened between the deceased and accused at the time of occurrence remained in mystery---Police, even after Medico-legal examination of accused, immediately after occurrence, mysteriously deferred his arrest for five days---All those aspects, were extenuating circumstances in favour of accused---Prosecution had to exclude all extenuating circumstances in favour of accused before praying for his death sentence---Extreme penalty of death awarded to accused being too harsh, lesser sentence of imprisonment for life would meet the ends of justice---Sentence of death of accused was converted into imprisonment for life---Benefit of S.382-B, Cr. P. C. would also be extended to accused.

Sardar Khurram Latif Khan Khosa for Appellant.
Chaudhry Muhammad Mustafa, Deputy Prosecutor-General for the State.
Date of hearing: 26th October, 2010.

JUDGMENT

MUHAMMAD ANWAARUL HAQ, J.---Qadir Khan, appellant was tried in case F.I.R. No.1494, dated 14-12-2004, registered at Police Station Sadar, Faisalabad in respect of an

offence under section 302, P.P.C. After conclusion of the trial, learned trial Court vide, its judgment-dated 22-6-2005 has convicted and sentenced the appellant as under:--

> Under section 302(b), P.P.C. to 'Death' for committing Qatl-e-Amd of Muhammad Saleem. He was also directed to pay Rs.1,00,000 (rupees one lac only) as compensation to the legal heirs of the deceased under section 544-A, Cr. P. C. or in default thereof to undergo six months' Simple Imprisonment.

2. Feeling aggrieved, the appellant has challenged his conviction and sentence through Criminal Appeal No. 1281 of 2005, whereas learned trial Court has transmitted Murder Reference No. 635 of ' 2005 for confirmation or otherwise of 'Death' sentence of the appellant. Both these matters being integrated are being disposed of together.

3. Prosecution case in brief unfolded in F.I.R. (Exh. PE/1) by Ronak Ali complainant (P.W.4) is that complainant along with Zulfiqar came to meet Muhammad Saleem alias Babar on 13-12-2004 at about 7-30 p.m. Qadir Khan also came to meet his brother Muhammad Saleem and stayed there. At the mid of the night complainant got up on hearing whispering and quarrelling of his brother and Qadir Khan. Complainant switched on the light and saw Qadir Khan was forcing his deceased brother for sodomy. Qadir Khan inflicted a knife blow at the left side of the chest of Muhammad Saleem alias Babar. He threatened to kill if anyone came near to him he also said that he loves Babar very much and they have decided to live and die together and inflicted knife blows on his own abdomen. When witnesses tried to catch him he ran away while brandishing his knife. Muhammad Saleem in an injured condition taken to hospital for his treatment but he succumbed to the injuries. Motive behind the occurrence mentioned in the F.I.R. was that Qadir Khan wanted to establish illicit relations with Muhammad Saleem.

4. On 14-12-2004, after receiving information about present occurrence, Muhammad Amin, S.-I. (P.W.9) proceeded to Allied Hospital, he inspected the dead body prepared the injury statement (Exh. PF), inquest report (Exh. PG), and sent the same for autopsy. He visited the place of occurrence; secured blood-stained earth (Exh. PC) sketched rough site-plan (Exh. PJ) of the place of occurrence. On 19-12-2004, he had formally arrested Qadir Khan appellant who thereafter, led to the recovery of knife P3 which was taken into possession vide memo (Exh. PD).

5. After completion of investigation, challan was prepared and submitted before the learned trial court, charge was framed against the appellant on 24-2-2005 to which appellant pleaded not guilty and claimed trial.

6. To substantiate the charge the prosecution has examined nine witnesses in total out of which Dr. Altaf Pervaiz Qasim (P.W.6) provided medical evidence, Muhammad Amin, S.-I. (P.W.9) conducted investigation of this case. Ronak Ali complainant (P.W.4) and Zulfiqar (P.W.5) have furnished ocular account.

7. On 14-12-2004 Dr. Altaf Pervaz Qasim (P.W.6) conducted the post mortem examination on the dead body of Muhammad Saleem alias Babar and observed as under:-

(1) A stab wound 2 cm x 1 1/2 cm on front of left chest at a distance of 10 cm away from midline and 3 cm below the left nipple. Corresponding cut was present on qameez. The stab entered the left chest through 4th inter costal space, injured the plura, perforated the left lung and heart through and through, chest cavity was full of blood.

In his opinion death was caused by Injury No. 1, inflicted by sharp-edged weapon leading to hemorrhagic shock, which was ante-mortem and sufficient to cause death in ordinary course of nature.

The probable time between injury and death was immediate while the time elapsed between death and post-mortem was about 1218 hours.

8. The learned Special Public Prosecutor gave up Aamer Shehzad being unnecessary on 20-4-2005 on the same day he tendered in evidence reports of Chemical Examiner about blood-stained cotton (Exh. PK) and report of Serologist (Exh. PK/l), report of Chemical Examiner regarding blood-stained knife and that of Serologist (Exh.PL and PL/1) and closed the prosecution evidence.

9. The appellant was examined under section 342, Cr.P.C. He denied the allegation and professed his innocence. While answering to question (Why this case against you and why the P.Ws. have deposed against you?), he replied as under:

"Qadir Khan runs Hotel at Chak No. 209/RB in front of Aljanat Factory. Muhammad Saleem deceased and Aamer Shehzad were also working in Al-Janat Factory. Both were used to take meal from the Hotel of Qadir Khan on borrowed basis and the deceased and Aamer Shehzad to pay the charges of hotel at the expiry of month. That on 13-12-2004 Qadir Khan went to Muhammad Saleem deceased and Aamer Shehzad for getting money charges of their meal on the call of Muhammad Salem deceased. That on the request of Muhammad Saleem that he was too late at night, please stay and sleep there. Muhammad Saleem deceased and Aamer Shehzad slept in one cot and Qadir Khan slept another cot, in midnight I heard that Aamer Shehzad was compelling Muhammad Saleem for illicit relations. Qadir Khan tried to intervene between Aamer Shehzad and Muhammad Saleem deceased. Aamer Shehzad inflicted knife blow to Muhammad Saleem deceased and Qadir Khan too. Mobile police came there and took Qadir Khan injured along with Muhammad Saleem to hospital on their vehicle with the help of one labourer Muhammad Nawaz. Aamer Shehzad misguided the P.Ws and concocted the fake story to save himself. P.Ws. were not present at the time of occurrence. They were called after the occurrence by the police. to strengthen the prosecution story with the connivance of Aamer Shehzd. I tender my MLC in my defence".

The appellant did not make statement under section 340(2) Cr.P.C.; however, he produced his own M.L.C. Exh. DA in his defence. Learned trial Court vide its judgment, dated 22-6-2005 found the appellant guilty and convicted and sentenced him as mentioned above, hence, these matters before this Court.

10. The learned counsel for the appellant, in support of this appeal, contends that there was a delay in registration of the F.I.R. and the same was recorded after the post mortem examination with some deliberations and consultations; that both the eye-witnesses, Ronak Ali (P.W.4) and Zulfiqar (P.W.5) are admittedly residents of Bhakkar which is, at a distance of 4-30 hours drive from the place of occurrence, and they remained fail to advance any plausible explanation for their presence at the spot; that Aamer Shehzad was the most natural and important witness of this incident as admittedly occurrence took place in his quarter where he was residing and it is clear from the site-plan (Exh. PH) that the deceased was sleeping with Aamer Shehzad on the same cot, this fact has further been admitted by the Investigating Officer while appearing as p.W.9. that according to his investigation the deceased and Aamer Shehzad were sleeping on one cot; but his evidence was withheld by the prosecution and he has been given up being unnecessary, and an adverse inference within the meaning of Article 129(g) of Qanun-e-Shahadat Order, 1984 shall be drawn against the prosecution that the story of the prosecution is highly improbable as the allegations levelled against the appellant does not appeal to a prudent mind; that keeping the plea of appellant during the trial and prosecution version in juxta position, the version of the appellant appears to be more plausible; that the appellant was medically examined on 14-12-2004 at 2-40 a.m. on the same day through police; that the police had confined the appellant illegally from 14-12-2004 to 19-12-2004 and his arrest was shown on 19-12-2004; that the prosecution has failed to prove its case and in any case it was not a case of capital punishment because it is not known and shrouded in mystery as to what exactly happened prior to the occurrence.

11. On the other hand, learned Deputy Prosecutor-General while opposing this appeal contended that the F.I.R. in this case was promptly lodged with all the details of the incident; that both the eye-witnesses P.W.4 and P.W.5 are the most natural witnesses; and their presence is fully established from the fact that they remained consistent on all the material particulars mentioned in the F.I.R.; that knife P-3 was recovered at the instance of the appellant which was taken into possession through Exh.PD and that the report of the Chemical Examiner and Serologist are positive; that the appellant has not been able to give any reason for his false implication; that as far as specific plea of the appellant is concerned that cannot be believed because of the reason that he has not produced any evidence in support thereof and even he himself has not opted to make statement on oath as required under section 340(2), Cr.P.C. and that there was no mitigating circumstance in this case, therefore, this appeal be dismissed and the Murder Reference be answered in the affirmative.

12. We have heard the learned counsel for the parties at length, and have given anxious consideration to their arguments and have also scanned the evidence on record with their able assistance.

13. Occurrence in this case took place on the intervening night between 13th and 14th of December, 2004. The matter was reported to the police at 1-20 a.m. on 14-12-2004 at the bridge of Rajbah Thaddi Wala whereas formal F.I.R. Exh. PB/1 was recorded at 1-35 a.m. at the police station at a distance of 12 km from the place of occurrence. The post-mortem examination was conducted on 14-12-2004 at 3-00 p.m. Presence of Ronak Ali (P.W.4) and Zulfiqar (P.W.5) at the place of occurrence has fully been established, their relationship with

the deceased further suggests that their presence in the house with the deceased was quite natural, they remained consistent on all material aspects of the case even after a lengthy cross-examination. Minor variations in minute details of the incident are insignificant, and do not effect their straightforward, coherent and natural narration of the whole incident. The medical evidence and recovery of weapon of offence coupled with positive reports of Chemical Examiner and that of Serologist further corroborate ocular account. We, therefore, hold that the eye-witnesses were present at the time of occurrence and have witnessed the occurrence.

14. In the aforesaid circumstances of the case, we are of the considered view that the prosecution has proved its case against Qadir Khan appellant beyond any shadow of doubt to maintain his conviction under section 302(b), P.P.C.

15. So far as the question of quantum of sentence is concerned, there are certain extenuating circumstances in this case persuading us to take a lenient view in this regard. It is the case of the prosecution that the appellant has himself inflicted injuries on his person during the occurrence whereas appellant has attributed his injuries to Aamer Shehzad. The appellant had been medically examined on the same day through police. MLR (Exh. DA) reflects that the injuries were fresh and were result of some fight as stated before the doctor. It has come on the record that the deceased and Aamet Shehzad were sleeping on one and the same cot, but said Aamer Shehzad has not been produced and thus it remained shrouded in mystery as to what exactly happened between the deceased and the appellant at the time of occurrence. Police even after Medico-legal examination of the appellant immediately after the occurrence mysteriously deferred his arrest for five days. All these aspects of prosecution case in our view are extenuating circumstances in favour of the appellant in the peculiar circumstances of this case.

16. It is by now well-established principle that prosecution has to exclude all extenuating circumstances in favour of the accused before praying for his death sentence. We, here, respectfully refer an observation of the Hon'ble Supreme Court of Pakistan in the case of Ansar Ahmad Khan Barki v. The State and another (1993 SCMR 1660), Hon'ble Supreme Court of Pakistan has held that the prosecution is bound by law to exclude all possible extenuating circumstances in order to bring the charge home to the accused for the award of normal penalty of death.

In the case of Mir Muhammad alias Miro v. The State (2009 SCMR 1188) the Hon'ble Supreme Court of Pakistan has emphasized as under:--

> "It will not be out of place to emphasize that in criminal cases, the question of quantum of sentence requires utomost care and caution on the part of the Courts, as such decisions restrict the life and liberties of the people. Indeed the accused persons are also entitled to extenuating benefit of doubt to the extent of quantum of sentence.
>
> In the case of Mst. Bevi v. Ghulam Shabbir and another 1980 SCMR 859, it was ruled by this Court" that the principle underlying the concept of benefit of doubt can

in addition to the consideration of question of guilt or otherwise, be pressed also in matter of sentence."

17. In view of the above, we are of the considered view that the extreme penalty of death awarded to the appellant is too harsh in the circumstances mentioned above and the lesser sentence of Imprisonment for Life would meet the ends of justice, therefore sentence of death of the appellant is converted into Imprisonment for Life. The amount of compensation as ordered by the learned trial court and imprisonment in default thereof shall remain intact. Benefit of section 382-B, Cr.P.C. shall also be extended to the appellant. With the above modification in the quantum of sentence this Criminal Appeal No. 1281 of 2005 is partly allowed.

18. Murder Reference No.635 of 2005 is answered in the Negative and death sentence of Qadir Khan appellant is Not Confirmed.

H.B.T./Q-17/L Sentence reduced.

2011 Y L R 1008
[Lahore]
Before Muhammad Anwaar-ul-Haq, J
RAZIA BIBI---Petitioner
Versus
THE STATE and others---Respondents

Criminal Miscellaneous No. 739-B of 2011, decided on 21st February, 2011.

Criminal Procedure Code (V of 1898)---

----S. 497, fourth proviso---Penal Code (XLV of 1860), Ss.302/201/34---Qatl-e-amd, causing disappearance of evidence, or giving false intention to screen offender---Bail grant of---Accused was female and statutory period of six months mentioned in fourth proviso of S.497, Cr.P.C. had expired---Effort was made, even during the pendency of bail application for conclusion of trial on the undertaking of counsel for the complainant, but the trial was pending---Delay in the trial of accused had not occasioned on account of act or omission of accused, or any person acting on her behalf---Even if few dates obtained by defence counsel, were excluded, the fact 'remained that accused was behind the bars for a period of more than eight months---Accused, in circumstances, was entitled to grant of bail, as a matter of right---Argument of counsel for the complainant that trial was almost concluded, was misconceived---Accused admitted to bail, in circumstances.

Zahid Hussain Shah v. The State PLD 1995 SC 49 and Muhammad Siddique v. Muhammad Behram and another 1998 PCr.LJ 358 ref.
Muhammad Nadeem Sheikh for Petitioner.
Rai Salah-ud-Din Kharal for the Complainant.
Tasawar Ali Khan, D.P.-G. for the State.

ORDER

MUHAMMAD ANWAAR-ULHAQ, J.---Petitioner seeks post arrest bail in case F.I.R. No.384 dated 7-6-2010 under sections 302 and 201/34, P.P.C. registered at Police Station Saddar Jaranwala District Faisalabad.

2. Prosecution story as per F.I.R. is that on 7-6-2010 petitioner and her other co-accused namely Irshad Banu, Taj Muhammad and Shama Bibi had murdered the sister of the complainant Mst.Kaneez Fatima. The precise allegation against the petitioner is that she during the occurrence was holding the legs of the victim.

3. Learned counsel for the petitioner does not press this petition on merits and only contends that the petitioner was arrested in this case on 10-6-2010 and without any fault on her part, her trial has yet not been concluded whereas newly added 4th proviso of section 497, Cr.P.C. entitles a woman to be released on bail if her trial has not been concluded within six months.

4. On the other hand, learned Deputy Prosecutor-General assisted by learned counsel for the complainant contends that evidence of all the prosecution witnesses has already been concluded and the case is now pending only for the production of relevant reports of chemical examiner and serologist etc. Further contends that the trial is likely to be concluded in the near future. He also adds that the prosecution alone is not responsible for delay in the trial, as learned counsel for the petitioner was also not available on various dates of hearing.

5. Arguments heard. Record perused.

6. Admittedly, the petitioner was arrested in this case on 10-6-2010. The 4th proviso of section 497, Cr.P.C. reads as follows:--

> "Provided further that where a woman accused of an offence is refused bail under the foregoing proviso, she shall be released on bail if she has been detained for a continuous period of six months and whose trial for such offence has not been concluded, unless the Court is of the opinion that the delay in the trial of the accused has been occasioned by an act or omission of the accused or any other person acting on her behalf."

The statutory period of six months mentioned in the proviso mentioned above was expired in this case on 10-12-2010 and an, effort was made even during the pendency of this application for conclusion of trial on the undertaking of learned counsel for the complainant but trial is still pending. Certified copy of the order sheet shows that delay in the trial of the petitioner has not been occasioned on account of an act or omission of the petitioner or any person acting on her behalf. Even if few dates obtained by learned defence counsel are excluded, the fact remains that the petitioner is behind the bars for a period of more than eight months. It was held in the case of "Zahid Hussain Shah v. The State" (PLD 1995 SC 49) that:--

> "The right of an accused to be enlarged on bail under the 3rd proviso to section 497(1), Cr.P.C. is a statutory right, which cannot be denied under the discretionary power of the Court to grant bail. The right of an accused to get bail under the 3rd proviso of section 497(1), Cr.P.C. is not left to the discretion of the Court but is controlled by that provision. The bail under the 3rd proviso to section 497(1), Cr.P.C. can be refused to an accused by the Court only on the ground that the delay in the Conclusion of the trial had occasioned on account of any act or omission of the accused or any other person acting on his behalf."

Having regard to the well settled legal position referred above, I am of the considered view that the petitioner is entitled to the grant of bail, as a matter of right. The argument of learned counsel for the complainant that trial is almost concluded is misconceived. Here I respectfully refer the case of "Muhammad Siddique v. Muhammad Behram and another 1998 PCr.LJ 358" wherein it has t been observed as under:

> "The trial would be deemed to be concluded only when the statements of all the prosecution witnesses have been recorded, the statement of the accused under section 342 and the statements of the defence witnesses, if any, have also been recorded."

In view of all above, I admit the petitioner to bail subject to her furnishing bail bonds in the sum of Rs.2,00,000 (Rupees Two lacy) with two sureties in the like amount to the satisfaction of the learned trial Court.

H.B.T./R-8/L Bail granted.

2011 Y L R 1021
[Lahore]
Before Muhammad Anwaar-ul-Haq, J
Malik NAZEER HUSSAIN---Petitioner
Versus
SESSIONS JUDGE, LAHORE and others---Respondents

Writ Petition No. 2889 of 2011, decided on 25th February, 2011.

Criminal Procedure Code (V of 1898)---

----S. 491---Constitution of Pakistan, Art.199---Constitutional petition---Habeas corpus proceedings---Custody of minor---Petitioner/father of minor girl aged 14 months had challenged order passed by Sessions Judge in proceedings under S.491, Cr.P.C., whereby respondent mother of minor girl was directed, to move S.H.O. Police Station concerned for registration of criminal case under the relevant provisions of law against the petitioner for not producing the minor in the court---Petitioner failed to produce the minor in the court despite his undertaking in that behalf---Conduct of the petitioner was highly objectionable as he did not seem to have any regard for the orders of the court---Law on the point of interference in appropriate cases under S.491, Cr.P.C., was very much clear---Mere filing of an application before the

Guardian Court by the respondent /mother of the minor, was not at all a bar to pass an order under S.491, Cr.P.C., when welfare of suckling baby aged 14 months was at stake---No justifiable reason existed to interfere in the impugned order---Constitutional petition was dismissed with cost to be paid to mother of minor.

Mst. Khalida Perveen v. Muhammad Sultan Mehmood and another PLD 2004 SC 1 and Mst. Ghulam Fatima v. The State and 5 others 1998 SCMR 289 ref.
Saeed Ullah Khan for Petitioner.
Ch. Muhammad Ishaq Additional Advocate-General for the State.
Mian Muhammad Ajmal Pervaiz for Respondent No.2.

ORDER
MUHAMMAD ANWAAR-ULHAQ, J.---Through this writ petition, the petitioner has challenged the order, dated 9-2-2011 passed by the learned Sessions Judge, Lahore in the proceedings under section 491, Cr.P.C. whereby respondent No.2 was directed to move an application to S.H.O,' Police Station concerned for registration of a criminal case under the relevant provisions of law against the petitioner for not producing the 14 months minor daughter of respondent No.2 in the court.

2. Learned counsel for the petitioner contends that the petitioner being father of the minor is natural guardian and respondent No.2 is required to approach the Guardian Court to get the custody of the minor as the petitioner has already filed an application for custody of minor before the learned Guardian Court, which is pending adjudication; that no criminal case can be registered against the real father of the minor.

3. Learned Additional Advocate General for the State and learned counsel for respondent No.2 contend that despite many opportunities granted to the petitioner. He failed to produce the female child aged only 14 months before the learned Sessions Judge, Lahore, therefore, the Court was competent to pass an order for registration of criminal case; that even otherwise the petitioner also has disregarded the order of learned Sessions Judge and then the orders of this Court, therefore, he is not entitled for any discretionary relief.

4. Arguments heard. Record perused.

5. The impugned order has been passed in the proceedings under section 491, Cr.P.C. for custody of the minor daughter of respondent No.2 aged about l 14 months. Learned Sessions Judge on 7-2-2011 issued a notice to the petitioner and keeping in view the age of the minor (14 months) directed the concerned S.H.O. to recover and deliver the custody of minor baby to her mother (respondent No.2) and further directed the mother to produce the minor before the court on 8-2-2011, but on 8-2-2011 the minor could not be recovered and was not produced in the Court, however, the petitioner undertook to produce the minor on 9-2.-2011. On the date fixed, petitioner did not appear before the court and the learned Sessions Judge passed the following order:--

> "A petition under section 491, Cr.P.C. by real mother against her spouses for recovery and production of her infant baby is very much competent before this

> Court. The question whether minor was voluntarily left by petitioner or not can only be determined after recording evidence, which exercise cannot be undertaken in these summary proceedings. The admitted position is that minor is in custody of respondent No.2. He was required to produce minor today. It appears that 'respondent has deliberately and intentionally shirked to produce the minor. When a person makes a commitment before a .Court of law but thereafter he wriggles out of the 'same, which shows that he has no regard for the Court. This act should not be gone unnoticed-and is required some penal action to stern recurrence in future. Hence, petitioner is directed to move 'an application to S.H.O. Police Station concerned who will register a criminal case under relevant provisions of law, under intimation to this Court."

Against the above mentioned order this writ petition has been tiled and a pre-admission notice was issued to respondent No.2 on 11-2-2011 and operation of the impugned order was suspended till the next date that was 21-2-2011. On the date fixed following order was passed by this Court:

> "Mian Muhammad Ajmal Pervaiz Advocate has put in appearance on behalf of respondent No.2. The alleged detenue has not been produced. Learned counsel for the petitioner is directed to ensure the presence of the alleged detenue (minor) iii the Court on the next date of hearing. Learned counsel for the petitioner requests that as he is busy on 23rd and 24th of this month so a date of 25th of February 2011 may be granted. Learned counsel for the respondent has no objection to it, however, it is, clarified that the stay order shall not be extended further if the alleged detenue is not produced before this Court on 25th of February 2011.

Today, petitioner along with his learned counsel very strangely informs that minor was sleeping in his house so he did not feel it proper to disturb her sleep and more so petitioner in very clear words stated that he was not ready to produce the minor in this Court. The conduct of the petitioner is highly objectionable; as he does not seem to have any regard for the orders of the Courts. It is quite understandable that learned Sessions Judge had no option except to pass the impugned order. Law on the point of interference in appropriate cases under section 491 Cr.P.C. is very much clear. It was held in the case of Mst. Khalida Perveen v. Muhammad Sultan Mehmood and another (PLD 2004 SC 1) as under:--

> "In our opinion in the cases pertaining to the custody of a child, the Courts are not supposed to go into the technicalities of the law and they should decide the case keeping in view the facts and circumstances of each case placed before it for the decision mainly taking into consideration welfare of the child. Although ordinarily a petition under section 491, Cr.P.C. is not found to be competent when there is no element of illegal custody by the father of his own child but in the welfare of the child as well as to ensure that the rights which have been conferred upon the child are fully protected in a suitable manner, the Courts could also pass appropriate orders in exercise of its inherited Jurisdiction. ---. Thus, petition is converted into appeal and allowed as a result whereof the impugned judgment is set aside and the custody of the minor Hina Sultan alias Umm-i-Romaan aged two years is handed over to the petitioner Mst.Khalida Parveen, with the observation that parties shall be at liberty to

approach the. Guardian Judge for redressal of their grievance if any. The Guardian Judge shall deal with the matter independently, if proceedings are instituted before hint, in accordance with law without being influenced in any manner from the observation made hereinabove."

Mere tiling of an application before the Guardian Court is not at all a bar to pass an order under section 491, Cr.P.C. when on the face of it welfare of a suckling baby aged only 14 months is at stake. Here I respectfully refer the case of Mst. Ghulam Fatima v. The State and 5 others (1998 SCMR 289), wherein it has been beta as under:

"At the outset it may be mentioned here that pendency of the guardian-ship matter before a Family Court would not affect the proceedings pending under section 491 of Cr.P.C. Needless to add, that main anxiety of a Court in such matters is to put the minor in custody of the person who is entitled to such custody, keeping in view the Muslim Law on the subject and welfare of the minor. No doubt, ultimately the order of the Family Court would hold the I field irrespective of the fact what order has been passed under section 491, Cr.P.C. as held in the cases of Khushi Muhammad's case (1988 SCMR 1234), Ahmad Sami's case (1996 SCMR 2), Miss Hina Jilani's case (PLD 1994 Lah. 151) and Shafqatullah (1995 PCr.LJ 1868). In any case, there is no illegality in dealing with the question of custody, of a -minor under section 491 of Cr.P.C. if such minor is in illegal or unlawful custody."

6. In view of the conduct of the petitioner, I do not find any justifiable reason to interfere in the impugned order. This writ petition being devoid of ally force is dismissed with a cost of Rs.25,000 (Rupees twenty five thousand only) to be paid to respondent No.2. In case of failure of the petitioner to pay the cost, respondent No.2 may apply to the concerned D.O(R)/Collector for recovery of the same as arrears of land revenue as per rules. It is further observed that learned Sessions Judge shall adopt all necessary measures keeping in view the High Court Rules and Orders Volume-V Part-F for redressal of the grievance of respondent No.2.

H.B.T./N-17/L Petition dismissed.

2011 Y L R 1366
[Lahore]
Before Muhammad Anwaarul Haq, J
ZAFAR IQBAL---Petitioner
Versus
THE STATE and others----Respondents

Criminal Miscellaneous No. 3260-B of 2011, decided on 31st March, 2011.

Criminal Procedure Code (V of 1898)---

----S. 498---Penal Code (XLV of 1860), Ss.365-B & 376---Kidnapping, abduction or inducing woman to compel for marriage and rape---Pre-arrest bail, confirmation of----

Accused was no more required for the purpose of investigation in the matter--Main accused had already been allowed bail after arrest---Case of accused who was witness of Nikah, was at better footing than the case of main accused who had been allowed bail---Considerations for grant of bail before arrest and bail after arrest, were entirely different--Humiliation and unjustified harassment was a sine qua non for pre-arrest bail, besides the mala fide of the complainant or the Police---Where arrest of accused was not necessary requirement of the Investigating Agency, sending accused behind the bars only for the reason that he could be released on bail after his arrest was altogether unjustified---Court while deciding such like cases, must avoid to be a party to please/satisfy the ego of the complainant party---Ad intern pre-arrest bail already allowed to accused was confirmed, in circumstances.

Muhammad Fazal Ilyas Bodi v. The State 1979 SCMR 9; Muhammad Ramzan v. Zafar Ullah and another 1986 SCMR 1380 and Muhammad Aslam v. The State 2004 YLR 1341 ref.

Saeed Ahmad Seikh for Petitioner.

Tasawar Ali Khan Rana, Deputy Prosecutor-General for the State with Wajid Ali S.-I. with record.

Zafar Iqbal Mahar for the Complainant.

ORDER

MUHAMMAD ANWAARUL HAQ, J.---Through this petition Zafar Iqbal petitioner seeks pre-arrest bail in case F.I.R. No. 467 of 2010 registered at Police Station Saddar Depalpur, District Okara, on 6-8-2010 in respect of an offence under section 365-B amended with, section 376, P.P.C.

2. Learned counsel for the petitioner contends that the case against the petitioner is totally false and is based upon mala fide of the complainant; that in fact it is a case of runaway marriage, the alleged abductee Mst. Shugufta Bibi had contracted marriage with the co-accused Muhammad Ramzan Asim but subsequently resiled from her previous stance; that co-accused of the petitioner namely Muhammad Ramzan Asim and his father Ghulam Rasool have already been allowed bail after arrest by this Court through Criminal Miscellaneous No. 12175-B/2010 and Criminal Miscellaneous No. 10885-B of 2010, respectively and case of the present petitioner is at better footing than the case of his co-accused already enlarged on bail. Learned counsel for the petitioner adds that petitioner was only a witness of the Nikah and performance of the same has been admitted by the alleged abductee in the court of learned Area Magistrate on 30-7-2010.

3. On the other hand, learned Deputy Prosecutor-General assisted by learned counsel for the complainant while opposing this bail application contends that pre-arrest bail is an extraordinary relief and cannot be granted in routine without the proof of mala fide on the part of the complainant or of the police; that the petitioner is specifically nominated in the F.I.R. and the alleged abductee Mst. Shugufta Bibi has fully implicated the petitioner in this case; that the case of the co-accused allowed bail is quite distinguishable as they were granted after arrest bail whereas considerations for

pre-arrest bail are altogether different and the petitioner even if seems to be, entitled for after arrest bail deserves to be arrested first to claim the rule of consistency.

4. Heard. Record perused.

5. The Investigating Officer present in the Court frankly concedes that the 'petitioner is no more required to him for the purpose of investigation in the matter.

6. Admittedly, the main accused Muhammad Ramzan Asim has already been allowed bail after arrest by this Court through Criminal Miscellaneous No.12175-B of 2010 on 5-11-2010 and in Para No.6 of the order, it has been observed as under:

> "Admittedly there is Nikah Nama which was performed on 11-2-2009 between the petitioner and Shagufta Parveen, the alleged abductee. When confronted learned Law Officer failed to establish that whether any proceedings have been carried out by the Investigating Officer in order to ascertain authenticity of the said Nikah Nama during the course of , investigation. There are divergent statements on the part of the alleged abductee. Firstly she has stated that she entered into Nikah with her free will and consent and subsequently she resiled from her said statement when she was in the custody of her parents.---
>
> ----Without commenting more on the facts and circumstances, I am of the considered view that the case against the petitioner is one of further inquiry into his guilt falling with the ambit of section 497(2), Cr.P.C. Moreover, one of the co-accused namely Ghulam Rasool has already been admitted to bail by this Court in terms of order dated 7-10-2010, therefore, the petitioner is also entitled to the concession of bail on the principle of rule of consistency in view of dictum of law of august Supreme Court of Pakistan in the case of Muhammad Fazal Ilyas Bodi v. The State (1979 SCMR 9)".

7. Apparently the case of the petitioner, who is a witness of the Nikah mentioned above, is at better footing than the case of his co-accused Muhammad Ramzan Asim but the main question to be resolved is, whether an accused can claim the benefit of rule of consistency in his pre-arrest bail petition on the basis of an after-arrest bail allowed to his co-accused. Needless to add that considerations for grant of bail before arrest and bail after arrest are entirely on different footing. Humiliation and unjustified harassment is a sine qua non for pre-arrest bail besides the mala fide of the complainant or of the police. But at the same time, another consideration while deciding a pre-arrest bail before the court is some expected advancement in the investigation in the shape of some recovery after the arrest of the accused in some appropriate cases. In the cases where arrest of the accused is not a necessary requirement of the Investigating Agency, sending the accused/petitioner behind the bars only for the reason that he may be released on bail after his arrest is altogether unjustified and Court while deciding such like cases must avoid to be a party to please/satisfy the ego of the complainant party. I respectfully refer the case of Muhammad Ramzan v. Zafar Ullah and another (1986 SCMR 1380) where the Hon'ble Supreme Court has observed as under:--

"(2) The case of murder was initially instituted against seven persons. The majority of them were not attributed any specific role in so far as the physical injuries to the victims are concerned. Accordingly, in this category the respondent was allowed bail before arrest and some others were allowed bail after arrest. The petitioner has chosen not to challenge the grant of bail after arrest to the other persons falling in the same category to which the respondent belongs. The distinction made according to the learned counsel, is based on the fact that he has been allowed bail before arrest.

(3) After hearing the learned counsel we feel that prima facie, at this stage, the case of the petitioner is not distinguishable from that of others to whom bail has been allowed. No useful purpose would be served if the bail of Zafar Ullah Khan respondent is cancelled on any technical ground because after arrest he would again be allowed bail on the ground that similarly placed other accused are already on bail. We, therefore, in the circumstances of this case, do not consider it a fit case for grant of leave to appeal. This petition accordingly, is dismissed."

In the case of Muhammad Aslam v. The State 2000 YLR 1341 this Court has observed as under:--

"The petitioner appears to have a reasonably good case for post-arrest bail on the basis of suddenness of the occurrence, lack of premeditation on the part of the accused party, divergent findings of different Investigating Officers of this case and admission of a co-accused to post-arrest bail. Thus, it shall have a colour of ludicrousness if he is sent behind the bars for a few days by dismissing his application for pre-arrest bail so as to enable him to come out of jail after a few days on post-arrest bail. I for one would not like to be a party to such a mockery of the system."

The case in hand is an example of the situation where arrest of the accused/ petitioner is not required by the Investigating Officer and I am not agreeing with the learned counsel for the complainant that petitioner without going to jail cannot claim his bail on the rule of consistency.

8. Keeping in view the principle laid down in the cases referred above, I do not find any justifiable reason to send the petitioner behind the bars. This petition is, therefore, accepted and ad interim pre-arrest bail already allowed to the petitioner by this Court vide order dated 18-3-2011 is hereby confirmed subject to his furnishing fresh bail bond in the sum of Rs.100,000 (Rupees one hundred thousand only) with one surety in the like amount to the satisfaction of the learned trial Court/Area Magistrate within a period of ten days from today.

9. It is, however, clarified that observations made herein are just tentative in nature and strictly confined to the disposal of this bail petition.

H.B.T./Z-16/L Bail confirmed.

2011 Y L R 1376
[Lahore]
Before Muhammad Anwaarul Haq, J
KHALID ALI---Petitioner
Versus
THE STATE and another----Respondents

Criminal Miscellaneous No.4184-B of 2010, decided on 14th May, 2010.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), S.302/34---Qatl-e-amd---Bail, grant of---Further inquiry--- F.I.R. showed that accused along with his brother, who was declared innocent during the investigation, was alleged to have inflicted fist blows to the deceased---Post-mortem report reflected that all injuries were caused by sharp-edged weapon, except two simple injuries by blunt weapon; and those two as per contents of the F.I.R. were collectively attributed to accused and his brother, who had already been granted bail by the Trial Court---Possibility of false involvement of accused being real brother of principal accused, in circumstances, could not be ruled out; and question of his sharing common intention; and vicarious liability required further probe---Accused was behind the bars without any progress in trial and even charge had not been framed in the case---Accused, in circumstances was admitted to bail.

Ch. Shahid Hussain for Petitioner.
Mrs. Farzana Shahzad Khan, D.P.-G. with Qadeer Virk, A.S.-I.
ORDER

MUHAMMAD ANWAARUL HAQ, J.---Khalid Ali petitioner by way of the instant petition has sought his post arrest bail in case F.I.R. No. 536 of 2009, dated 15-7-2009 under sections 302, 34, P.P.C., Police Station Liaqat Abad, Lahore.

2. Learned counsel for the petitioner contends that no specific role is attributed to the petitioner and whatever role is attributed to him is collectively attributed to his co-accused as well, who has already been exonerated during the investigation; that petitioner is behind the bars without any progress in trial and the petitioner is previous non-record holder in any criminal case and that he is entitled to the concession of bail.

3. On the other hand, learned Deputy Prosecutor-General while opposing this petition contends that petitioner is nominated in the F.I.R. and he is vicariously liable for the act of his co-accused who had caused fatal injuries to the deceased. She, however, after consulting the record confirms that no specific injury is attributed to the petitioner and petitioner is not a previous criminal record holder.

4. Arguments heard. Record perused.

5. I have noticed that according to the F.I.R. petitioner along with his brother Arif Ali (declared innocent during the investigation) is alleged to inflict only fist blows to the deceased and post-mortem report reflects all injuries caused by sharp-edged weapon except two simple injuries by blunt weapon and these two as per contents of the F.I.R. are collectively attributed to the present petitioner and his brother Arif Ali who has already been granted bail by the Trial Court. In these circumstances, possibility of the petitioner's false involvement being real brother of the principal accused cannot be ruled out and question of his sharing common intention and vicarious liability requires further 2 probe. Petitioner is behind the bars without any progress in trial and learned counsel for the petitioner states that even charge has not been framed in this case. In these circumstances, I admit the petitioner to bail subject to his furnishing bail bond in the sum of Rs.2,00,000 (Rupees two lac only) with one surety in the like amount to the satisfaction of the learned Trial Court.

6. It is, however, clarified that observations made herein above are just tentative in nature and strictly confined to the disposal of this bail petition.

H.B.T./K-63/L Bail granted.

2011 YLR 1547
[Lahore]
Before Muhammad Anwaarul Haq, J
ZAFAR IQBAL alias MALANGA--- Petitioner
Versus
THE STATE---Respondent

Criminal Appeal No.2376 of 2010, and Criminal Miscellaneous No.1 of 2011, decided on 7th March, 2011.

Criminal Procedure Code (V of 1898)---

----S. 426---Penal Code (XLV of 1860), S.319--- Qatl-e-Khata--- Suspension of sentence, petition for---Offence under S.319, P.P.C., under which the conviction and sentence of the petitioner had been recorded by the Trial Court, was a bailable offence---Accused, in such like cases, after admission of appeal for regular hearing, was entitled to bail as a matter of right---Question as to whether case of the petitioner fell within the purview of S.302, P.P.C., or it did fall under S.319, P.P.C., needed reappraisal of evidence, which was only possible at the time of final hearing of the appeal---No chance existing for early fixation of appeal in near future, petition was allowed and sentence of petitioner was suspended till the final disposal of his criminal appeal.

Hata and others v. The State, PLD 1967 Lah. 1302; Safdar Ali Shah v. The State 1997 MLD 961; Ghulam Sarwar v. The State 2003 PCr.LJ 1714; Masood Khan v. The State PLD 2004 Kar. 386 and Muhammad Qasim v. The State 2005 YLR 1048 ref.
Zafar Iqbal Chohan for Petitioner.
Rana Tasawar Ali Khan, Deputy Prosecutor General for the State.
Syed Zahid Hussain Bokhari for the Complainant.

ORDER

MUHAMMAD ANWAARUL HAQ, J.---Through this petition, petitioner Zafar Iqbal alias Malanga seeks suspension of his sentence, who has been convicted and sentenced by the learned trial court as under:

> "Diyat under section 319, P.P.C. and in addition to 'Diyat' five years R.I. as 'Tazir'. He was ordered to remain in jail till realization of the 'Diyat' and also to serve out the punishment as 'Tazir'. It was further ordered that the 'Diyat' if realized shall be paid to the legal heirs of the deceased inaccordance with law. Benefit of section 382-B Cr.P.C. has been given to the convict/petitioner."

2. Learned counsel for the petitioner, in support of this petition, contends that offence under section 319, P.P.C. is a bailable offence and that as per the rule laid down in the judgments reported as Hata and others v. The State (PLD 1967 Lahore 1302), Safdar Ali Shah v. The State 1997 MLD 961), Ghulam Sarwar v. The State (2003 PCr.LJ 1714) and Masood Khan v. The State (PLD 2004 Karachi 386), propriety demands that till the decision of .criminal appeal, petitioner may be released on bail while suspending his sentence.

3. On the other hand, learned Deputy Prosecutor-General assisted by learned counsel for the complainant opposes this petition by contending that in fact it is a murder case and charge against the petitioner was also framed under section 302, P.P.C.; that finding of the learned trial court that the case does not fall within the purview of section 302, P.P.C. is erroneous and that appeal against acquittal of the petitioner under section 302, P.P.C. has already been filed, which is pending before this Court.

4. Heard. Record perused.

5. Be that as it may, the offence under section 319, P.P.C. under which the conviction and sentence of the petitioner has been recorded by the learned trial court is a bailable, offence. It is by now well settled that in such like cases after admission of appeal for regular hearing, the accused is entitled to bail as a matter of right. In this context, I respectfully refer the judgment reported as Hata and others v. The State (PLD 1967 Lahore 1302), wherein it has been held as under:

> "(5) It must also be remembered that an appeal is not a new trial but is a continuation of the trial already held or a part of the trial of an offence undertaken by the Court of the first instance. Hence an appellate Court has power to pass such order or inflict a sentence which was within the power of the original Court who tried the case. As such the provisions as contained in section 496, Cr.P.C. Code, shall apply to the case of a person convicted of a bailable offence.
>
> (6) For these reasons, I hold that a person convicted of a bailable offence and who has filed an appeal against the conviction and sentence, is entitled to bail as a matter of right."

This principle has also been adopted in numerous cases thereafter such as Safdar Ali Shah v. The State (1997 MLD 961), Abdul Samad v. The State (1999 SD 432), Ghulam Sarwar v. The State (2003 PCr.LJ 1714) and Muhammad Qasim v. The State (2005 YLR 1048). The question as to whether case of the petitioner falls within the purview of section 302, P.P.C. or it does fall under section 319, P.P.C. needs reappraisal of evidence which is only possible at the time of final hearing of the appeal, and there is no hope for early fixation of the same in the near future.

6. In view of all above, without commenting upon the merits of the case, this petition is allowed and sentence of the petitioner is suspended till the final disposal of his criminal appeal, subject to his furnishing bail bonds in they 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. However, the petitioner shall remain present before this Court on each and every date of hearing fixed in the main appeal.

H.B.T./Z-14/L Petition allowed.

2011 Y L R 1551
[Lahore]
Before Sh. Najam ul Hasan and Muhammad Anwaarul Haq, JJ
MUMRAIZ---Appellant
Versus
THE STATE----Respondent

Criminal Appeal No.162-J Criminal Revision No.494 and Murder Reference No.454 of 2005, decided on 12th October, 2010.

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

----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Incident was a case of single accused and in promptly lodged F.I.R., all the details regarding the occurrence had been mentioned---Both the witnesses, though related to the deceased, but counsel for accused remained unable to point out any personal enmity or grudge of the witnesses against accused---Mere relationship of the witnesses with the deceased, was not enough to discard their testimony, unless they had some personal grudge of their own against accused---Close relationship of the witnesses with the deceased, rather had excluded any possibility of substitution in the case that was otherwise a rare phenomenon in the case of single accused; as it was not possible that the eye-witnesses could leave the actual culprit responsible for two murders of their very close relatives and would falsely implicate accused in the case---Plea of accused that both the deceased had killed each other was just a flimsy and unfounded plea taken on his behalf---Both the deceased were father and son and accused remained totally failed to substantiate his said plea during the trial---Ocular account was consistent, trustworthy and reliable on all material aspects of the occurrence and it was further corroborated by medical evidence---Minor discrepancies regarding the seat of certain injuries also did not affect the prosecution case at all---Ocular account was further corroborated by very strong motive set up in F.I.R.---Another circumstance against accused was his abscondence of 25 days and he

failed to explain the same during the trial---Non-sending of recovered bullet from the dead body of the deceased to the Forensic Science Laboratory for its comparison with the recovered pistol was necessarily a negligence on the part of Investigating Officer, but such negligence could not be made basis for extension of any doubt to accused, if case against him was otherwise proved beyond any shadow of doubt---Finding of conviction and sentence of accused by the Trial Court, in circumstances was quite in accordance with law; and was based upon well recognized principles of appreciation of evidence in a criminal case.

Talib Hussain and others v. State and others 2009 SCMR 825 ref.

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

----S. 302(b)---Criminal Procedure Code (V of 1898), S.367(5)---Qatl-e-amd---Sentence---Reasons to be given by court---Normal sentence in murder case---Reason for non-awarding sentence of death---Counsel for accused remained unable to point out extenuating circumstances in the case calling for any mitigation in favour of accused, who was awarded punishment of death---Act of accused and in the manner he had committed cold-blooded murder over a small dispute, was shocking---Accused was aged about 51 years at the time of occurrence; and was not of immature mind and he fully knew the consequence of his successive fires with a pistol at both the deceased---Normal sentence in murder cases was death and court was required to give reason under S.367(5), Cr.P.C. for not awarding the same---Question of sentence in a murder case was a question of very vital importance; and all the care and caution was required in that regard, but it was equally important aspect of the matter that sentence of death could not be altered on the basis of flimsy grounds; and principle of proportionality could not be lost sight---No extenuating circumstance was available in favour of accused for extending him any benefit regarding death---Sentence---Conviction and sentence of accused under S.302(b), P.P.C., were maintained, in circumstances.

Malik Israr Elahi with Miss Bushra Qamar for Appellant.
Kashif Ali Chaudhry for the Complainant.
Shahid Bashir, Deputy Prosecutor-General for the State.
Dates of hearing: 11th and 12th October, 2010.

JUDGMENT

MUHAMMAD ANWAARUL HAQ, J.---Mumraiz, appellant was tried in Case F.I.R. No.1, dated 2-1-2005, registered at Police Station Chakrala, District Mianwali in respect of an offence under section 302, P.P.C. After conclusion of trial, learned trial Court vide judgment dated 25-5-2005 has convicted the appellant under section 302(b), P.P.C. and sentenced him to 'Death' on two counts for committing Qatl-e-Amd of Fateh Khan and Muhammad Ameer. He was also directed to pay Rs.2,00,000 (Rupees two hundred thousands only) each as compensation to legal heirs of both the deceased under section 544-A, Cr.P.C. or in default whereof to undergo six months' S.I. each.

2. Feeling aggrieved, the appellant Mumraiz has challenged his conviction and sentence through Criminal Appeal No.162-J of 2005, whereas learned trial Court has transmitted Murder Reference No. 454 of 2005 for confirmation or othermiise of the

'DEATH' sentence of the appellant. Said Khan, complainant has filed Criminal Revision No.494 of 2005 for enhancement of compensation amount. All these matters being integrated are being disposed of together.

3. Prosecution case in brief unfolded in F.I.R. (Exh.PM) by Said Ameer, complainant (P.W.7) is that on 2-1-2005 at about 11-00 am he was trimming trees in his land located at Mangla Colony, Mauza Dhibba Karsial while his father Fateh Khan and brother Muhammad Ameer were grazing their goats there, meanwhile Mumraiz accused while armed with a pistol .30 bore came there from southern side and raised lalkara that he will teach a lesson to all of them for his insult and no one will be spared alive, he started making straight successive fire-shots with his pistol for the purpose of committing their murder, which hit at the head, right shoulder, upper part of the right as well as left thigh of his father, who fell down on the ground and Mumraiz accused went away. The complainant and his brother Muhammad Ameer shifting their father in injured condition to their house but at a short distance, Mumraiz accused again attracted and made straight successive fire shots at his brother Muhammad Ameer which hit on the left side of his back and the right shoulder, who fell down on the ground, thereafter, Mumraiz accused waiving his pistol, fled away from the place of occurrence. Muhammad Ameer succumbed to the injuries at the spot. The complainant, Mehr Khan and Muhammad Iqbal witnessed the occurrence; they shifted Fateh Khan in injured condition to District Headquarter Hospital, Mianwali where he also succumbed to the injuries.

The motive behind the occurrence was dispute of a Banna of land between the parties and one day prior to the occurrence Fateh Khan and Muhammad Ameer (deceased persons) had insulted Mumraiz appellant, due to that grudge, he had committed murder of Fateh Khan and Muhammad Ameer.

4. After registration of F.I.R., Muhammad Tahir, Inspector/S.H.O. (P.W.12) visited the places of murder of both the deceased, inspected the dead body of Muhammad Ameer, prepared his injury statement, inquest report and sent the dead body for autopsy. He also recorded statement of the P.Ws., sketched the rough site plan and secured blood-stained earth from both the places of murder of the deceased. In the District Headquarter Hospital, Mianwali, he inspected the dead body of Fateh Khan, prepared his injury statement, inquest report and sent the same for autopsy. On 27-1-2005 he arrested Mumraiz accused from the shrine of Ban Hafiz Jee. On 30-1-2005 during investigation of this case Mumraiz accused while in police custody led to the recovery of pistol .30 bore along with a magazine containing three bullets from his residential house.

5. On 2-1-2005 at about 8-30 pm, Dr. Maqbool Mubarik (P.W.4) conducted post mortem examination on the dead body of Muhammad Ameer and observed as under:--

(1) A firearm entry wound lx1 cm on front of right chest, 6 cm lateral to right nipple and 5 cm from right axilla.

(2) A firearm exit wound 1-1/2 x 2 cm on back of left chest, 11 cm from midline and 16 cm infer lateral to left axilla.

(3) A firearm entry wound 1 x 1 cm on the back of right fore-arm, 5 cm below of the tip of elbow. (A metallic foreign body corres-ponding to injury No.3

recovered from right upper arm sealed in the box and handed over to the police).

In his opinion cause of death was haemorrhage and shock in consequence of Injuries Nos.1 and 2, which badly damaged both lungs and thoracic aorta and were sufficient to cause death in ordinary course of nature. All the injuries were ante mortem caused by a firearm.

The probable time between injuries and death was immediate whereas between death and post mortem 8 to 12 hours.

On the same day he also conducted the post mortem examination on the dead body of Fateh Khan and observed as under:--

(1) A firearm grazing wound 1 x 1-1/2 cm on the left side of skull, 10 cm above the left ear.

(2) A firearm wound of entry 1 x 1 cm on the front of Rt. shoulder, 10 cm above and lateral to Rt. nipple.

(3) A firearm exit wound of Injury No.2 1 x 1 cm on the front of Rt. Shoulder, 3 cm medial to Injury No.2.

(4) A firearm wound of entry 1 x 1 cm on the front of Rt. thigh 10 cm below inguinal ligament.

(5) A firearm wound of exit of injury No.4 on the back of Rt. thigh, 3 cm below right buttock.

(6) A firearm wound of entry 1 x 1 cm on the lateral surface of left buttock.

(7) A wound of exit of Injury No.6 1 x cm, 5 cm behind the Injury No.6.

In his opinion cause of death was haemorrhage and shock due to Injuries Nos. 4 and 5, which badly damaged the right femoral artery. Both the injuries were sufficient to cause death in ordinary course of nature. All the injuries were ante mortem caused by a firearm.

The probable time between injuries and death was immediate whereas between death and post mortem 8 to 12 hours.

6. To substantiate the charge the prosecution has examined 12 witnesses in total out of which Dr. Maqbool Mubarik (P.W.4) provided medical evidence, Muhammad Tahir, Inspector/S.H.O. (P.W.12) conducted investigation of this case and Said Ameer, complainant (P.W.7) and Muhammad Iqbal (P.W.8) have furnished ocular account.

7. The appellant was examined under section 342 Cr.P.C. He denied the allegation and professed his innocence. While answering to question (Why this case against you and why the P.Ws. have deposed against you?) appellant replied as under:--

"Fateh Khan deceased and Muhammad Ameer deceased had a quarrel over the ownership of a tractor. Muhammad Aslam my brother is siding with Fateh Khan deceased being his son-in-law and brother-in-law of Muhammad Ameer deceased. I had enmity with my brother Muhammad Aslam. Fateh Khan and

Muhammad Ameer deceased persons fired at each other and both sustained injuries and died. Muhammad Aslam my brother instigated Said Ameer P.W. to falsely involve me in this case and at his instigation, I have been falsely implicated in this case. Mehr Khan and Muhammad Iqbal P.Ws. have close relation with the deceased persons and their house is at a considerable distance from the place of occurrence. I am a joint owner of the land where the occurrence has taken place. There is no path near the place of occurrence and it had been shown in the site plan just to show the presence of the witnesses. There was no dispute of "Banna" with the deceased of mine. I produce copy of Jammabandi 2001-2002 Exh.DC of Mauza Dhibba Karsial and copy of an N.I.C. of my father Mark-A, copy of my own NIC mark-B, copy of my service certificate mark-C and photo copy of school certificate mark-D".

The appellant did not make statement under section 340(2), Cr.P.C., however, he produced Ghulam Jafar, Patwari Halqa (DW-1) in his defence. Learned trial Court vide its judgment-dated 25-5-2005 found the appellant Mumraiz, guilty and convicted and sentenced him as mentioned above, hence these matters before this Court.

8. Learned counsel for the appellant contends that the motive put forward by the prosecution was a dispute of Banna but no evidence in this respect has been produced and the same has not been proved, so in these circumstances it can be said that there was some other motive behind the occurrence which has been suppressed by the prosecution; that both the eye-witnesses are closely related to the deceased and no independent witness has been produced; that the presence of these witnesses at the place of occurrence is highly doubtful; that when both these witnesses appeared in the Court, they made certain discrepancies which indicate that they were not present at the place of occurrence; that P.W.7 has stated that appellant made fire from a distance of 3-Karams whereas P.W.8 stated that the fire was made from a distance of 55-Karams; that Investigating Officer did not find any trimmed branches of the trees whereas the complainant stated that he was cutting the trees when the occurrence took place; that F.I.R. has been registered after consultation and due deliberation; that medical evidence does not support the prosecution case; that a pistol .30-bore has shown to be recovered from the appellant but no crime empty was recovered from the place of occurrence; that as the motive is not proved and recovery does not support the prosecution case, the appellant is entitled for reduction in his sentence.

9. On the other hand learned Deputy Prosecutor-General assisted by the learned counsel for the complainant contends that it is a daylight occurrence in which F.I.R. is promptly lodged; that appellant remained absconder for about one month; that two eyewitnesses produced by the prosecution have fully supported the prosecution version; that allegation of murder of both the deceased is categorically attributed only to the appellant; that presence of the witnesses at the place of occurrence is natural and fully explained by them; that substitution is a rare phenomenon especially in the cases of single accused and where the witnesses are closely related and have no reason to implicate an innocent person and leave the real culprit who has killed their near kith and kin; that the witnesses are consistent qua the time and place of occurrence; that minor discrepancies in the seat of certain injuries mentioned in the F.I.R. does not affect the prosecution case; that dimension of injuries indicate that single weapon has been used in

the occurrence which support the prosecution case that it was only the appellant who committed this occurrence; that appellant fired many shots which landed on the vital parts of the deceased which indicate that he had all the intention to kill the deceased; that the motive part is fully proved and it was so suggested to the eyewitnesses that an altercation took place earlier to the instant occurrence in which the appellant and deceased exchanged hot words and slaps; that it has also come on record that the proceedings under sections 107 and 155, Cr.P.C. were initiated by the police between the parties, so the existence of dispute is proved through Exh.PN that even if the motive is not proved, the same cannot be considered as mitigating circumstance; that appellant has made up his mind for committing the occurrence after due deliberation; that the appellant is a mature person aging 51-years at the time of occurrence and he has committed a cold blooded murder of two innocent persons just on a trivial dispute and In these circumstances, appellant is not entitled to any leniency.

10. We have heard the arguments from both the sides and have perused the record carefully.

11. We have noticed that occurrence in this case took place at 11-00 a.m. in broad-daylight and matter was directly reported to the police station at 1-00 p.m. at a distance of about 22-Kms from the place of occurrence. It is a case of single accused and in promptly lodged F.I.R. all the details regarding the occurrence have been mentioned. Both the witnesses although related to the deceased but learned counsel for the appellant remained unable to point out any personal enmity or grudge of the witnesses against the appellant, even otherwise. It is by now well settled that mere relationship of the witnesses with the deceased is not enough to discredit their testimony unless they have some personal grudge of their own against the accused, in the case of Talib Hussain and others v. State and others 2009 SCMR 825 Hon'ble Supreme Court has observed as under:--

> "An interested witness is one who is partisan or inimical towards accused or has a motive previously or cause of his own to falsely implicate the accused in crime--Mere relationship of a witness with the deceased or the very fact that he is interested in prosecution, would not dub him as an interested witness".

12. The close relationship of the witnesses with the deceased rather excludes any possibility of substitution in this case that is otherwise a rare phenomenon in the cases of single accused as it is not possible that the eye-witnesses could leave the actual culprit responsible for two murders of their very close relatives and would falsely implicate the appellant in this case. The plea of appellant that both the deceased had killed each other is just a flimsy and unfounded plea taken on his behalf. Both the deceased were father and son and the appellant remained totally failed to substantiate his plea so taken during the trial.

13. Ocular account in our view is consistent, trustworthy and reliable on all material aspects of the occurrence and it is further corroborated by medical evidence. We are not agreeing with the argument of the learned counsel for the appellant that medical evidence is in conflict with the ocular account only for the reason of some variation in describing the distance between the assailants and the accused by the eye-witnesses, minor discrepancies regarding the seat of certain injuries also do not affect the

prosecution case at all as it is the case of the prosecution that the appellant made successive firing at both the deceased and there is no specific seat of injury ascribed in the F.I.R. Dimension of injuries indicate that single weapon has been used during the occurrence. Ocular account is further corroborated by very strong motive setup in the F.I.R. that an altercation took place one day prior to this occurrence between both the deceased and the appellant and he was annoyed on the same. Another circumstance against the appellant is his abscondance of 25 days and he remained fail to explain the same during the trial.

14. Non-sending of recovered bullet from the dead body of Muhammad Ameer (deceased) to the Forensic Science Laboratory for its comparison with the recovered pistol is necessarily a negligence on the part of the Investigating Officer and negligence of the Investigating Officer cannot be made basis for extension of any doubt to the appellant if case against him is otherwise proved beyond any shadow of doubt.

15. In view of the above, we are satisfied that finding of conviction and sentence of the appellant by the learned trial court is quite in accordance with law and is based upon well recognized principles of appreciation of evidence in a criminal case. Learned counsel for the appellant remained unable to point out any extenuating circumstance in this case calling for any mitigation in favour of the appellant. Act of the appellant and in the manner he committed this cold-blooded double murder over a small dispute, is shocking. It was suggested on behalf of the appellant in the evidence of P.W.7., that the appellant was slapped by the deceased a day prior to the occurrence and the appellant at the same time had slapped him in the same manner. Appellant was aged about 51-years at the time of occurrence and was not of immature mind and he fully knew the consequence of his successive fires with a pistol at both the deceased, in both parts of this unfortunate occurrence. Normal sentence in murder cases is death and Court is required to give reasons under section 367(5), Cr.P.C. for not awarding the same. The question of sentence in a murder case is of course a question of very vital importance and all the care and caution is required in this regard but it is equally important aspect of this matter that sentence of death cannot be altered on the basis of flimsy grounds and principle of proportionality cannot be lost sight. We are of the considered view that there is no extenuating circumstance available in favour of the appellant for extending him any benefit regarding his sentence, therefore his conviction and sentence under section 302(b), P.P.C. is maintained and his Criminal Appeal No.162-J of 2005 is, dismissed.

16. So far as Criminal Revision No. 494 of 2005 is concerned, in the peculiar circumstances of this case, we are satisfied that the awarded compensation to the legal heirs of the deceased by the learned trial court is quite adequate, hence this revision petition is also dismissed.

17. Resultantly death sentence awarded to Mumraiz, appellant on both counts is confirmed and Murder Reference (M.R. No. 454 of 2005) is answered in affirmative.

H.B.T./M-181/L Appeal dismissed.

2011 Y L R 1941
[Lahore]
Before Muhammad Anwaarul Haq, J
GHULAM RASOOL---Petitioner
Versus
FAISAL and another---Respondents

Criminal Miscellaneous Nos.13664-BC and 13666-BC of 2010, decided on 11th March, 2011.

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

----S.497(5)---Penal Code (XLV of 1860), Ss. 324/337-F(iii)/ 337-L(2)/ 337-A(i)/ 337-H(2)/34---Attempt to commit Qatl-e-amd etc.---Cancellation of bail, refusal of---Injury allegedly caused by the accused with the butt of his rifle on the head of the witness was not substantiated by medical evidence---All the accused were alleged to have fired at the other victim on his right leg and it was yet to be determined as to whose fire had hit him---Four accused were not found to have made firing in police investigation---Application of S.324, P.P.C. in the peculiar circumstances of the case could only be determined after recording same evidence---Case against accused, thus, needed further inquiry---Very strong and exceptional grounds were required for cancellation of bail granted to accused by a competent court, which were not available in the case---Bail could not be cancelled when the case was at trial stage, except in extraordinary circum-stances in order to avoid causing prejudice to any party---Accused had not misused the concession of bail---Petitions for cancellation of bail were dismissed in circumstances.

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

----S. 497(5)---Cancellation of bail---Principles--- Considerations for cancellation of bail are different from considerations for grant of bail---Bail can be cancelled if the order granting bail is perverse on the face of it and has been passed in violation of the principles for grant of bail or the same is patently illegal, erroneous, factually incorrect and has resulted in miscarriage of justice.

Tariq Bashir and 5 others v. The State PLD 1995 SC 34; The State/Anti-Narcotic through Director General v. Rafiq Ahmad Channa 2010 SCMR 580; State v. Khalid Sharif 2006 SCMR 1265 and Ehsan Akbar v. State 2007 SCMR 482 **ref**.

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

----S.497(5)---Penal Code (XLV of 1860), S.324---Attempt to commit Qatl-e-amd---Cancellation of bail---Principle---When the case is at trial stage, bail cannot be cancelled except in extra-ordinary circumstances, so that it may not cause any prejudice to any party.

1998 SCMR 1691; 1988 SCMR 1129 and PLD 1989 SC 585 **ref**.
Ch. Shahid Tabassum for Petitioner.
Tasawar Ali Khan, D.P.-G. for the State with Adnan Shahzad S.-I.
Mrs. Khalida Parveen for Respondents.

ORDER

MUHAMMAD ANWAARUL HAQ, J.---Through this Criminal Miscellaneous No.13664-BC of 2010 as well as Criminal Miscellaneous No.13666-BC of 2010, the petitioner Ghulam Rasool has sought cancellation of bails after arrest granted to respondents/accused Faisal and Muqarrab vide orders dated 20-10-2010 and 31-8-2010 respectively passed by learned Additional Sessions Judge, Wazirabad. I shall dispose of both these petitions through this single order, as arising out of same F.I.R. No.293 dated 19-5-2010 offences under sections 324, 337F(iii), 337L(2), 337A(i) and 337H(2)/34, P.P.C. registered at Police Station Alipur Chatha Gujranwala.

2. Learned counsel for the petitioner contends that respondents are named in the promptly lodged F.I.R. with attribution of specific injuries that find support from the medical evidence; that bail granting orders are not based upon proper appreciation of evidence available on the record; that .44 bore gun has been recovered from the respondent Faisal and during investigation he has been found involved in the occurrence; that respondent Faisal is a desperate and hardened criminal and has previous criminal record; that the learned ASJ did not appreciate the fact that section 324, P.P.C. provides double punishment, one for the attempt to commit Qatl-e-amd and the second for the injury, if any caused.

3. On the other hand, learned counsel appearing on behalf of the respondents/ accused submits that charge has already been framed and case is fixed for prosecution evidence but the prosecution witnesses are not appearing before the learned trial Court that according to the F.I.R., respondent Muqarrab caused injury on the head of Salah Din with the Butt of his rifle but there is no medical evidence to prove the same; that it is clearly mentioned in the F.I.R. that all the five accused fired at the injured Naeem and their fires hit his right leg but it is not ascertainable at this stage that whose fire hit the injured; that according to X-ray report of the injured Muhammad Naeem no bony injury has been seen on his right leg so the injuries attributed to the respondents fall within the purview of section 337F(iii), P.P.C. and maximum punishment provided for the said offence is three years; that the learned trial Court rightly held that application of section 324, P.P.C. needs further inquiry in this matter; that respondent Faisal was released on bail after three and half months of his arrest whereas the respondent Muqarrab remained behind the bars for one month and twenty days.

4. Learned Deputy Prosecutor-General after consulting the record states that as per final report under section 173, Cr.P.C., allegations contained in the F.I.R. were partially found false and it was opined that only Faisal accused made fire at the injured whereas all other accused did not make any fire in the whole occurrence.

5. Arguments heard. Record perused.

6. It has been alleged in the F.I.R. that respondent Muqarrab inflicted blow with the Butt of his rifle at the head of one Salah Din but the same has not been substantiated with any medical evidence. It has also been mentioned in the F.I.R. that all the accused fired at the injured Naeem causing injuries on his right leg but it is yet to be determined that whose fire hit the injured at his leg. There is opinion of Investigating Officer that allegation of firing qua four accused has not been established. Application of section 324, P.P.C. in the peculiar circumstances of this case can only be determined after

recording of some evidence. All these facts, prima facie, make the whole case is one of further inquiry into the guilt of the respondents and case against them squarely falls within the purview of subsection (2) of section 497, Cr.P.C. Even otherwise it is well settled by now that considerations for the grant of bail and its cancellation are quite different. Once a competent court grants bail to an accused, very strong and exceptional grounds are required for the cancellation of the same. It was so held by the Hon'ble Supreme Court of Pakistan in the case of "Tariq Bashir and 5 others v. The State PLD 1995 Supreme Court 34" and thereafter the same view has been taken by the Hon'ble Supreme Court of Pakistan in the case of "The State/Anti-Narcotic through Director General v. Rafiq Ahmad Channa 2010 SCMR 580" in the following words:--

> "It is settled law that considerations for cancellation of bail are different from considerations for the grant of bail. The bail can be cancelled if the order on the face of it perverse and has been passed in violation of the principles for grant of bail or it is patently illegal erroneous, factually incorrect and has resulted in miscarriage of justice. Reference is invited to State v. Khalid Sharif 2006 SCMR 1265 and Ehsan Akbar v. State 2007 SCMR 482."

Learned counsel for the respondents has placed on record certified copy of order sheet of learned trial court, which reflects that charge in the case has already been framed and non-bailable warrants of arrest have been issued against the prosecution witnesses. It is also well settled principle that when case is at trial stage, bail cannot be cancelled except in the extra-ordinary circumstances so that it may not cause any prejudice to any party. It was so held by the Hon'ble Supreme Court of Pakistan in the following cases:--

> 1998 SCMR 1691, 1988 SCMR 1129 and PLD 1989 SC 585.

Admittedly there is no allegation of misuse of concession of bail against the respondents. Learned counsel for the petitioner has not been able to point out any illegality or jurisdictional defect in the bail granting orders. Therefore, I do not find any good ground to cancel the bails already granted to the respondents by the court of competent jurisdiction. Both these petitions being devoid of any force are dismissed.

7. It is, however, clarified that observations made herein are just tentative in nature and strictly confined to the disposal of these petitions.

N.H.Q./G-21/L Petitions dismissed.

2011 Y L R 1859
[Lahore]
Before Manzoor Ahmad Malik and Muhammad Anwaarul Haq, JJ
NASIR AHMAD and others---Appellants
Versus
THE STATE and 2 others---Respondents

Criminal Appeals Nos.616, 2077, Criminal Revision No. 560 of 2005 and Murdered Reference No.56 of 2008, decided on 8th March, 2011.

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

----S. 302(b)/34--- Qatl-e-amd--- Appreciation of evidence---Benefit of doubt--- Police opinion regarding innocence of accused could not be given any weight in the absence of the evidence of those witnesses who had appeared during the investigation, on the basis of which police had formed its opinion---No importance could be attached to the findings of the police officers appearing as court witnesses in the case to the extent of innocence of the accused, especially when the complainant had already opted to file a private complaint being dissatisfied with the police investigation---Prosecution story as narrated in the F.I.R. and then in the private complaint did not appeal to reason to the extent of the alleged presence of both the eye-witnesses at the time of occurrence---Eye-witnesses were closely related to the deceased and their presence at the place of occurrence was per chance---Enmity between both the parties was admitted---Strong and independent corroboration of ocular account needed in such circumstances was lacking---No weapon of offence could be recovered from the accused and even no report of Forensic Science Laboratory was available on record regarding the 18 crime empties allegedly recovered from the spot---Medical evidence could not corroborate the ocular testimony qua the accused, because corroboration was always with regard to the story of prosecution and to the identity of each accused---Medical evidence might confirm the ocular evidence with regard to the receipt of the injury, kind of weapon used for causing the injury, duration between the injury and the death, but it could not connect the accused with the commission of the crime---Significant contradictions appeared in the ocular account and medical evidence---Prosecution story was doubtful and the accused were entitled to benefit of doubt---Accused were acquitted in circumstances.

Muhammad Iqbal v. State and others 1996 SCMR 908; Muhammad Ahmad (Mahmood Ahmed) v. The State 2010 SCMR 660; Mst. Shamim and 2 others v. The State and another 2003 SCMR 1466; Israr Ali v. The State 2007 SCMR 525; Muhammad Akram v. The State 2009 SCMR 230; Tariq Pervez v. The State 1995 SCMR 1345 and Haji Amanullah v. Munir Ahmad and others 2010 SCMR 222 **ref**.

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

----S. 302(b)/34--- Qatl-e-amd--- Appreciation of evidence---Police opinion---Opinion of police about the guilt or innocence of accused based on statements of witnesses not produced before the court, is inadmissible in evidence.

Muhammad Iqbal v. State and others 1996 SCMR 908 **ref**.

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

----S.302(b)/34---Criminal Procedure Code (V of 1898), S.173---Qatl-e-amd---Police opinion---Guidelines---Determination of guilt or innocence of accused lies exclusively within the domain of the courts of law and this sovereign power of the courts can never be allowed to be exercised by the police employees or by anyone else---Tendency of allowing such like impressions of the Investigating Officer to creep into the evidence, if not curbed, would lead to disastrous consequences---If an accused can be let off or acquitted only on the basis of the opinion of Investigating Officer regarding his innocence, then why cannot on the same principle another accused be hanged to death only because the Investigating Officer has opined about his guilt.

Muhammad Ahmad (Mahmood Ahmed) v. The State 2010 SCMR 660 **ref**.

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

----S. 302(b)/34--- Qatl-e-amd--- Appreciation of evidence---Prosecution story---Importance---Prosecution story being the foundation on which the edifice of the prosecution case is raised occupies a pivotal position in a criminal case; it should, therefore, stand to reason and must be natural, convincing and free from any interest improbability---Not safe to believe a prosecution story which does not meet these requirements, nor prosecution case based on an improbable prosecution story can sustain conviction**.**

Mst. Shamim and 2 others v. The State and another 2003 SCMR 1466 **ref**.

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

----S. 302(b)/34--- Qatl-e-amd--- Appreciation of evidence---Medical evidence---Corroborative value---Corroboration is always with regard to the story of the prosecution and to the identity of each accused---Medical evidence may confirm the ocular evidence with regard to the receipt of the inquiry, kind of weapon used for causing the injury, duration between the injury and the death, but it cannot connect the accused with the commission of the crime.

Israr Ali v. The State 2007 SCMR 525 **ref**.

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

----S. 302(b)/34--- Qatl-e-amd--- Appreciation of evidence---Benefit of doubt, extension of---Principle---In case of doubt, the benefit thereof must accrue in favour of accused as a matter of right and not of grace---For giving benefit of doubt it is not necessary that there should be many circumstances creating doubts---Single circumstance creating reasonable doubt in a prudent mind about the guilt of the accused would make him entitled to the benefit of doubt not as a matter of grace and concession, but as a matter of right.

Muhammad Akram v. The State 2009 SCMR 230 and Tariq Pervez v. The State 1995 SCMR 1345 **ref**.

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

----S.417---Penal Code (XLV of 1860), S.302(b)/34---Qatl-e-amd---Appeal against acquittal---Scope---Accused after his acquittal by Trial Court enjoys double presumption of innocence and very strong and convincing reasons are required to dislodge this presumption**.**

Haji Amanullah v. Munir Ahmad and others 2010 SCMR 222 **ref**.

Iftikhar Ahmad Mian for Appellant (in Criminal Appeal No.616 of 2005).

Ch. Muhammad Mustafa, Deputy Prosecutor-General for State.

Ch. Farooq Haider for the Complainant/Appellant (in Criminal Appeal No.2077 of 2005 and for the petitioner in Criminal Revision No.560 of 2005).

Date of hearing: 8th March, 2011.

JUDGMENT

MUHAMMAD ANWAARUL HAQ, J.---Appellants in Criminal Appeal No.616 of 2005, namely Nasir Ahmad, Muhammad Idrees and Basharat were tried in a Complaint Case pertaining to case F.I.R. No.455 of 2004, dated 4-9-2003, registered at Police Station Saddar Kharian District Gujrat, in respect of offences under sections 302, 109, 148, 149, P.P.C. and have been convicted and sentenced by the learned Additional Sessions Judge, Gujrat through the impugned judgment dated 21-4-2005, as under:--

> Death Sentence each under section 302(b) read with section 34, P.P.C. on two counts and to pay compensation of Rs.50,000 each under section 544-A, Cr.P.C. to legal heirs of both the deceased, recoverable as arrears of land revenue and in default of payment of compensation to further undergo for six months' S.I. each.

Murder Reference No.56 of 2008 for confirmation or otherwise of death sentence awarded to appellants Nasir Ahmad, Muhammad Idrees and Basharat and Criminal Appeal No.2077 of 2005 filed by the complainant against acquittal of accused Muhammad Bashir, Muhammad Akmal, Abdul Rehman, Muhammad Sadiq, Mian Khan, Munir Ahmad and Ijaz Ahmad as well as Criminal Revision No.560 of 2005 for enhancement of compensation shall also be disposed of through this single judgment.

It is pertinent to mention here that vide order of this Court dated 19-12-2005 the appeal against acquittal has been dismissed to the extent of respondents Nos.4 and 5, namely Muhammad Sadiq and Mian Khan, whereas notice was issued to respondents Nos.1, 2, 3, 6 and 7, namely Muhammad Bashir, Muhammad Akmal, Abdul Rehman, Munir Ahmad and Ijaz Ahmad.

2. Initially, complainant Subedar Abdul Ghafoor (P.W.3) got registered F.I.R. No. 455 of 2003 (Exh.PD), under sections 302, 109, 148 and 149, P.P.C. at Police Station Saddar Kharian, but during the investigation all the ten accused nominated in the F.I.R. were declared innocent by the police and discharge report was presented to the learned Ilaqa Magistrate who did not agree with the same, whereupon the challan was submitted by the police before the court of competent jurisdiction while placing the names of all the ten nominated accused in Column No.2 thereof.

3. Feeling aggrieved by the investigation, complainant Subedar Abdul Ghafoor (P.W.3) has preferred a Private Complaint (Exh. PK) alleging therein that on 4-9-2003 at

about 6-00 p.m. he along with Mian Muhammad Ameer (deceased), Shabbir Hussain (deceased), Khadim Hussain, Tanvir Hussain, Sadagat Ali and Muhammad Zaman was coming back to his village on motorcycles after making arrangements for a 'Jalsa' in respect of embracing Islam by Sheikh Raheel Ahmad scheduled to be held on 7th September, 2003 at 'Alfata Markazi Jamia Majid' Chak Sikandar No.30; that Mian Muhammad Ameer and Shabbir Hussain were going ahead on a motorcycle and when they reached near the 'Daira' of Noor Ahmad situated at Road Ronda Bansarian, suddenly, Nasir Ahmad armed with mouser, Muhammad Idrees, Basharat and Muhammad Akmal armed with pistols .30 bore, Muhammad Bashir, Munir Ahmad, Ijaz and Abdul Rehman armed with rifles along with two unknown persons armed with firearms, came in front of them and intercepted the motorcycle of Mian Muhammad Ameer, Nasir Ahmad raised 'Lalkara' to teach them a lesson for making arrangements of 'Jalsa' and fired a shot with his mouser which landed on the head of Mian Muhammad Ameer, Muhammad Idrees made fire with his pistol .30 bore hitting at the head of Shabbir Hussain, Muhammad Bashir fired a shot with his rifle hitting on the chest of Mian Muhammad Ameer, Munir Ahmad fired a shot with his rifle which landed on the shoulder of Mian Muhammad Ameer, Muhammad Akmal made fire with his pistol hitting on the back of Shabbir Hussain, Basharat fired a shot with his pistol which hit Shabbir Hussain on his belly, Ijaz Ahmad fired a shot with his rifle hitting Shabbir Hussain on his belly, Abdul Rehman made a fire with his rifle which landed on the right buttock of Mian Muhammad Ameer; then, all the accused persons made fire shots with their respective weapons at Shabbir Hussain and Mian Muhammad Ameer hitting at different parts of their bodies; that he along with his companions kept on making hue and cry but due to fear no body came forward to provide them help; that Mian Muhammad Ameer and Shabbir Hussain succumbed to their injuries at the spot.

It was further alleged in the private complaint (Exh. PK) that all the accused persons committed this occurrence at the abetment of Muhammad Sadiq and Mian Khan accused.

Motive behind the occurrence was that Mian Muhammad Ameer (deceased) was a known leader of the Muslim Community of Chak Sikandar whereas the accused persons are 'Qadianies' and before this occurrence they had been committing mischief because of which litigation was pending between the parties and due to this grudge the aforesaid accused persons with their common intention have committed this occurrence.

4. All the ten accused were summoned by the learned trial court and they were formally charge sheeted under sections 302, 109, 148 and 149, P.P.C., to which they pleaded not guilty and claimed trial. The complainant produced as many as five witnesses to prove the charge against the accused whereas eight CWs were examined by the learned trial Court. Dr. Tahir Bashir (P.W.2) provided medical evidence; Muhammad Siddique, Inspector (CW-5), Muhammad Nazir, S.-I. (CW-6) and Muhammad Arif Gondal, Inspector (CW-7) conducted investigation of this case, whereas Subedar Abdul Ghafoor, complainant (P.W.3) and Tanvir Hussain (P.W.4) have furnished the ocular account. Fateh Muhammad (P.W.5) provided evidence regarding the abetment.

5. On 5-9-2003 at about 5-30 a.m., Dr. Tahir Bashir (P.W.2) conducted the postmortem examination on the dead body of Mian Muhammad Ameer (deceased) and observed as under:--

(i) A firearm entry wound 1-1/2 x 1-1/2 cm on the medial side of left leg. Tattooing was present.

(ii) A firearm exit wound 2-1/2 x 3-1/2 cm on the posterior and medial part of left leg (exit of Injury No.1).

(iii) Firearm entry wound 1-1/2 x 1-1/2 cm on the left upper thigh with blackening present.

(iv) Firearm exit wound 3 x 2 cm medially on the left upper thigh (exit of Injury No. 3).

(v) Firearm entry wound 3 in number on the back of right iliac region measuring each 1-1/2 x 1-1/2 cm in the area of 6 x 4 cm (three in number).

(vi) Firearm exit wound 2 x 2 cm on the front of left lower chest.

(vii) Firearm exit wound 2 x 2 cm on the front of left lower abdomen.

(viii) Firearm exit wound 2 x 2 cm on the left side of umbilicus region (Injuries Nos. 6, 7 and 8 are exit of Injury No.5).

(ix) Abrasion multiple in area 5 x 4 cm left knee joint underneath fracture.

(x) Firearm wound 2 x 2 cm on the back and top of right shoulder (metallic body recovered from the right shoulder and handed over to police).

(xi) Two firearm wound (entry) measuring each 1-1/2 x 1-1/2 cm on the right lower chest (two foreign bodies recovered from the abdominal area and handed over to the police).

(xii) Firearm entry wound 2-1/2 x2 cm on the back of skull.

(xiii) Firearm exit wound 4 x 4 cm on the front of skull (exit of injury No.12).

In his opinion, all the injuries were ante mortem, caused by firearm except Injury No.9, caused by blunt weapon. Cause of death was Injury No.12, which was sufficient to cause death in ordinary course of nature. The probable time between injuries and death was within fifteen minutes whereas between death and postmortem 12 to 20 hours.

On the same day at about 4-55 a.m., P.W.2 had conducted the postmortem examination on the dead body of Mian Muhammad Shabbir and observed as under:--

(i) Lacerated firearm wound 1-1/2 x 1-1/2 cm on the left lumber region internally with blackening present.

(ii) Firearm exit wound 4 x 3 cm on the back of left lumber region.

(iii) Firearm exit wound 1-1/2 x 1-1/2 cm on the left scapular region with blackening and tattooing was present.

(iv) Firearm exit wound on the posterior side of right scapular region measuring 4 x 3 cm.

(v) Firearm entry wound 1-1/2 x 1-1/2 cm on the lower part of abdomen 2 cm below the umbilical region.

(vi) Firearm exit wound 4 x 5 cm on the right iliac fossa.

(vii) Firearm entry wound 1-1/2 x 1-1/2 cm on the right partial region with blackening.

(viii) A firearm exit wound 4 x 5 cm on the left parital region underneath fracture.

(ix) Two firearm entry wounds measuring each 1-1/2 x 1-1/2 cm on the lateral side of left femur.

(x) Two exit firearm wounds measuring each 3 x 2 cm on the medial side of lower end of femur.

(xi) Firearm entry wound 1-1/2 x 1-1/2 cm on the interior side of middle left leg.

(xii) Firearm exit wound 2-1/2 x 2-1/2 cm on the lateral side of left leg.

(xiii) Firearm entry wound 2 x 2 cm with blackening on the right ankle joint medially.

(xiv) Firearm exit wound 4-1/2 x 3 cm on the lateral side of right ankle joint.

In the opinion of the doctor, injuries were ante-mortem in nature caused by firearm weapons. Injury No.1 was sufficient to cause death in ordinary course of nature. Cause of death was haemorrhage and loss of vital organs. Probable time between injuries and death was within 15 minutes while between death and post-mortem examination it was 12 to 20 hours.

6. The learned ADA after tendering in evidence certain documents i.e. Exh.PW, Exh.PW/1, Exh.PX, Exh.PY, Exh.PZ, Exh.PAA, Exh.PBB and Exh.PCC closed the prosecution case.

7. Thereafter, statements of all the accused as required under section 342, Cr.P.C. were recorded, in which they refuted all the allegations levelled against them and professed their innocence. While answering to question (Why this case against you and why the P.Ws. have deposed against you?), appellant Nasir Ahmad replied as under:--

> "I am innocent. Witnesses are inimical towards me. I never participated in occurrence. Occurrence was unseen one. No body had seen the occurrence. Complainant party has a religious rivalry against me and other accused named in the F.I.R. As I and other accused belong to Ahmadia community and the complainant side belong to Ahle-Islam. As the occurrence was not witnessed by any one so they have nominated me and other members of Ahmadia community as accused and also added the unknown persons as accused that if at any stage the actual accused persons come on line they may also be added along with us. I and other accused persons named in the F.I.R. surrendered themselves before the law enforcement agencies. Large number of persons of village Chak Sikandar and other villagers appeared before the Investigating Officer in spite of belonging to different set of religious thought in our defence and stated before 1.O. about our innocence. I and other accused named in the F.I.R. offered cross dialogue with the witnesses of the prosecution and offered them to get any type of satisfaction

about us but complainant party did not accept our offers and were of the view that they will get challan us at any cost. Four I.Os. after thorough investigation declared me and other accused innocent. I was injured prior to occurrence, long bone of my left arm was fractured and in the above said state of affaires no body can operate weapon like mouser or .30 bore pistol."

Appellants Muhammad Idrees and Basharat adopted the same stance as taken by the appellant Nasir Ahmad.

8. All the accused/appellants did not appear as their own witness under section 340(2), Cr.P.C, however, they produced some documentary evidence i.e. Exh. DA to Exh. DM in their defence.

9. After conclusion of the trial, co-accused namely Muhammad Bashir, Muhammad Akmal, Abdur Rehman, Munir Ahmad, Ijaz Ahmad, Muhammad Sadiq and Mian Khan were acquitted from the charges, whereas appellants Nasir Ahmad, Muhammad Idrees and Basharat have been convicted and sentenced by the learned trial court, as mentioned above.

10. Learned counsel for the appellants in support of this appeal (Criminal Appeal No.616 of 2005) contends that the prosecution witnesses are highly inimical, interested and chance witnesses apart from being related to the deceased; that it has been admitted by both the eye-witnesses i.e. P.W.3 Subedar Abdul Ghafoor and P.W.4 Tanveer Hussain that there was enmity between the parties because of religious differences and in the past, murder cases were registered against each other and in such a situation corroboration in support of the ocular account is a must, but there is absolutely no corroboration from any source; that 18 empties of .30-bore pistol were recovered from the spot, but no weapon of offence was recovered from any of the appellants, as such there is no report of Forensic Science Laboratory on the file. Further contends that the medical evidence at the most can be considered as supportive evidence and is not a corroborative piece of evidence, even otherwise there is a serious conflict between the ocular account and the medical evidence; that the prosecution story is not probable in the circumstances of this case for the reason that P.W.3 claims to be 'Imam' of 'Alfatah Markazi Jamia Masjid' and it is also his case that he was present at a distance of 20/25 feet from the accused, but despite of the admitted religious differences between the parties he has not received any injury; had he (P.W.3) been present at the spot he would have been the main target of the assailants. Also contends that immediate motive of occurrence as per the F.I.R. was that one Sheikh Raheel Ahmad embraced Islam and in this connection a 'Jalsa' was going to take place and for that reason this occurrence has been committed, but said Sheikh Raheel Ahmad has not appeared either before the police or before the learned trial court to support the prosecution case and that none has appeared in support of the assertion that arrangement for 'Jalsa' was being made by the complainant.

11. On the other hand, learned Deputy Prosecutor-General assisted by learned counsel for the complainant has controverted the arguments of learned counsel for the appellants by submitting that the matter was promptly reported to the police by an eye-witness, it was reported directly at the police station wherein every detail of the incident such as place, names of the accused, weapons which they were carrying at the relevant

time, the roles which they had played and the motive has been mentioned; that the prosecution has produced most natural eye-witnesses of the occurrence; that P.W.4. Tanveer Hussain is real son of deceased Muhammad Ameer and real brother of the other deceased Shabbir Hussain who has no enmity of any sort with the appellants therefore, he is an independent witness. Further contends that substitution of the accused by the complainant is a rare phenomena as his real brother and real nephew were murdered so he will not substitute innocent persons in place of the real culprits; that even otherwise the complainant is resident of the same area and his presence at the place of occurrence has reasonably been explained by him. Also contends that as a matter of fact Sheikh Raheel Ahmad embraced Islam in West Germany and in the village Chak Sikandar the Muslims were going to celebrate the event which is the immediate cause of the incident; that the fact of embracing Islam by Sheikh Raheel Ahmad was mentioned in many newspapers of the relevant period and those clippings of the newspapers have been brought on the record as Exh.PW, Exh.PW/1 and Exh.PX; that time of occurrence, place of occurrence, locale of injuries, time between the death and the postmortem examinations by the doctor are the circumstances which strengthen the ocular account and are sufficient to believe the same; that according to the eye-witnesses the appellants were armed with .30-bore pistols/mouser and 18 empties of .30 bore pistol/mouser were also recovered from the spot, which is sufficient corroboration in the circumstances of the case.

12. As far as the appeal against acquittal (Criminal Appeal No. 2077 of 2005) is concerned, learned counsel for the appellant/complainant submits that all the respondents were accused of firing at both the deceased and there was no circumstance for the learned trial court to extend them the benefit of doubt as the ocular account remained consistent qua them which was substantially supported by the medical evidence available on the record.

13. We have heard the learned counsel for the parties at length, have given anxious consideration to their arguments and have also scanned the record with their able assistance.

14. In this occurrence, two persons namely Muhammad Ameer and Shabbir Hussain have lost their lives. The matter was initially reported to the police through F.I.R. (Exh.PD), which was recorded on the statement of Subedar Abdul Ghafoor who appeared as P.W.3. However, all the accused nominated in the F.I.R. were found innocent during the investigation and the police prepared a discharge report in favour of the accused. Being dissatisfied with the investigation, the complainant filed a Private Complaint with almost the same story wherein the appellants have been convicted and their seven co-accused have been acquitted by the learned trial court including the accused of the abetment in this case. The ocular account has been furnished by P.W.3 Subedar Abdul Ghafoor and P.W.4 Tanveer Hussain. P.W.3 Subedar Abdul Ghafoor is brother of deceased Muhammad Ameer and uncle of deceased Shabbir Hussain, whereas P.W.4 Tanveer Hussain is real son of deceased Muhammad Ameer and real brother of deceased Shabbir Hussain. It is the case of the prosecution that on the day of occurrence i.e. 4-9-2003 at 6-00 p.m. the deceased and the eye-witnesses were returning on two motorcycles after making arrangement for a 'Jalsa' to celebrate the embracing Islam by

one 'Qadiani' namely Sh. Raheel and they were attacked upon by the appellants along with their co-accused.

15. The main stress of the learned counsel for the appellants is on the finding of the police regarding the innocence of all the accused in all the investigations. Muhammad Arif Gondal Inspector CW-7 has stated in his statement as under:--

> "On 18-10-2003 I was posted as S.H.O. at Police Station Saddar Kharian. On that day I investigated this case and agreed with the investigation conducted by S.-I./ Nazir Ahmad. On 25-10-2003 I prepared report under section 173, Cr.P.C. of this case. During this I also prepared discharge report of the accused persons recommended by the DSP/SDPO Kharian, which application was rejected/turned down by learned Ilaqa Magistrate."

The statement of CW-7 shows that all the accused including appellants were declared innocent and a discharge report was also submitted in their favour. Learned counsel for the appellants is of the view that finding of police is sufficient to cause a fatal dent to the prosecution case, as the police is the main source to place first-hand information before the court regarding an occurrence. His further emphasis is that all the Investigating Officers could not tilt in favour of all the accused who admittedly belong to a minority in the area. We are afraid that the police opinion itself cannot be given any weight in the absence of the evidence of those witnesses who had appeared during the investigation on the basis of which the police has formed its opinion. We are fortified by the observation of the Hon'ble Supreme Court in the case of Muhammad Iqbal v. State and others 1996 SCMR 908 which reads as follows:--

> "The opinion of the Police about the innocence of Muhammad Akram or with regard to alibi pleaded by him before the Police during the investigation, which according to the Investigating Officer was supported by a number of witnesses, lack evidentiary value. The accused has not produced the witnesses in the Court in proof of his alibi. Needless to say that opinion of the Police about the guilt or innocence based on statement of witnesses not produced before the Court is inadmissible in evidence."

It has further been held in the case of Muhammad Ahmad (Mahmood Ahmed) v. The State (2010 SCMR 660) as under:--

> "It may be mentioned here, for the benefit and guidance of all concerned, that determination of guilt or innocence of the accused persons was the exclusive domain of only the Courts of law established for the purpose and the said sovereign power of the Courts could never be permitted to be exercised by the employees of the police department or by anyone else for that matter. If the tendency of allowing such-like impressions of the Investigating Officer to creep into the evidence was not curbed then the same could lead to disastrous consequences. If an accused person could be let off or acquitted only because the Investigating Officer was of the opinion that such an accused person was innocent then why could not, on the same principle, another accused person be hanged to death only because the Investigating Officer had opined about his guilt"

In view of the above, we are not going to attach any importance to the findings of CWs-6, 7 and 8, to the extent of finding of innocence of the accused in this case especially when the complainant had already opted to file a private complaint being dissatisfied with the investigation conducted by the police.

16. Excluding the opinion of police in view of the contentions raised from both the sides, there are two main points for determination in this case, i.e.:--

(a) Whether the story narrated by the prosecution in the private complaint is probable? and

(b) Whether the ocular account is worth reliance without any independent corroboration in the peculiar circumstances of this case?

The record reveals that there is a religious antipathy between the parties as the complainant party is "Muslim" and the appellants' are "Ahmadis" (as per the complaint and other record of this case); both the groups are living in the same village. It has been admitted by the eye-witnesses of this case i.e. P.W.3 and P.W.4 that in the past, criminal cases including the murder cases were got registered by both the parties against each other and in the murder case registered against 'Ahmadis' all the accused of the case were acquitted whereas in the case registered against the Muslims, four persons were convicted. It has also been admitted by the said P.Ws. that few persons who are accused in this case were also accused in the earlier cases as well; therefore, enmity between the parties is admitted and it is also on the record that P.W.3 is 'Imam Masjid' of the mosque of the same village. It has come on the record undisputedly that both the deceased have lost their lives due to serious religious grudge between the parties and it is also an admitted position that the same grudge was also there with all force against the complainant (P.W.3) and the other eye-witness (P.W.4), but they did not receive even a scratch despite of their alleged presence at the place of occurrence, we have noticed that according to the site plan (Exh.PL) place of occurrence was not a populated area rather was a deserted place and in the circumstances it is not probable that ten accused persons, all armed with deadly weapons, if emerged at that place and resorted to firing, why they did not cause any injury to the said eye-witnesses. In a criminal case, the most important point for determination for a court is, whether the prosecution story is probable and whether a prudent man believes the same. Here we respectfully refer the observation of the Hon'ble Supreme Court in the case of Mst. Shamim and 2 others v. The State and another (2003 SCMR 1466), which reads as under:---

> "The prosecution story being the foundation on which edifice of the prosecution case is raised occupies a pivotal position in a criminal case. It should, therefore, stand to reason and must be natural, convincing and free from any inherent improbability. It is neither safe to believe a prosecution story which does not meet these requirements nor a prosecution case based on an improbable prosecution story can sustain conviction."

In view of all the circumstances mentioned above, we are of the considered view that the prosecution story as narrated in the F.I.R. and then in the private complaint does not appeal to reason, to the extent of the alleged presence of both the eye-witnesses at the time of occurrence.

17. For the second point as to whether any corroboration is required, suffice it to say that it is a case where witnesses are closely related, enmity between the parties is admitted and presence of witnesses at the place of occurrence on the face of it, is as per chance. It is well settled principle of law that in such like cases strong and independent corroboration is required to believe the ocular account, which essential corroboration, in our humble view is lacking in this case. Admittedly, no weapon of offence could be recovered from the appellants and even there is no report of Forensic Science Laboratory available on the record regarding the 18 empties allegedly recovered from the place of occurrence during the investigation.

Another question, which arises with reference to the corroboration, is, whether medical evidence can corroborate the ocular evidence qua the appellants. The answer is in the negative, because when we talk of corroboration, it is always with regard to the story of the prosecution and with regard to the identity of each accused. The medical evidence may confirm the ocular evidence with regard to the receipt of the injury, kind of weapon used for causing the injury, duration between the injury and the death, but it cannot connect the accused with the commission of the crime. In this case there are also some significant contradictions in the ocular account and in the medical evidence, as it is the case of the prosecution that Muhammad Akmal, acquitted co-accused of the appellants, fired with pistol which hit on the back of Shabbir deceased whereas that firearm injury in fact is an exit wound; as per the F.I.R., fire shot made by Ijaz Ahmad, acquitted co- accused, landed on right shoulder of Shabbir deceased, but as per medical evidence that is also an exit wound; as per the prosecution case appellant Nasir Ahmad stopped the deceased from the front side of the motorcycle and then made fire which hit on the head of Muhammad Ameer deceased, but on the front of the head of said deceased there is only an exit wound. It has been held in the case of Israr Ali v. The State (2007 SCMR 525) that medical evidence alone cannot be corroborative evidence as the injuries cannot speak of their authorship.

18. In the light of our above discussion, we find that the prosecution story in the circumstances is doubtful in nature and the accused/appellants are entitled to the benefit thereof not as a matter of grace but as a matter of right. In this context, we respectfully refer the case of Muhammad Akram v. The State (2009 SCMR 230), wherein the Hon'ble Supreme Court has held as under:--

> "The nutshell of the whole discussion is that the prosecution case is not free from doubt. It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

Therefore, Criminal Appeal No.616 of 2005 is allowed, the conviction and sentence recorded by the learned trial court against the appellants through the impugned judgment dated 21-4-2005 are set aside and by extending them the benefit of

doubt they are acquitted of the charges. The appellants are in jail and shall be released forthwith if not required in any other case. Death sentence of convicts Nasir Ahmad, Muhammad Idrees and Basharat is not confirmed and Murder Reference No.56 of 2008 is answered in the Negative.

19. As far as Criminal Appeal No.2077 of 2005 against acquittal of accused/ respondents Muhammad Bashir, Muhammad Akmal, Abdul Rehman, Munir Ahmad and Ijaz Ahmad is concerned, in the light of our observations regarding the acquittal of three appellants in Criminal Appeal No.616 of 2005, this appeal has lost its relevance, even otherwise it has been held by the Hon'ble Supreme Court of Pakistan in the judgment reported as Haji Amanullah v. Hunir Ahmad and others (2010 SCMR 222) that when an accused person is acquitted by the trial court, he enjoys double presumption of innocence and to dislodge that presumption very strong and convincing reasons are required, but no such reasons are reflected from the record, therefore, the acquittal of the above named accused/respondents as ordered by the learned trial Court is maintained and Criminal Appeal No.2077 of 2005 stands dismissed. In view of the acquittal of appellants Nasir Ahmad, Muhammad Idrees and Basharat, Criminal Revision No.560 of 2005 against them for enhancement of compensation is also dismissed.

N.H.Q./N-24/L Appeal accepted.

PLJ 2011 Cr.C. (Lahore) 529 (DB)
Present: Manzoor Ahmad Malik and Muhammad Anwaar-ul-Haq, JJ.
MUHAMMAD ISHFAQ and two others--Appellants
versus
STATE etc.—Respondents

Crl. Appeal No. 990 of 2005 and M.R. No. 629 of 2005,
heard on 28.10.2010.

Opinion of Police--

----Opinion of police regarding guilt or innocence of the accused is not admissible in evidence. [P. 535] A

2010 SCMR 660.

Evidence--

----Principle--If evidence of the prosecution is disbelieved qua one accused it cannot be believed against the other unless there is a strong and independent corroboration especially when the witnesses are inimical and interested. [P. 536] B

PLJ 2008 SC 269.

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

----S. 302(b)--Conviction and sentence recorded against appellant by trial Court--Challenge to--Benefit of doubt--Held: If any doubt arises from the circumstances of the case its benefit has to go to the accused--Prosecution had miserably been failed to prove its case against the

appellants and ocular account was not in line with medical evidence, even otherwise prosecution has to prove its case beyond any shadow of doubt--Prosecution was full of doubts and the appellants were entitled to the benefit of the same not as a matter of grace but as a matter of right--Appeal allowed, by extending them benefit of doubt--Conviction and sentence set aside. [Pp. 537 & 538] C & D

PLD 2002 SC 1048, 2009 SCMR 230 & 2010 SCMR 846.
Malik Akhtar Saeed Bhatti & Mr. Hamid Ali Mirza, Advocates for Appellants.
Chaudhry Muhammad Mustafa, D.P.G. for State.
Date of hearing: 28.10.2010.

Judgment

Muhammad Anwar-ul-Haq Haq, J.--Abdul Rehman alias Gagi, Abdul Rashid and Muhammad Ishfaq appellants' alongwith Nasir Ali and Saif-ur-Rehman co-accused were tried in case F.I.R. No. 465, dated 03.10.2003, registered at Police Station Sadar Samundari, District Faisalabad in respect of offences under Sections 302, 324 148, 149 PPC. After conclusion of the trial, learned trial Court vide its judgment-dated 29.03.2005 while acquitting co-accused namely Nasir Ali and Saif-ur-Rehman has convicted and sentenced the appellants as under:--

Muhammad Ishfaq

Under Section 302(b) PPC to `Death' as Ta'zir for committing Qatl-i-Amd of Muhammad Sajjad deceased. He was also ordered to pay Rs. 1,00,000/- (rupees one hundred thousand only) as compensation to the legal heirs of the deceased under Section 544-A, Cr. P.C.

Abdul Rehman alias Gagi and Abdul Rasheed

Under Section 302(b) PPC to `Imprisonment for Life' as Ta'zir each for committing Qatl-i-Amd of Muhammad Sajjad deceased. They were also directed to pay Rs.50,000/- (rupees fifty thousand only) each as compensation to the legal heirs of the deceased under Section 544-A, Cr.P.C. or in default to suffer simple imprisonment for six months each.

2. Feeling aggrieved, the appellants have challenged their convictions and sentences through Criminal Appeal No. 990 of 2005, whereas learned trial Court has transmitted Murder Reference No. 629 of 2005 for confirmation or otherwise of the Death sentence of Muhammad Ishfaq appellant. Both these matters being integrated are being disposed of together.

3. Succinctly, the case of prosecution in the FIR (Ex.PA/1) is that on 03.10.2003 at about 07.00 p.m. Muhammad Iftikhar (PW-10) complainant, Mujahid Ali, Abid Ali and Muhammad Sajjad were taking cold drinks outside the shop of one Muhammad Hussain, Muhammad Sajjad deceased was returning after making a phone call, suddenly, Muhammad Ishfaq armed with pistol .30 bore, Abdul Rashid armed with gun .12 bore, Saif-ur-Rehman armed with pistol .30 bore, Abdul Rehman alias Gagi armed with pistol .30 bore and Nasir Ali armed with gun .12 bore, double barrel emerged from the Baithak of Nasir Ali appellant, Saif-ur-Rehman raised a lalkara that Muhammad Sajjad be taught a lesson for injuring him, then Muhammad Ishfaq fired from his pistol which hit on the chin of Muhammad Sajjad, Abdul Rashid made fire shot with .12 bore gun which hit Muhammad Sajjad at the back of his right ankle and on the right thigh, Abdul Rehman alias Gagi fired from his pistol .30 bore

which hit Muhammad Sajjad near his anus, Nasir Ali made successive firing with his gun .12 bore double barrel and raised lalkaras to the effect that if anybody came near, he would be killed. Upon receipt of those injuries Muhammad Sajjad fell down and died at the spot. It was alleged in the FIR that in result of indiscriminate firing of the appellants one Asif was also injured.

The motive set-forth in the FIR was that Muhammad Sajjad a month and a half, prior to the present occurrence, had injured Saif-ur-Rehman for which he nourished a grudge, and he alongwith his co-accused with a common intention has killed Muhammad Sajjad, by causing him fire-arm injuries.

4. On 03.10.2003, after receiving information about the occurrence, Muhammad Aslam, SI (PW-12) reached at the place of occurrence, recorded oral statement of the complainant (Ex. PA) and sent the same for registration of formal FIR; inspected the dead body, prepared injury statement, inquest report and dispatched the dead body to the mortuary for autopsy. He also sketched site-plan of the place of occurrence without scale, secured blood-stained earth, and recorded the statements of the PWs. He also summoned the draftsman who prepared scaled site-plan of the place of occurrence. On 30.11.2003 he arrested Abdul Rehman alias Gagi appellant, who on 11.12.2003 led to the recovery of two Pistols P-3 and P5 alongwith bullets.

5. After completion of investigation, challan against all the accused was submitted before the learned trial Court, charge was framed against them to which they pleaded not guilty and claimed trial.

6. To substantiate the charge the prosecution has examined twelve witnesses in total out of which Dr. Sadiq Ali Arshad (PW-4) provided medical evidence, Muhammad Aslam, SI (PW-12) conducted investigation of this case, whereas Muhammad Iftikhar complainant (PW-10) and Mujahid Ali (PW-11) have furnished ocular account.

7. On 04.10.2003 Dr. Sadiq Ali Arshad (PW-4) conducted the post mortem examination on the dead body of Muhammad Sajjad and observed as under:--

(1) Fire-arm lacerated wound of entry 3 x 2 cm oval in shape on the right upper leg, 4 cm below the root of penis and a lacerated fire-arm wound of exit oval in shape 4 x 3 cm on the right upper leg about 4 cm outer and lower to the wound of entries.

(2) Fire-arm wound of entry 2 cm x 2 cm rounded in shape on the inner and back side of right lower leg, back on the right knee joint. Blackening was present around the wound.

(3) A lacerated fire-arm wound (grazing) on the right side of upper leg (perinium). 2 cm right from the midline.

(4) Lacerated fire-arm wound of entry 5 x 3 cm on the left back side of chest, 5 cm below the shoulder bone. No blackening was present.

(5) An abrasion 2 x 3 cm, skin deep on the left side of chin, 1 cm outer to the midline.

In his opinion death was caused due to Injury No. 4 causing damage to both the lungs. All the injuries were ante-mortem. Injury No. 5 was result of fall, rest of the injuries were inflicted by fire-arm weapon.

The probable time between injury and death was sudden while the time elapsed between death and post-mortem about 14 to 18 hours.

8. The appellants and their co-accused were examined under Section 342 Cr.P.C. They denied the allegations and professed their innocence. While answering to question (Why this case against you and why the PWs have deposed against you?), they replied as under:--

Muhammad Ishfaq

"Due to enmity and to save the skin of actual culprits. The factual position is that the PWs Mujahid Ali alongwith Sami Ullah both, were closely related to the deceased and complainant and on the day of alleged occurrence. Mujahid Ali and Sami Ullah fired at deceased and Muhammad Asif, because deceased Sajjad was a notorious and criminal person who was involved in murder, hudood zina and other criminal case and all his family members were against Sajjad deceased due to his immoral, indecent and criminal activities".

Abdul Rehman alias Gagi

"This is a false case against me. PWs deposed against me due to enmity and to save the skin of actual culprits. The factual position is that the PWs Mujahid Ali alongwith Sami Ullah both, were closely related to the deceased and complainant and on the day of alleged occurrence, Mujahid Ali and Sami Ullah fired at deceased and Muhammad Asif, because deceased Sajjad was a notorious and criminal person who was involved in murder, hudood zina and other criminal cases and all his family members were against Sajjad deceased due to his immoral, indecent and criminal activities".

Abdul Rashid appellant adopted almost the same plea as taken by his co-accused Muhammad lshfaq.

Neither the appellants made statements u/S. 340 (2) Cr.P.C. nor they produced any evidence in their defence. Learned trial Court vide its judgment, dated 29.03.2005 found the appellants guilty and convicted and sentenced them as mentioned above, hence, these matters before this Court.

9. The learned counsel for the appellants, in support of this appeal, contended that there is a conflict between ocular account and the medical evidence because as per the allegation of the eye-witnesses the deceased received injury on his left flank whereas there is no injury on the flank rather injury is on the back side of the deceased; that there is a specific attribution to Saif-ur-Rehman co-accused of the appellant (since acquitted) that he fired with his pistol and the bullet hit on the chin of the deceased whereas in the Post-mortem Report (Ex. PB) Injury No. 5 on the chin is result of fall; that as per site-plan the assailants were at a distance of 13 feet from the deceased whereas there is a blackening around Injury No. 2 in the post-mortem report; that as per the site-plan Ex. PF there was insufficient light at the time of occurrence, as only one bulb has been shown in the site-plan that too at a distance of 79 feet from the place of occurrence; that as per FIR and the statement of the eye-witnesses one Asif was injured in this occurrence but he never appeared before the learned trial Court to support the allegation levelled by the complainant; that prosecution did not produce even the MLR of said Asif; that the best evidence available with the prosecution has been withheld, as such a presumption under Article 129(g) of Qanun-e-Shahadat Order, 1984 is to be drawn against the prosecution; that no crime-empty was recovered from the spot, therefore, recovery of two pistols at the instance of Abdul Rehman alias Gagi is of no avail to the

prosecution; that Muhammad Ishfaq has been attributed an injury with the pistol at the flank of the deceased and if at all that is Injury No. 4, its dimension is 5 cm x 3 cm which clearly suggests that this injury cannot be caused with a pistol; that doctor (PW-4) during the cross-examination has admitted that two metallic pieces were recovered from the dead body but these led were not sent to the Fire-arm Expert; that four persons namely Abdul Rehman alias Gagi, Abdul Rashid, Muhammad Ishfaq and Saif-ur-Rehman (acquitted co-accused) fired at the deceased with different weapons and even specific injuries were attributed to each of the four persons but Saif-ur-Rehman was acquitted by the learned trial Court and against his acquittal no appeal has been preferred either by the State or the complainant and if this evidence is disbelieved qua Saif-ur-Rehman it cannot be believed qua the appellant unless there is a strong and independent corroboration which is not available in this case; that the deceased was a man of questionable character; that motive is double-edged weapon and it can cut both ways; that it is on the record that Saif-ur-Rehman co-accused who has been acquitted got registered a case against the deceased and Saif-ur-Rehman is business partner of Ishfaq; lastly, the learned counsel for the appellants have vehemently contended that all the accused named in the FIR except Abdul Rehman alias Gagi were declared innocent by four different investigating officers; i.e. Ahmad Khan, SI/SHO, Masroor Ahmad DSP/SDPO, Ghulam Akbar Sial, Inspector and Muhammad Aslam, SI and they all concluded that Nasir, Ishfaq, Abdul Rashid and Saif-ur-Rehman were innocent, therefore, the appeal be allowed and the appellants be acquitted.

10. On the other hand, learned Deputy Prosecutor General opposed this appeal on the grounds that the FIR in this case was promptly lodged wherein all the details of incident are mentioned; that the ocular account is furnished by the natural witnesses who were residents of the village where this incident take place and that is also supported by the medical evidence; that both the eye-witnesses are very closely related to the deceased and in this view of the matter substitution of a real culprit with some innocent is a rare phenomena; that motive has fully been established by the prosecution; that there was sufficient light and the witnesses could have witnessed this occurrence in the light shown in the site-plan; that opinion of police is not binding on the Court and in proof of their innocence no witness has been produced, therefore, this appeal be dismissed and the Murder Reference be answered in the affirmative.

11. We have heard the learned counsel for the parties at length, have given anxious consideration to their arguments and have also scanned the evidence on record with their able assistance.

12. In this case five persons namely Abdul Rehman alias Gagi, Abdul Rashid, Muhammad Ishfaq, Nasir Ali and Saif-ur-Rehman were implicated. Specific allegation of firing was levelled against Muhammad Ishfaq, Abdul Rehman alias Gagi, Abdul Rashid appellants and Saif-ur-Rehman whereas the allegation against Nasir co-accused was that he also resorted to firing and kept on raising lalkara. However, during the trial Muhammad Iftikhar (PW-10) had levelled an allegation against Nasir that his fire had injured Asif (not produced). The learned counsel has vehemently contended that this case was investigated by four different police officers and they all have concluded that all the accused named in the FIR except one Abdul Rehman alias Gagi were innocent. He has referred the statements made by Muhammad Iftikhar (PW-10) and Muhammad Aslam (PW-12) who have admitted that accused were declared innocent by the police during all four investigations. The question for

determination before us is whether the opinion of police officers regarding guilt or innocence of the accused is relevant and admissible in evidence? we, are of the view that the opinion of the police regarding guilt or innocence of the accused is not admissible in evidence and in holding so we are fortified by the judgment of the Hon'ble Supreme Court of Pakistan in the case of Muhammad Ahmad (Mahmood Ahmed) versus The State (2010 SCMR 660) where the Hon'ble Supreme Court was pleased to observe as under:--

"It may be mentioned here, for the benefit and guidance of all concerned, that determination of guilt or innocence of the accused persons was the exclusive domain of only the Courts of law established for the purpose and the said sovereign power of the Courts could never be permitted to be exercised by the employees of the police department or by anyone else for that matter. If the tendency of allowing such-like impressions of the Investigating Officer to creep into the evidence was not curbed them the same could lead to disastrous consequences. If an Investigating Officer was of the opinion that such an accused person was innocent then why could not, on the same principle, another accused person be hanged to death only because the Investigating Officer had opined about his guilt."

13. As for as merits of this case are concerned, it is the case of the prosecution that three appellants alongwith their acquitted co-accused Saif-ur-Rehman fired at the deceased and had caused injuries to him. It is mentioned in the FIR that the fire shot by Saif-ur-Rehman had hit near the chin of the deceased and stand remained the same by both the eye-witnesses while appearing before the Court as PW-10 and PW-11, but the Post-Mortem Examination on the dead body of the deceased reflects Injury No. 5 was caused by fall. Another important aspect is, blackening around Injury No. 2 allegedly caused by appellant Abdul Rashid, whereas site-plan (Ex. PF) shows the distance between the said appellant and the deceased about 13 feet, much beyond the blackening range. Another lapse in this case is regarding two metallic pieces recovered from the dead body, and then handed over to the police, but these two metallic pieces were not sent to the Forensic Science Laboratory alongwith two pistols allegedly recovered at the instance of Abdul Rehman alias Gagi appellant for any expert opinion, that could have been a very important piece of evidence in this case.

14. It is settled law that if evidence of the prosecution is disbelieved qua one accused it cannot be believed against the other unless there is a strong and independent corroboration, especially when the witnesses are inimical and interested. In this respect we seek guidance from the judgment reported as Akhtar Ali and others versus The State (PLJ 2008 SC 269), the following principle has been highlighted by the Apex Court:--

"It is settled law that eye-witnesses found to have falsely implicated five out of eight accused then conviction of remaining accused on the basis of same evidence cannot be relied upon without independent corroboration. See Ghulam Muhammad's case (PLJ 1976 SC 29), Sheral alias Sher Muhammad's case (1999 SCMR 697) and Ata Muhammad's case (1995 SCMR 599). It is also a settled law that credibility of the ocular evidence is not divisible. See Faiz Bakhsh's case (PLD 1959 PC 24), Nadia's case (42 Cr.L.J. 53), Muhammad's case (PLD 1954 FC 84), Sher Bahadar's case (1972 SCMR 651) and Muhammad Afsar's case (PLD 1954 FC 171).

15. As far as recovery of two pistols from Abdul Rehman alias Gagi appellant is concerned, since no empty was recovered from the spot and as such mere report of the Forensic Science Laboratory that the pistols were in working order is of no avail to the prosecution.

16. The motive alleged in the FIR is that about one and a half month prior to the present occurrence a quarrel took place between Sajjad deceased and Saif-ur-Rehman appellant, therefore, motive set up in the FIR was directly against Saif-ur-Rehman who has been acquitted by the learned trial Court and no appeal against his acquittal has been filed either by the State or by the complainant party, therefore, the motive in this case can not be treated as a corroborative piece of evidence against the appellants.

17. As per contents of the FIR one Muhammad Asif was also injured in this occurrence, while appearing in Court Muhammad Iftikhar complainant (PW-10) has categorically stated that Muhammad Asif also had received injury on his chest and that fire was shot by Nasir acquitted co-accused of the appellants, but surprisingly the whole file is silent about this most important witness, and even his Medico-legal Report is not available on the file and in these circumstances learned counsel for the appellants is rightly of the view that adverse inference within the meaning of Article 129(g) of Qanun-e-Shahadat Order, 1984 shall be drawn against the prosecution. He has rightly placed reliance upon the case reported as Riaz Ahmed versus The State (2010 SCMR 846) wherein the Honourable Supreme Court has emphasized as under:-

"Therefore, his evidence was the best piece of the evidence, which the prosecution could have relied upon for proving the case, but for the reasons best known, his evidence was withheld and he was not examined. So a presumption under Illustration (g) of Article 129 of Qanun-e-Shahadat Order, 1984 can fairly be drawn that had the eye-witness Manzoor Hussain been examined in the Court his evidence would have been unfavourable to the prosecution".

18. We are of the considered view that prosecution has miserably been failed to prove its case against the appellants and ocular account is not in line with the medical evidence, even otherwise prosecution has to prove its case beyond any shadow of doubt and if any doubt arises from the circumstances of the case its benefit has to go to the accused. We respectfully refer here the case of Muhammad Akram versus The State (2009 SCMR 230) wherein Hon'ble Supreme Court of Pakistan has emphasized as under:--

"It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

In an other case Ayub Masih v. The State (PLD 2002 SC 1048), the Hon'ble Supreme Court of Pakistan has observed as under:--

"It is hardly necessary to reiterated that the prosecution is obliged to prove its case against the accused beyond any reasonable doubt and if it fails to do so the accused is entitled to the benefit of doubt as of right. It is also firmly settled that if there is an element of doubt as to the guilt of the accused the benefit of that doubt must be extended to him. The doubt of course must be reasonable and not imaginary or artificial. The rule of benefit of doubt, which is described as the golden rule, is essentially a rule of prudence which cannot be ignored while dispensing justice in accordance with law. It is based on the maxim, `it is

better that ten guilty persons be acquitted rather than one innocent person be convicted' in simple words it means that utmost care should be taken by the Court in convicting an accused. It was held in The State v. Mushtaq Ahmad (PLD 1973 SC 418) that this rule is antithesis of haphazard approach or reaching a fitful decision in a case. It will not be out of place to mention here that this rule occupies a pivotal place in the Islamic Law and is enforced rigorously in view of the saying of the Holy Prophet (PBUH) that the `mistake of Qazi (judge) in releasing a criminal is better than his mistake in punishing an innocent".

19. For all what has been discussed above, in our view the prosecution case is full of doubts and the appellants are entitled to the benefit of the same not as a matter of grace but as a matter of right. Therefore, by extending them benefit of doubt we, allow Criminal Appeal No. 990 of 2005, the convictions and sentences recorded by the learned trial Court against Muhammad Ishfaq, Abdul Rehman alias Gagi and Abdul Rashid appellants are set-aside. They are acquitted of the charges levelled against them. They are in jail. They be released forthwith if not required to be detained in any other case.

20. Murder Reference No. 629 of 2005 is answered in the NEGATIVE and sentence of the death of Muhammad Ishfaq is NOT CONFIRMED.

(A.S.) Appeal allowed.

PLJ 2011 Cr.C. (Lahore) 1053 (DB)
Present: Manzoor Ahmed Malik and Muhammad Anwaar-ul-Haq, JJ.
MANZOOR AHMAD @ JHOORA and another--Appellant
versus
STATE and another--Respondents

Crl. Appeal No. 466-J and Murder Reference No. 81 of 2006, heard on 18.1.2011.

Substitution--

----Substitution in such like cases where both eye-witnesses are close relatives of deceased ladies, is a rare phenomenon, it is impossible that real father of two deceased daughters and husband of third deceased would let off real culprit and shall substitute his own real brother. [P. 1060] A

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

----S. 302(b)--Conviction and sentence--Challenge to--Appreciation of evidence--Mitigating circumstance--Quantum of sentence--Principle of proportionality--Conviction and sentence of appellant recorded by trial Court was quite in accordance with law and was based upon well recognized principles of appreciation of evidence in a criminal case--As far as quantum of sentence of appellant remained unable to point out any mitigating circumstance in favour of appellant--Act of three innocent ladies, was shocking and dreadful--Question of sentence in a murder case is of course a question of very vital importance and all care and caution is required in this regard, but it is equally important aspect that sentence of death cannot be avoided on basis of flimsy grounds and principle of proportionality cannot be lost sight in brutal murders--Another important legal aspect while considering sentence one out of two in

a case of Qatl-i-Amd is Section 382-C, Cr.P.C.--Plea taken by appellant in his defence was not only false but on the face of it scandalous as well and while taking into consideration Section 382-C, Cr.P.C.--There was no extenuating circumstance available in favour of appellant for extending him any benefit regarding his sentence--Conviction and sentence u/S. 302(b) PPC on three counts was maintained and appeal was dismissed.

[P. 1061 & 1062] B, C & D

Mr. Haider Rasul Mirza, Advocate for Appellant (at State expenses).

Chaudhry Muhammad Mustafa, D.P.G. for State.

Date of hearing: 18.1.2011.

Judgment

Muhammad Anwaar-ul-Haq, J.--Manzoor Ahmad alias Jhoora appellant was tried in case F.I.R. No. 555, dated 22.05.2004, registered at Police Station Jaranwala, District Faisalabad in respect of an offence under Section 302 PPC. After conclusion of the trial, learned trial Court vide its judgment dated 22.11.2005 has convicted the appellant under Section 302(b) PPC and sentenced him to `Death' on three counts for committing Qatl-i-Amd of Mst. Tasleem Bibi, Mst. Amina Bibi and Mst. Shagufta Bibi(deceased ladies). He was also ordered to pay Rs. 1,00,000/- (rupees one hundred thousand only) as compensation on each count to the legal heirs of the deceased ladies under Section 544-A, Cr.P.C. and in default thereof to further undergo S.I. for six months on each count.

2. Feeling aggrieved, the appellant has filed instant appeal through jail i.e. Criminal Appeal No. 466-J of 2006, whereas learned trial Court has transmitted Murder Reference No. 81 of 2006 for confirmation or otherwise of the Death sentence of Manzoor Ahmad alias Jhoora appellant. Both these matters being integrated are being disposed of together.

3. Prosecution story in brief un-folded in the F.I.R. (Ex. PD/1) by Zafar Ali complainant (PW-8) is that on 22.05.2004 complainant along with Muhammad Ashraf and Meraj Din, brothers-in-law (Salay) of the complainant was sitting in the room of his residential house. On the same day at about 09:00 a.m. appellant Manzoor Ahmad alias Jhoora (real brother of the complainant) armed with a rifle .7mm arrived there, asked all the inmates of the house loudly to recite KALMA and fired upon Mst. TasleemBibi, who was washing the clothes near the hand pump, which fires hit on front side of her chest and legs, then the appellant made fire shots upon Mst. Amina Bibi, who was pasting clay outside the outer door, which fire landed at front side of her chest, thereafter appellant made fire of rifle upon Mst. Shagufta Bibi, when she was running towards the house of the neighbours in order to save her life, which fire landed at her right armpit and upper part of arm, she fell down on the ground and then the appellant while brandishing the rifle, fled away from the spot. The complainant and the PWs tried to manage Mst. Amina Bibi, Mst. Tasleem bibi and Mst. Shagufta Bibi but all the three ladies succumbed to the injuries at the spot.

Motive behind the occurrence as mentioned in the F.I.R. (Ex. PD/1) was that the complainant settled engagement of his daughter Mst. Tasleem Bibi with someone in Lahore but the appellant Manzoor Ahmad alias Jhoora was not happy over the said engagement and due to this grudge, he had committed this occurrence.

4. On 22.05.2004, Faiz Ahmad S.I. (PW-11), reached at the place of occurrence, recorded statement of the complainant (Ex. PD) and sent the same for registration of the same. Thereafter, he prepared injuries statement (Ex. PF, Ex. PJ and Ex. PM) regarding the dead bodies of Mst. Amina Bibi, Mst. Tasleem Bibi and Mst. Shagufta Bibi, respectively. He also prepared inquest reports (Ex. PG, Ex. PK and Ex. PN) and then investigation of this case was entrusted to Mukhtar Ahmad A.S.I./I.O. (PW-12).

On entrustment of investigation of this case, Mukhtar Ahmad A.S.I. (PW-12) arrived at the place of occurrence on the same day i.e. 22.05.2004, he sent all the dead bodies of the deceased ladies to the hospital for post-mortem examination, recorded statements of the PWs under Section 161 Cr.P.Code, inspected the place of occurrence and sketched the rough site-plan (Ex. PU). He took blood stained earth from the places of murder of Mst. Shagufta Bibi, Mst. Tasleem Bibi and Mst. Amina Bibi and secured the same vide recovery memos. (Ex. PA, Ex. PB and Ex. PC) respectively. On 27.05.2004, he arrested Manzoor Ahmad alias Jhoora (appellant) and on 06.06.2004, the appellant while in police custody led to the recovery of a .7mm rifle (P-11) along with license (P-12) which were taken into possession by the I.O. vide recovery memo. (Ex. PT).

5. After completion of investigation, challan against the appellant was submitted before the learned trial Court, charge was framed against him to that he pleaded not guilty and claimed trial.

6. To substantiate the charge the prosecution had examined twelve witnesses in total out of which Dr. Kanwal Naeem Bari (PW-5) provided medical evidence, Faiz Ahmad, S.I. (PW-11) and Mukhtar Ahmad A.S.I (PW-12) conducted investigation of this case, whereas Zafar Ali complainant (PW-8) and Muhammad Ashraf (PW-9) have furnished the ocular account.

7. On 22.05.2004 at about 03:00 p.m. Dr. Kanwal Naeem Bari (PW-5) conducted post-mortem examination on the dead body of Mst. Amina Bibi and found as under:--

(1) A fire-arm lacerated wound of entrance x cm on the back of left side of chest. Scapular region 15 cm from centre.

(2) A fire-arm wound of entrance 1 x 1 cm on left side back of chest 7 cm outward and downward from Injury No. 1.

(3) 2 x cm on left arm back side 12 cm from elbow joint.

(4) A fire-arm lacerated wound of exit 2 x 1 cm on right side of front of chest. 8 cm upward from the nipple and 7 cm from the midline.

(5) A fire-arm lacerated wound of exit 3 cm x 2 cm on left side of front of chest upper part mid clavicle region. 1 cm downward from the clavicle.

In her opinion the cause of death was injuries No. 1 to 5, causing damage to vital organs, heart and lung, leading to death in ordinary course of nature. All the injuries were ante-mortem and were caused by fire-arm.

Probable time between injury and death was immediate whereas duration between death and post-mortem was about 8 to 9 hours.

On the same day at about 03:30 p.m. she conducted the post-mortem examination on the dead body of Mst. Tasleem Bibi and observed as under:--

(1) A fire-arm wound of entrance 1/2 x 1/2 cm on left side of back of chest, middle part 10 cm from axilla and 8 cm from centre.

(2) A fire-arm, wound of entrance 1/2 x 1/2 cm 3 cm upward and outward from Injury No. 1 and 14 cm from the left shoulder (left side of back of chest).

(3) A fire-arm lacerated wound of exit 6 x 3 cm on front of chest, central part of-chest in midline, 18 cm from the right nipple.

(4) A fire-arm wound of exit on right breast. 2 x 1 cm inner side of the breast, 2 x 1/2 cm from the nipple.

(5) A fire-arm lacerated wound of exit 2 x 1 cm in midline front of chest, 2 x 1/2 cm down from Injury No. 3.

(6) A fire-arm wound of entrance 1 x 1 cm on right thigh, posterior aspect 3 cm from knee joint.

(6B) A fire-arm wound of exit 3 x 2 cm on medial aspect of right thigh, 11 cm from knee joint.

(7A) A fire-arm lacerated wound of entrance 2 x 1 cm on right leg, posterior aspect 7 cm from knee joint.

(7B) A fire-arm wound of exit 3 x 1/2 cm on right leg. 9 cm from knee joint. 2 cm medial from Injury No. 7-A.

In her opinion the cause of death was due to Injuries No. 1 to 5, causing damage to lung and heart and finally leading to death in ordinary course of nature. All the injuries were ante-mortem and were caused by fire-arm.

Probable time between injury and death was immediate whereas duration between death and post-mortem was about 8 to 9 hours.

On the same day at about 04:00 p.m. she conducted the post-mortem examination on the dead body of Mst. Shagufta Bibi and observed as under:--

(1-A) A fire-arm entrance 1/2 x 1/2 cm on left arm front 16 cm from shoulder joint.

(1-B) A fire-arm lacerated wound of exit 1/2 x 1/2 cm on left arm 3 cm from Injury No. 1-A.

(2-A) A fire-arm lacerated wound of entrance 1/4 x 1/4 on left side, lateral aspect of chest. Middle part 7 cm lateral from left nipple.

(2-B) A fire-arm lacerated wound of exit 4 x 1/2 cm on right/side of chest, lateral aspect 5 x 1/2 cm lateral from left nipple.

In her opinion the cause of death was due to Injuries No. 2-A and 2-B, causing damage to lung and heart and leading to death in ordinary course of nature. All the injuries were ante-mortem and were caused by fire-arm.

Probable time between injury and death was immediate whereas duration between death and post-mortem was about 8 to 9 hours.

8. The appellant was examined under Section 342 Cr. P.C. He denied the allegations and professed his innocence. While answering to question (Why this case against you and why the PWs have deposed against you?), he replied as under:--

"The PWs are related to the deceased ladies while the others are police officials. They have deposed against me to strengthen their case. In fact the deceased were of bad character ladies. They have been murdered by the complainant along with PWs due to their stained character, I have been booked in this case falsely to make scapegoat because there were strained relations between me and the complainant prior to the occurrence."

Neither the appellant made statement u/S. 340 (2) Cr.P.C. nor did he produce any evidence in his defence. Learned trial Court vide its judgment-dated 22.11.2005 found the appellant guilty and convicted and sentenced him as mentioned above, hence, these matters before this Court.

9. Learned counsel for the appellant, in support of this appeal, contends that there are material contradictions between ocular and medical evidence because as per F.I.R. and statements of the PWs before the Court, the fires shot by the appellant hit Mst. Tasleem Bibi on her chest and legs whereas all the injuries on her chest are exit wounds and the entry wounds are on the back of her chest, similarly, the injuries received by Mst.Amina Bibi are also on the back of her chest whereas it is mentioned in the F.I.R. as well as alleged by the prosecution witnesses before the Court that she received injuries on her chest and as-far-as the injuries received by Mst. Shagufta Bibi is concerned, as per F.I.R. she received injuries on the right armpit and right arm whereas there is an injury on her arm but actually there is no injury on her armpit and is an entry wound at her chest; that it is the case of the prosecution that all the deceased received nine entry wounds but surprisingly no crime-empty was recovered from the spot and there is no explanation for non-recovery of crime-empties from the spot, in this circumstance, recovery of rifle .7 mm (P-11) carries no value; that so far as motive part as alleged in the F.I.R. is concerned, no independent witness, has been produced by the prosecution to prove the same, even otherwise story of the prosecution is highly improbable; that two eye-witnesses allegedly remained present but none of them made any attempt to catch hold of the appellant, all these circumstances make the whole prosecution story doubtful; that both the eye-witnesses are closely related and interested

witness and there is no independent corroboration and their evidence cannot be accepted without some independent strong corroborative evidence.

10. On the other hand, learned Deputy Prosecutor-General opposed this appeal on the grounds that it is a daylight occurrence in which three innocent ladies were killed; that matter was promptly reported to the police with all the necessary details of the occurrence by the complainant which rules out the possibility of concoction and deliberation by the complainant/prosecution; that prosecution case has fully been proved through ocular account supported by medical of evidence and there is no material contradiction between the ocular account and medical evidence; that both the eye-witnesses are laymen and they are not expected to provide exact pictorial view of the incident and even they were not cross-examined on this aspect of the matter; that ocular account has been furnished by Zafar Ali complainant (PW-8) real brother of the appellant and Muhammad Ashraf (PW-9) brother-in-law (Sala) of the complainant, having no enmity with the appellant and substitution in such like cases is a rare phenomenon; that the doctor who conducted the post-mortem examination on the dead bodies of all the three deceased ladies, has not been cross-examined. Further contends that the frivolous plea taken by the appellant regarding bad character of the deceased ladies is belied by medical evidence. Lastly contends that there is no mitigating circumstance in favour of the appellant because he has killed three innocent deceased ladies in a very callous manner, hence, he does not deserve any leniency and is not entitled to any exception, hence, appeal of the appellant be dismissed and murder reference be answered in the affirmative.

11. We have heard the learned counsel for the parties at length, and have given anxious consideration to their arguments and have also scanned the record with their able assistance.

12. In this case, occurrence took place on 22.05.2004 in the daylight at about 09:00 a.m. in which three innocent women were murdered, matter was promptly reported to the police by Zafar Ali complainant (PW-8) on the same day at 10.30 a.m., whereas the distance between the Police Station and place of occurrence is about five miles and the post-mortem examinations on the dead bodies of the deceased ladies were also conducted on the same day. We have noticed that it is a promptly lodged F.I.R. with all the necessary details of this unfortunate occurrence that rules out the possibility of any concoction or deliberation on behalf of the complainant/prosecution.

13. In order to prove the ocular account prosecution has examined Zafar Ali complainant (PW-8) real brother of the appellant and Muhammad Ashraf (PW-9) brother-in-law (Sala) of the complainant, complainant is the resident of the same house where the deceased ladies were residing and occurrence took place and his presence is not disputed whereas PW-9 during his cross-examination has given plausible explanation of his presence at the spot, even otherwise, he is closely related to the complainant, therefore, his presence at the house of his brother-in-law cannot be considered as improbable or against the natural conduct and his presence at the spot is conceivable. Though, both the eye-witnesses are related to the deceased ladies yet we do not find any reason of false implication of the appellant by them in this case, even otherwise, there is no reason to doubt their testimonies because they have no enmity of any sort with the appellant. Mere relationship of these witnesses is not sufficient to discard their testimonies especially when the complainant is real brother of the

appellant. In this respect, we respectfully refer the case of Haji versus The State (2010 SCMR 650), wherein the Hon'ble Supreme Court has observed as under:

"Both the ocular witnesses undoubtedly are inter se related and to the deceased but their relationship ipso facto would not reflect adversely against the veracity of the evidence of these witnesses in absence of any motive wanting in the case, to falsely involve the appellant with the commission of the offence and there is nothing in their evidence to suggest that they were inimical towards the appellant and mere inter se relationship as above noted would not be a reason to discard their evidence which otherwise in our considered opinion is confidence-inspiring for the purpose of conviction of the appellant on the capital charge being natural and reliable witnesses of the incident."

Even otherwise, substitution in such like cases where both the eye-witnesses are close relatives of the deceased ladies, is a rare phenomenon, it is impossible that real father of two deceased daughters and husband of the third deceased would let off the real culprit and shall substitute his own real brother in this case. Here, we refer the case of Khalid Saif Ullah versus The State (2008 SCMR 688) wherein Hon'ble Supreme Court of Pakistan has observed as under:

"Substitution is a phenomenon of a rare occurrence because even the interested witnesses would not normally allow real culprits for the murder of their relations let off by involving innocent persons. In this context, reference can usefully be made to the case of Irshad Ahmad and others v. The State and others PLD 1996 SC 138".

We are of the considered view that ocular account is coherent, straightforward reliable and worth reliance and is further corroborated by medical evidence on all material aspects.

14. As far as contention of learned counsel for the appellant that there is a contradiction between ocular account and medical evidence, we have noticed that complainant has given the description of this unfortunate occurrence in his own words but he was not cross-examined on this aspect of the matter, even otherwise it is unnatural to expect from eye-witnesses to give a photographic narration of all the fire-arm injuries to the deceased and especially it is unimaginable for any one to describe fire-arm injuries received by three deceased during the occurrence. In our view ocular account is fully supported by medical evidence as according to the opinion of the doctor (PW-5) all the three deceased ladies died due to fire-arm injuries medical evidence is further inline with the prosecution case on other material aspects such as time of death weapon of offence etc. Place and time of occurrence is also not denied in this case.

15. Appellant has taken a specific plea while cross-examining the eye-witnesses that deceased ladies were of bad character and they have been murdered by the complainant and PWs due to their stained character and same suggestion was put to the Investigating Officer (PW-12) during his cross-examination but the appellant has miserably been failed to prove the plea taken by him in any manner whatsoever. In the Post Mortem reports (Ex. PH and Ex. PL) doctor has opined that hymens of Mst. Tasleem Bibi and Mst. Shagufta Bibi were intact that further counteract the plea of appellant that deceased girls were of immoral character.

16. As regards evidence of recovery of rifle .7mm (P-11) taken into possession by the I.O. vide recovery memo. (Ex. PT) from the appellant, we are of the view that it is of no avail to the prosecution because no crime-empty was collected by the I.O. from the spot. But even if the evidence of recovery of rifle is excluded, the prosecution story stands fully proved by the ocular account supported by medical evidence and there is sufficient material available on the record to prove prosecution case against the appellant beyond any shadow of doubt.

17. In view of the above, we are satisfied that finding of conviction and sentence of the appellant recorded by the learned trial Court is quite in accordance with law and is based upon well recognized principles of appreciation of evidence in a criminal case.

18. As far as quantum of sentence of the appellant is concerned the learned counsel for the appellant remained unable to point out any mitigating circumstance in favour of the appellant in this case. Act of the appellant and in the manner he committed murder of three innocent ladies, is shocking and dreadful. The question of sentence in a murder case is of course a question of very vital importance and all the care and caution is required in this regard, but it is equally important aspect of this matter that sentence of death cannot be avoided on the basis of flimsy grounds and principle of proportionality cannot be lost sight in brutal murders. Another important legal aspect while considering sentence one out of two in a case of Qatl-i-Amd is Section 382-C, Cr.P.C. We reproduce the same for ready reference:

"382-C, Scandalous or false and frivolous pleas to be considered in passing sentence. In passing a sentence on an accused for any offence, a Court may take into consideration any scandalous or false and frivolous plea taken in defence by him or on his behalf."

The plea taken by the appellant in his defence is not only false but on the face of it scandalous as well and while taking into consideration Section 382-C, Cr.P.C. we are of the considered view that there is no extenuating circumstance available in favour of the appellant for extending him any benefit regarding his sentence, hence his conviction and sentence under Section 302 (b) PPC on three counts as ordered by the learned trial Court, is maintained and his Criminal Appeal No. 466-J of 2006 is, dismissed.

19. Resultantly death sentence awarded to Manzoor Ahmad alias Jhoora, appellant on three counts is CONFIRMED and murder reference (M. R. No. 81 of 2006) is answered in AFFIRMATIVE.

(A.S.) Appeal dismissed.

K.L.R. 2011 Cr.C. 177
[Lahore]
Present: **MUHAMMAD ANWAARUL HAQ, J.**
Muhammad Hanif
Versus
The State and another

Criminal Miscellaneous No. 2520-B of 2011.

BAIL --- (Mobile snatcher)

Criminal Procedure Code (V of 1898)---
---S. 497(2)---Pakistan Penal Code, 1860, Ss. 392/411---Occurrence of mobile snatching---Rule of consistency---**Held:** There was no substantive progress in trial---There was no criminal record against petitioner---Case of petitioner was almost at par with that of his co-accused having already been allowed bail by High Court---Matter fell within purview of further inquiry---Bail after arrest granted.

(Para 5)

[Occurrence of mobile snatching. Trial was delayed. Petitioner was not a previous record holder---Bail was allowed].

ORDER

MUHAMMAD ANWAARUL HAQ, J. --- The petitioner seeks post-arrest bail in case F.I.R. No. 93, dated 16.3.2010 under Sections 392 and 411, P.P.C. registered at Police Station Mangtanwala, District Nankana Sahib.

2. Learned counsel for the petitioner contends that the petitioner is not named in the F.I.R. and he is behind the bars since 24.5.2010 without any substantive progress in his trial; that there is no previous criminal record against the petitioner and his case is at par with the case of his co-accused Muhammad Habib who has already been allowed bail by this Court *vide*Order dated 30.11.2010 passed in Criminal Miscellaneous No. 12785-B of 2010. Further contends that recovery memo. of mobile phone does not contain any serial number of the mobile phone and recovery shown against the petitioner of one ring, mobile phone and pistol is fabricated, therefore, the petitioner is entitled for bail.

3. On the other hand learned Deputy Prosecutor General while vehemently opposing this bail petition contends that case of the petitioner is distinguishable than that of his co-accused Muhammad Habib to the extent of recovery, as recovery of mobile phone is sufficient evidence that connects him with the crime. Further contends that the offence against the petitioner is heinous in nature, hence, he is not entitled for bail.

4. Arguments heard. Record perused.

5. Be that as it may, the petitioner is behind the bars since 24.5.2010 without any substantive progress in his trial. The investigating officer present in Court confirms that

there is no previous criminal record against the petitioner. Co-accused of the petitioner namely Muhammad Habib has already been allowed bail by this Court on 20.11.2010 *vide* Criminal Miscellaneous No. 12785-B of 2010 and case of the petitioner is almost at par with the case of his co-accused Muhammad Habib. In this view of the matter, case of the petitioner falls within sub-section (2) of Section 497, Cr.P.C. and is one of further inquiry into his guilt. I, therefore, admit the petitioner to bail subject to his furnishing bail bond in the sum of Rs. 100000/- (Rupees one hundred thousand only) with one surety in the like amount to the satisfaction of learned Trial Court.

6. It is, however, clarified that the observations made herein are just tentative in nature and strictly confined to the disposal of this bail petition.

Bail after arrest granted.

K.L.R. 2011 Cr.C. 179
[Lahore]
Present: **MUHAMMAD ANWAARUL HAQ, J.**
Manzoor Khan
Versus
The State and another

Criminal Miscellaneous No. 2958-B of 2011.

BAIL --- (Audit report)

Criminal Procedure Code (V of 1898)---

---S. 497(2)---Pakistan Penal Code, 1860, Ss. 381/406/506---F.I.R.---Bail concession---Audit report---Further inquiry---**Held:** There was an inordinate delay in lodging F.I.R.---Nothing had been recovered from petitioner despite that he remained on physical remand for a considerable period---During investigation petitioner was found to be involved to the extent of S. 406, P.P.C.---Case against petitioner did not fall within prohibitory clause---Authenticity of audit report in question would be determined by Trial Court after recording of some evidence---Matter called for further inquiry---Bail after arrest granted.

(Paras 5,6)

Key Terms:- Audit report and bail.

[Allegation regarding embezzlement of accused. Nothing was recovered from petitioner. Authenticity of audit report was to be determined at trial stage. Bail was allowed].

For the Petitioner: **Ch. Sajid Ali Bul, Advocate.**

Tasawar Ali Khan, D.P.G. with Abdul Razzaq, A.S.I.

For the Complainant: **Azam Nazeer Tarar, Advocate.**

ORDER

MUHAMMAD ANWAARUL HAQ, J. --- The petitioner seeks post arrest bail in case F.I.R. No. 1334, dated 22.11.2010 under Sections 381, 406 and 506, P.P.C. registered at Police Station Factory Area Sheikhupura.

2. Learned counsel for the petitioner contends that there is an inordinate delay of 20 months in lodging of the F.I.R.; that the petitioner remained on physical remand for a considerable period but nothing was recovered from him; that there is no direct evidence against the petitioner and the audit report prepared by the complainant and his accountant is not a sufficient evidence to connect the petitioner with this crime; that he is behind the bars since 23.11.2010 without any substantive progress in his trial; that during the investigation the petitioner has been found involved only to the extent of Section 406, P.P.C., which does not fall within the prohibitory clause of Section 497, Cr.P.C. and case against the petitioner is one of further inquiry into his guilt.

3. On the other hand learned Deputy Prosecutor General assisted by learned counsel for the complainant while vehemently opposing this bail petition contends that the petitioner is involved in a huge embezzlement of about Rs. 36,80,665/-; that there is sufficient evidence against the petitioner including the bank statement of his account; that mere non-recovery is not a ground itself to enlarge the accused on bail; that there is no *mala fide* on the part of the complainant or the police and that the F.I.R. is based upon annual audit report of the firm.

4. Arguments heard. Record perused.

5. Admittedly, there is an inordinate delay in lodging of the F.I.R. and nothing has been recovered from the petitioner despite the fact that he remained on physical remand for a considerable period. The investigating officer, present in Court, states that *vide* case diary No. 29, dated 8.2.2011 the petitioner has been found involved only to the extent of Section 406, P.P.C. The authenticity of the audit report prepared by the Manager Audit would be determined by the learned Trial Court after recording of some evidence. In view of the final investigation report dated 8.2.2011 that the petitioner is only involved in this matter to the extent of an offence under Section 406, P.P.C., the case against him does not fall within the prohibitory clause of Section 497, Cr.P.C and is one of further inquiry into his guilt. He is behind the bars since 23.11.2010 without any substantive progress in his trial and as per police record the petitioner has no previous criminal record. I, therefore, admit the petitioner *to* bail subject to his furnishing bail bond in the sum of Rs. 500,000/- (Rupees five hundred thousand only) with one surety in the like amount to the satisfaction of learned Trial Court.

6. It is, however, clarified that the observations made herein are just tentative in nature and strictly confined to the disposal of this bail petition.

Bail after arrest granted.

2011 P.Cr.R. 65
[Lahore]
Present: **MUHAMMAD ANWAARUL HAQ, J.**
Mukhtar Ahmad
Versus
The State and another

Criminal Misc. No. 13153-B of 2010, decided on 2nd December, 2010.

BAIL --- (Implication by co-accused)

Criminal Procedure Code (V of 1898)---

*---S. 497(2)---Pakistan Penal Code, 1860, Ss. 302, 201, 34---Bail after arrest, grant of---Implication on statement of co-accused---Further inquiry---**Held:** Petitioner was not nominated in F.I.R---Petitioner was initially introduced in the case on statement of co-accused---Said co-accused was already released as bail---No weapon of offence whatsoever recovered from petitioner---I.O. opined that petitioner was not present at time of occurrence and he was already known to PWs prior to identification parade---Case prima facie fell within ambit of further inquiry---Bail after arrest granted.*

(Paras 5, 6)

Key Terms: *Co-accused.*

[Implication in offence of murder on statement of co-accused. Bail was allowed].

For the Petitioner: **Muhammad Ahsan Nizami, Advocate.**

For the State: **Arshad Mehmood, DPG with Amjad Hussain, S.I. with record.**

For the Complainant: **Ashraf Ali Javed, Advocate.**

Date of hearing: **2nd December, 2010.**

ORDER

MUHAMMAD ANWAARUL HAQ, J. --- Mukhtar Ahmed, petitioner by way of the instant petition has sought his post arrest bail in case F.I.R. 47/2010, dated 28.01.2010 under Sections 302/201/34, PPC registered at Police Station Saddar Nankana Sahib.

2. Learned counsel for the petitioner contends that petitioner is not nominated in the FIR; that he was subsequently involved in this case on the statement of his co-accused namely Muhammad Ashraf recorded under Section 164 of Cr.P.C. who has been allowed bail by this Court *vide* order dated 12.11.2010 passed in Criminal Miscellaneous No. 12555/2010; that case of the petitioner is at par with the case of his co-accused Muhammad Ashraf; that statement of one accused against the other is not admissible in evidence and

even otherwise statement of his co-accused is exculpatory as he had stated that he did not fire at the deceased rather he only accompanied the petitioner and his co-accused, who had fired at the deceased; that a fake identification parade was held for the identification of the petitioner on 24.06.2010, after six months of the alleged occurrence, whereas it has been proved that the witnesses had already seen the petitioner during the investigation; that case against the petitioner is one of further inquiry into his guilt as after thorough investigation police in its final report under Section 173, Cr.P.C. had declared that petitioner was not present at the time of occurrence and his role is only to the extent of abetment; that during the whole investigation no motive whatsoever was brought on the record against the petitioner rather it was attributed to his co-accused Rasheed Ahmad that no recovery has been affected from the petitioner; that petitioner is behind the bars since 21.06.2010 and is previously non-convict and has no criminal record.

3. On the other hand, learned Deputy Prosecutor General assisted by learned counsel for the complainant opposed this petition with the contentions that petitioner was implicated in this case on the statement of his co-accused namely Muhammad Ashraf recorded under Section 164 of Cr.P.C. before the learned Judicial Magistrate, that identification parade was held wherein the witnesses have identified the petitioner stating that he was present at the time of alleged occurrence and had also fired at the deceased; that the statement of witnesses under Section 161, Cr.P.C. and statement of co-accused namely Muhammad Ashraf recorded under Section 164 of Cr.P.C are sufficient to connect the petitioner with the alleged crime; that mere non-recovery of weapon of offence is not enough to enlarge thy petitioner on bail who is otherwise found fully involved in this case during the investigation.

4. Arguments heard. Record perused.

5. I have noticed that F.I.R. was lodged on 28.01.2010 but the petitioner is not named in the FIR. He was initially introduced in this case on the statement of his co-accused Muhammad Ashraf recorded under Section 164 of Cr.P.C. but *prima facie* it is an exculpatory statement wherein co-accused Muhammad Ashraf stated that he did not fire at the deceased but firing was made by the petitioner and his co-accused. The police after investigation had finally challaned the petitioner only under Section 109, PPC. No weapon of offence whatsoever was recovered from the petitioner. I have also noticed that complainant had moved an application on 20.07.2010 before the Investigating Officer but even in that application no active role of the petitioner has been mentioned. Investigating Officer present in Court states that *vide* case Diary No. 95, dated 15.10.2010 recorded by Muhammad Younas, SHO/Inspector Police Station Safdar, Nankana Sahib, the petitioner was not present at the time of occurrence and he was already known to the witnesses prior to the identification parade. In this view of the matter the case against the petitioner *prima facie* falls within the purview of sub-section (2) of Section 497, Cr.P.C. Co-accused of the petitioner Muhammad Ashraf has already been allowed bail by this Court against whom same allegation of abetment was established through investigation.

6. I, therefore, admit the petitioner to bail subject to his furnishing bail bond 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 learned Trial Court.

7. It is, however, clarified that observations made herein are just tentative in nature and strictly confined to the disposal of this bail petition.

Bail after arrest granted.

2011 P.Cr.R. 848

[Lahore]

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

Zafar Iqbal alias Malanga

Versus

The State

Criminal Appeal No. 2376 of 2010.

(a) Suspension of Sentence---

---Bailable offence---Rule of propriety---In such like cases, after admission of appeal for regular hearing, the accused is entitled to bail as a matter of right.

(Para 5)

Ref. *PLD 1967 Lah. 1302, 1997 MLD 961, 1999 SD 432, 2003 P.Cr.L.J. 1714, 2005 YLR 1048.*

SUSPENSION OF SENTENCE --- (Bailable offence)

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

---S. 426---Pakistan Penal Code, 1860, S. 319---Bailable offence---Matter of suspension of sentence pending appeal before High Court---Held: Offence alleged under which impugned conviction/sentence was recorded by Trial Court was bailable---In such like cases, after admission of appeal for regular hearing, the convict is entitled to bail as a matter of right---Question as to whether case of petitioner fell within purview of S. 302, P.P.C. or it did fall under Section 319, P.P.C. needed re-appraisal of evidence which was only possible at time of final hearing of appeal---Impugned sentence was suspended.

(Paras 5,6)

Ref. *PLD 1967 Lah. 1302, 1997 MLD 961, 1999 SD 432, 2003 P.Cr.L.J. 1714, 2005 YLR 1048.*

Key Terms:- *Suspension of sentence.*

[Since offence under Section 319, P.P.C. was bailable, impugned sentence was suspended in appeal by High Court].

For the Petitioner: **Zafar Iqbal Chohan, Advocate.**

For the State: **Rana Tasawar Ali Khan, Deputy Prosecutor General.**

For the Complainant: **Syed Zahid Hussain Bokhari, Advocate.**

ORDER

MUHAMMAD ANWAARUL HAQ, J. --- Through this petition, petitioner Zafar Iqbal alias Malanga seeks suspension of his sentence, who has been convicted and sentenced by the learned Trial Court as under:---

> 'Diyat under Section 319, P.P.C. and in addition to 'Diyat' five years' R.I. as 'Tazir '. He was ordered to remain in jail till realization of the 'Diyat' and also to serve out the punishment as 'Tazir'. It was further ordered that the 'Diyat' if realized shall be paid to the legal heirs of the deceased in accordance with law. Benefit of Section 382-B, Cr.P.C. has been given to the convict/petitioner. "

2. Learned counsel for the petitioner, in support of this petition, contends that offence under Section 319, P.P.C. is a bailable offence and that as per the rule laid down in the judgments reported as Hata and others v. The State (PLD 1967 Lahore 1302), Sardar Ali Shah vs. The State (1997 MLD 961), Ghulam Sarwar v. The State (2003 P.Cr.L.J. 1714) and Masood Khan v. The State (PLD 2004 Karachi 386), propriety demands that till the decision of criminal appeal, petitioner may be released on bail while suspending his sentence.

3. On the other hand, learned Deputy Prosecutor General assisted by learned counsel for the complainant opposes this petition by contending that in fact it is a murder case and charge against the petitioner was also framed under Section 302, P.P.C.; that finding of the learned ¬Trial Court that the case does not fall within the purview of Section 302, P.P.C. is erroneous and that appeal against acquittal of the petitioner under Section 302, P.P.C. has already been filed, which is pending before this Court.

4. Heard. Record perused.

5. Be that as it may, the offence under Section 319, P.P.C. under which the conviction and sentence of the petitioner has been recorded by the learned Trial Court is a bailable offence. It is by now well-settled that in such like cases, after admission of appeal for regular hearing, the accused is entitled to bail as a matter of right. In this context, I respectfully refer the judgment reported as Hata and others v. The State (PLD 1967 Lahore 1302), wherein it has been held as under:---¬

> "5. It must also be remembered that an appeal is not a new trial but is a continuation of the trial already held or a part of the trial of an offence undertaken by the Court of the first instance. Hence an Appellate Court has power to pass such order or inflict a sentence which was within the power of the original Court who tried the case. As

such the provisions as contained in Section 496, Cr.P.Code, shall apply to the case of a person convicted of a bailable offence. ……..

6. For these reasons, I hold that a person convicted of a bailable offence and who has filed an appeal against the conviction and sentence, is entitled to bail as a matter of right."

This principle has also been adopted in numerous cases thereafter such as Sardar Ali Shah v. The State (1997 MLD 961), Abdul Samad v. The State (1999 SD 432), Ghulam Sarwar v. The State (2003 P.Cr.L.J. 1714) and Muhammad Qasim v. The State (2005 YLR 1048). The question as to whether case of the petitioner falls within the purview of Section 302, P.P.C. or it does fall under Section 319, P.P.C. needs re-appraisal of evidence which is only possible at the time of final hearing of the appeal, and there is no hope for early fixation of the same in the near future.

6. In view of all above, without commenting upon the merits of the case, this petition is allowed and sentence of the petitioner is suspended till the final disposal of his criminal appeal, 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. However, the petitioner shall remain present before this Court on each and every date of hearing fixed in the main appeal.

Sentence suspended.

2012 M L D 222
[Lahore]
Before Muhammad Anwaarul Haq, J
SIKANDAR---Petitioner
Versus
THE STATE and another---Respondents

Criminal Miscellaneous No.4630/B of 2010, decided on 2nd March, 2011.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), Ss.365/302/201/109/148/149---Abduction, qatl-e-amd---Bail, grant of---Case was initially registered under S.365, P.P.C. and Ss.302, 201, 109, 148 and 149, P.P.C. had been added subsequently---Accused had already been allowed bail under S.365, P.P.C. by Trial Court---F.I.R. had been lodged after a delay of three years---No incriminating evidence was, statedly, available on the file against the accused---Co-accused, whose case was at par with the accused, had been granted bail by Trial Court---Complainant, father of the deceased, present in the court, did not oppose the grant of bail to accused---State also did not oppose the bail petition in view of the circumstances---Accused was admitted to bail, in circumstances.

Abdul Aziz Khan Niazi for Petitioner
Ch. Muhammad Akbar, Deputy Prosecutor General for the State.
Shahab-ud-Din for the Complainant
Wazir Ali, S.-I., with record

ORDER

MUHAMMAD ANWAARUL HAQ, J.---Through this petition, petitioner Sikandar seeks post-arrest bail in case F.I.R. No.155 of 2010 dated 24-6-2010, offence under section 365, P.P.C. (subsequently sections 302, 201, 109, 148, 149 were added), registered at Police Station Muhammad Pur District Rajan Pur.

2. Learned counsel for the petitioner contends that initially the case was registered under section 365, P.P.C. in which the petitioner was allowed bail by the learned trial court; that there is no incriminating evidence available on the file against the petitioner; that there is a delay of about three years in lodging of the F.I.R.; that co-accused of the petitioner, namely Hanif has already been granted bail by the learned trial court and case of the petitioner is at par with the case of his co-accused and he is entitled for bail even on the rule of consistency.

3. Complainant Shahab-ud-Din (father of the deceased), present before the Court, identified by the Investigating Officer, does not oppose the grant of bail to the petitioner.

4. Learned Deputy Prosecutor General, in view of the statement of the complainant and the bail granting order in favour of co-accused Hanif states that case of the petitioner is not

distinguishable than the case of his co-accused, namely Hanif and he does not oppose this bail petition on the ground of consistency.

5. In view of the above, I allow this petition and admit the petitioner to bail subject to his furnishing bail bond in the sum of Rs.200,000 (Rupees two hundred thousand only) with one surety in the like amount to the satisfaction of the learned trial court.

6. It is, however, clarified that the observations made herein above are just tentative in nature and strictly confined to the disposal of this bail petition.

N.H.Q./S-121/L Bail allowed.

2012 M L D 1154
[Lahore]
Before Muhammad Anwaarul Haq, J
NAZIR AHMED SHAHID---Petitioner
versus
THE STATE and another---Respondents

Criminal Miscellaneous No.3246-B of 2012, decided on 19th March, 2012.

Criminal Procedure Code (V of 1898)---
----S. 498---Prohibition (Enforcement of Hadd) Order (4 of 1979), Art.3 & 4---Prohibition or manufacture, etc., of intoxicants, owning or possessing intoxicant---Ad-interim pre-arrest bail, confirmation of---No evidence was available on record against the accused except the statement of co-accused, which had no evidentiary value---Accused had not been apprehended by the police at the spot and there was no evidence that accused was connected with the place, from where alleged recovery of liquor had been effected---No evidence existed on record regarding offence Art. 3 of Prohibition (Enforcement of Hadd) Order 1979, while Art. 4 of the said Order was bailable---Accused had no previous criminal record---False implication of accused in the case by the police with mala fide intention could not be ruled out---Ad interim pre-arrest bail already allowed to accused was confirmed, in circumstances.

Mian Mahmud Ahmad Kasuri and Javed Bashir for Petitioner.

Ch. Muhammad Akram Tahir, Deputy District Public Prosecutor for the State with Amjad Farooq A.S.-I. with record.

ORDER

MUHAMMAD ANWAARUL HAQ, J.---Through this petition, Nazir Ahmed Shahid petitioner seeks pre-arrest bail in case F.I.R. No.95, dated 17-2-2012, registered at Police Station B-Division, Kasur, in respect of offences under Articles 3 and 4 of the Prohibition (Enforcement of Hadd) Order, 1979.

2. Learned counsel for the petitioner contends that case against the petitioner is totally fake and petitioner has falsely been roped in this case by the police on the account

of ulterior motive just to show their efficiency; that except the statement of the co-accused of the petitioner that petitioner was selling the liquor, there is no evidence whatsoever available on the record to connect the petitioner with the recovered liquor or the quarter from where the alleged liquor was recovered; that the raid proceedings are in violation of Article 22 of the Prohibition Order; that no independent witness of the locality was got associated in the search process; that the offences do not fall within the prohibitory clause of section 497, Cr. P.C. Further contends that petitioner has no previous criminal record.

3. Conversely, learned Law Officer vehemently opposing this bail petition contends that petitioner is specifically named in the F.I.R; that during the investigation, petitioner has confessed that the railway quarter, from where the alleged recovery of liquor has been effected, is owned by him; that version of the prosecution is fully supported by the statements of the P.Ws. recorded under section 161, Cr. P.C; that pre-arrest bail is an extra-ordinary relief and deeper appreciation of the merits of the case at this stage is not proper; that prior condition of pre-arrest bail is to prove mala fide on the part of the complainant or of the police that is even not alleged in this petition; therefore, he is not entitled for the concession of bail.

4. Heard. Record perused.

5. Amjad Farooq A.S.I./Investigating Officer present in person after consulting the record confirms that petitioner has no previous criminal record.

6. Prima facie, there is no evidence available on the record against the petitioner except the statement of his co-accused namely Nadeem, which has no evidentiary value in the eyes of law. Admittedly, petitioner had not been apprehended by the police at the spot and there is no evidence that petitioner in any manner is connected with the Railway Quarter, from where alleged recovery of liquor has been effected. There is no evidence regarding the offence under Article 3 of the Prohibition (Enforcement of Hadd) Order, 1979 whereas Article 4 of the Order supra is bailable. Petitioner has no previous criminal record.

7. For the foregoing reasons, false implication of the petitioner in this case by the police with mala fide intention cannot be ruled out, hence, this petition is allowed and ad interim pre-arrest bail already allowed to the petitioner by this Court vide order dated 9-3-2012, is confirmed subject to his furnishing fresh bail bond in the sum of Rs.100,000 (Rupees one hundred thousand only) with one surety in the like amount to the satisfaction of the learned trial Court/Area Magistrate within a period of fifteen days from today.

8. It is, however, clarified that observations made herein are just tentative in nature and strictly confined to the disposal of this bail petition.

M.W.A./N-11/L Pre-arrest bail confirmed.

2012 P Cr. L J 804
[Lahore]
Before Muhammad Anwaarul Haq, J
MUHAMMAD NASIR IQBAL---Petitioner
versus
THE STATE and another---Respondents

Criminal Miscellaneous No. 2138-B of 2012, decided on 12th March, 2012.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), Ss. 392 & 411---Robbery, dishonestly receiving property stolen---Bail, refusal of---Allegation against accused was that he along with his co-accused committed robbery on gun-point in the house of the complainant and took away different articles with them---Validity---Accused was not named in the F.I.R., but had been named through supplementary statement of the complainant, wherein she categorically stated that she incidentally saw the accused along with his co-accused at a restaurant, and on knowing the whereabouts of both of them she instantly disclosed such information to the police---Record confirmed that accused was a habitual offender and five other criminal cases of similar nature had been registered against him---Allegedly robbed cash, mobile phone and other articles had been recovered at the instance of the accused---Accused has failed to show any ill-will or enmity of the complainant to falsely involve him in the case---Accused had been charged with S.392, P.P.C., which fell within the prohibitory clause of S.497, Cr.P.C.---Sufficient evidence was available on record to connect the accused with the alleged crime---Bail petition of accused was dismissed, in circumstances.

Muhammad Younas Sheikh for Petitioner.
Ch. Muhammad Akram Tahir, Deputy District Public Prosecutor along with Muhammad Hussain A.S.-I. with Record for the State.
Barrister Muhammad Ahmad Pansota, for the Complainant.

ORDER

MUHAMMAD ANWAARUL HAQ, J.---Through this 2nd petition Muhammad Nasir Iqbal petitioner has sought post-arrest bail in case F.I.R. No.1309, dated 15-12-2010 registered at Police Station Gulberg, Lahore, in respect of offences under sections 392 and 411, P.P.C. Earlier petition of the petitioner was dismissed for non-prosecution on 25-1-2012 through Criminal Miscellaneous No.310-B of 2012.

2. It has been argued by the learned counsel for the petitioner that case against the petitioner is totally false and fabricated; that there is an inordinate delay of about three days in lodging of the F.I.R. without any explanation; that petitioner is not nominated in the F.I.R. rather he was involved in this case through supplementary statement of the complainant made on 15-4-2011; that no identification parade was held in this case for proper identification of the assailant; that recovery of mobile phone (without mentioning its serial number), unspecified cash amounting to Rs.100,000, and two track suits shown against the petitioner, is a

fabrication on the part of the part of the police and is not a valid evidence to connect him with the commission of alleged offence; that in the circumstances, case against the petitioner is one of further inquiry into his guilt; that petitioner is behind the bars since 23-5-2011 without any substantive progress in the trial.

3. Conversely, learned Law Officer assisted by learned counsel for the complainant vehemently opposing this bail application contends that although name of the petitioner is not figured in the F.I.R. yet he along with his co-accused namely Ahsan Khalid has been named in this case through supplementary statement of the complainant made on 15-4-2011; that petitioner is a habitual offender and five other criminal cases under the similar offences, have also been registered against him; that there is no mala fide or ulterior motive on the part of the complainant to falsely implicate the petitioner in this case. Further adds that the prosecution witnesses are fully supporting the prosecution case; that recovery of mobile phone, cash amounting to Rs.100,000, 15 Sarees and two track suits, has already been effected at the instance of the petitioner and that is sufficient evidence to connect him with the commission of the alleged crime; that offence against the petitioner is very heinous in nature and falls within the prohibitory clause of section 497, Cr.P.C. and involvement of the petitioner in such a heinous offence and repetition of the same crime, does not entitle him for bail.

4. Heard. Record perused.

5. Be that as it may, allegation against the petitioner is that he along with his co-accused committed robbery on gun-point in the house of the complainant and took away different articles with them. Although petitioner is not named in the F.I.R. yet he along with his co-accused namely Ahsan Khalid has been named in this case through supplementary statement of the complainant made on 15-4-2011, wherein she has categorically stated that she incidentally saw the present petitioner along with his co-accused while sitting at Bundu Khan Restaurant, she came to know about the whereabouts of the petitioner and his co-accused and she instantly disclosed this information to the police. Learned Law Officer and Investigating Officer after consulting the record confirm that petitioner is a habitual offender and five other criminal cases i.e. F.I.Rs. Nos.109 of 2009, 109 of 2010, 767 of 2010, 84 of 2011 and 165 of 2011 of similar nature, have also been registered against him. There is recovery of a mobile phone, cash amounting to Rs.100,000, 15 Sarees and two track suits at the instance of the petitioner. Learned counsel for petitioner has failed to show any ill-will or enmity of the complainant to falsely involve him in this case. The offence under section 392, P.P.C. falls within the prohibitory clause of section 497, Cr.P.C. Prima facie, there is sufficient evidence available on the record to connect the petitioner with the alleged crime, therefore, I, am not persuaded to admit the petitioner to bail, hence, this petition being devoid of any force is dismissed.

6. It is, however, clarified that observations made herein are just tentative in nature and strictly confined to the disposal of this bail petition.

M.W.A./M-100/L Petition dismissed.

P L D 2012 Lahore 150
Before Muhammad Anwaarul Haq, J
SULTAN MUHAMMAD KHAN GOLDEN---Petitioner
Versus
Begum ABIDA ANWAR ALI and 5 others---Respondents

Criminal Revision No.422 of 2010, decided on 19th January, 2012.

(a) Criminal trial---

----Simultaneous civil and criminal proceedings---Likelihood of conflicting judgments---Stay of criminal proceedings during pendency of civil proceedings---Plaintiff (petitioner) initiated civil proceedings in the matter by filing suit for permanent injunction, wherein defendants joined the same by filing application under Order I, Rule 10, P.P.C.---Plaintiff (petitioner) subsequently managed to register F.I.R. and initiated criminal proceedings in the same matter and during such criminal proceedings opted to file a fresh (second) civil suit against the defendants---Defendants filed application for stay of criminal proceedings, which was accepted by the Trial court on the grounds that there was a likelihood of contrary judgments of civil Court and criminal court if both proceedings were continued side by side---Plaintiffs application before Trial Court for recalling the stay order was also dismissed---Grievance of plaintiff was that there was no justification for Trial Court to stay criminal proceedings when both civil and criminal proceedings, being independent could proceed side by side---Validity---Present civil suit between parties involved serious dispute of title and genuineness of the power of attorney---Plaintiff having taken different stances in both civil and criminal proceedings, Trial Court had rightly found that there was every likelihood of conflicting judgments regarding the same matter, therefore, civil proceedings should be completed first rather than the criminal proceedings---Plaintiff failed to point out any illegality/irregularity of procedure, jurisdictional infirmity or perversity of reasoning in the order of Trial Court so as to warrant an interference to declare the same as illegal---Revision petition was dismissed accordingly.

Malik Khuda Bakhsh v. The State 1995 SCMR 1621; Abdul Qadir Khan Mamdot v. Regional Police Officer, Multan and 5 others 2011 MLD 1773; Seema Fareed and others v. The State and another 2008 SCMR 839; Aftab Din v. S.H.O., Anti-Corruption (Establishment), Mianwali and another 2007 YLR 236; Haji Sardar Khalid Saleem v. Muhammad Ashraf and others 2006 SCMR 1192; M.Aslam Zaheer v. Ch. Shah Muhammad and another 2003 SCMR 1691 and Saliad Hussain v. The State PLD 1997 Kar. 165 distinguished.
Muhammad Akbar v. The State and another PLD 1968 SC 281; Abdul Haleem v. The State and others 1982 SCMR 988 and A. Habib Ahmad v. M.K.G. Scott Christian and 5 others PLD 1992 SC 353 rel.

(b) Administration of justice---

----Simultaneous civil and criminal proceedings---Propriety---Exception---Criminal and civil proceedings could run side by side but in appropriate cases where the controversy in

the F.I.R. and civil suit filed by same party rested upon the determination of title or the genuineness of a document, criminal proceedings could be stayed till the disposal of the civil suit.

Muhammad Iqbal Malik for Petitioner.
Ch. Muhammad Akram Tahir, Deputy District Public Prosecutor for the State.
Pervez Inayat Malik, for Respondents Nos. 1 and 2.
Muhammad Mubashir Khan for Respondents Nos. 3, 4 and 5.
Date of hearing: 19th January, 2012.

JUDGMENT

MUHAMMAD ANWAARUL HAQ, J.---Through this petition under section 439, Cr.P.C, the petitioner has called in question the order dated 30-6-2007 through which the application filed by respondents Nos.1 to 5 for staying proceedings of trial in case F.I.R. No. 184 registered at Police Station Naseerabad, Lahore on 7-3-2005 in respect of offences under sections 420/468/471, P.P.C. read with section 5(2) of the Prevention of Corruption Act, 1947 was accepted by the learned trial court and proceedings in the trial were stayed. The petitioner has also challenged the validity of order dated 17-1-2010 passed by the learned trial court through which it has dismissed the application for recalling his earlier order dated 30-6-2007.

2. The learned counsel for the petitioner contends that there was no justification with the learned trial court to stay the criminal proceedings when both the proceedings being independent can proceed side by side and the judgment of the civil court is not relevant in criminal case inasmuch as both the proceedings have different parameters for the purpose of appreciation of evidence. The citation relied upon by the learned trial court does not apply to the facts and circumstances of this case. Learned counsel placed reliance on the cases of Malik Khuda Bakhsh v. The State (1995 SCMR 1621, Abdul Qadir Khan Mamdot v. Regional Police Officer, Multan and 5 others 2011 MLD 1773, Seema Fareed and others v. The State and another (2008 SCMR 839), Aftab Din v. S.H.O., Anti-Corruption (Establishment), Mianwali and another (2007 YLR 236), Haji Sardar Khalid Saleem v. Muhamamd Ashraf and others (2006 SCMR 1192), M. Aslam Zaheer v. Ch. Shah Muhammad and another (2003 SCMR 1691) and Sajjad Hussain v. The State (PLD 1997 Karachi 165). The learned counsel while referring the case of Malik Khuda Bakhsh v. The State (1995 SCMR 1621) states that in this case Hon'ble Supreme Court has not approved the dictum laid down in PLD 1968 SC 281.

3. On the other hand both the learned counsel for respondents Nos.1 to 5 unanimously contend that it was none else but the petitioner who himself executed General Power-of-Attorney in favour of respondent No. 2 in respect of the disputed shop. Respondent No. 1 has become owner of the shop after paying sale consideration and fulfilling all the legal formalities required by the revenue department in transferring of property. For the first time the petitioner has initiated civil proceedings against the respondents in the year 2003 in shape of filing suit for permanent injunction which proceedings were ultimately transformed into suit for declaration with consequential relief and possession in the year 2005.

Admittedly civil proceedings are still pending but instead of taking decision from a civil court the petitioner manoeuvred to set criminal law into motion by registering above mentioned criminal case against the respondents which action is totally unjustified. Both the learned counsel placed reliance on the cases of Muhammad Akbar v. The State and another (PLD 1968 SC 281), Abdul Haleem v. The State and others (1982 SCMR 988), A. Habib Ahmad v. M.K.G. Scott Christian and 5 others PLD 1992 SC 353. The learned Law Officer has, however, argued in favour of continuing the proceedings in the trial and requested for setting aside the impugned orders dated 30-6-2007 and 17-1-2010 passed by the learned trial court in this case.

4. Heard. Record perused.

5.After hearing the learned counsel for the parties and going through the documents appended with this revision petition as well as the case-law on the subject with due care and caution I have noticed that it was the petitioner himself who initiated civil proceedings in the year 2003 by filing suit for permanent injunction wherein respondent No.1 joined the same by filing application under Order I, Rule 10, C.P.C. Record reflects that the petitioner thereafter got registered this criminal case on 7-3-2005 and during the criminal proceedings he opted to file a fresh suit on 10-10-2005 against the respondents with the following prayer:--

"It is, therefore, most respectfully prayed that a decree for possession respecting shop No. 3 constructed on plot Nos.217, 218/2 Block-G, Phase-III, Government Employees Cooperative Housing Society, Lahore, by declaring the sale deed and power of attorney referred to above as forged, fabricated, fictitious and unlawful, may kindly be passed in favour of plaintiff and against the defendants with costs."

6. Respondents then filed Criminal Miscellaneous No.12-Q of 2007 for quashing of proceedings in the F.I.R. but on 27-3-2007 the same was disposed of with the observation that respondents could move an application for stay of criminal proceedings before the learned trial court. The respondents thereafter filed the application for stay of proceedings and the same was allowed vide impugned order dated 30-6-2007 with the following observations:-

"6. Undoubtedly the discretion is never meant to be exercised arbitrarily, freakishly and capriciously but keeping in view the set of circumstances of this particular case, this Court feels that there is a strong likelihood of contrary judgments of Civil Court and Criminal Courts, if both the proceedings are continued for adjudication side by side or simultaneously. Therefore, to avoid this situation and also to save the time and undue mental physical stress being taken by the parties, the proceedings before this Court are stayed till the decision of the Civil Court."

7. There is no cavil with the proposition that civil and criminal proceedings can run side by side but in some appropriate cases where controversy in the F.I.R. and in civil suit filed by the same party rests upon the determination of title or the genuineness of a document Hon'ble Supreme Court has stayed the criminal proceedings till the disposal of the civil suit.

In this case serious dispute of title and genuineness of the Power-of-Attorney are the subject-matter of the civil suit pending between the parties. I have noted with concern that petitioner has taken different stances in both the proceedings and trial court in the impugned order has rightly observed that there is every likelihood of passing conflicting judgments regarding the same subject. Therefore, I am of the view that the learned trial court has rightly taken guideline from the case of Abdul Haleem v. The State and others (1982 SCMR 988), Muhammad Akbar v. The State and another (PLD 1968 SC 281 and had rightly observed that the civil proceedings should see its fate first rather than the criminal proceedings. The case-law referred by the learned counsel for the petitioner is quite distinguishable as in such like cases no rigid rule can be adopted as the facts of every criminal case are always different and seldom coincide. Learned counsel for the petitioner remained fail to point out any illegality/irregularity of procedure, jurisdictional infirmity or perversity of reasoning in the impugned order dated 30-6-2007 so as to warrant an interference of this Court by declaring the same to be illegal. So far as the legality of order dated 17-1-2010 is concerned suffice it to observe that the criminal law does not permit the court to review its judicial verdict delivered regarding the same matter. In view of all above I do not see any merit in this petition which is dismissed as such.

M.W.A./S-16/L Petition dismissed.

2012 Y L R 77
[Lahore]
Before Sh. Ahmad Farooq and Muhammad Anwaarul Haq, JJ
RASHID AHMED alias SHADDI---Petitioner
Versus
THE STATE---Respondent

C.M. No.1 of 2011 in Criminal Appeal No.478 of 2007, decided on 10th August, 2011.

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

----S. 426(1-A)---Penal Code (XLV of 1860), Ss.302(b) & 337-F(ii)/34---Qatl-e-amd---Suspension of sentence---Petition filed by accused for suspension of his sentence prior to the amendment made in S.426, Cr.P.C. had been dismissed by High Court---After amendment of S.426(1-A), Cr.P.C. accused had been given an independent right to validly apply for suspension of his sentence even after the dismissal of his previous application on merits---Accused was behind the bars for the last four years and four months---Appeal of accused was not likely to be fixed in the near future for the reason that his co-accused had been sentenced to death through the same judgment---Accused was not responsible for the delay in decision of his appeal in any manner whatsoever---Case of accused did not fall within the proviso of subsection (1-A) of S.426, Cr.P.C.---Sentence of accused was suspended in circumstances without touching the merits of his case till the final disposal of his appeal.

Liaqat and another v. The State 1995 SCMR 1819 ref

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

----S. 426(1-A)---Penal Code (XLV of 1860), Ss.302(b) & 337-F(iii)/34---Qatl-e-amd---Suspension of sentence---Second application for suspension of sentence---Suspension of sentence in view of the amended S.426(1-A), Cr.P.C. is an independent right of accused and same can validly apply for relief even after the dismissal of his petition on merits under S.426, Cr.P.C.

Liaqat and another v The State 1995 SCMR 1819 ref

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

----S. 426(1-A)---Suspension of sentence---Scope---Legislature has inserted the word "shall" in S.426(1A), Cr.P.C. purposely to make the same mandatory---In the case falling within the purview of sub-section (1-A) of S.426, Cr.P.C., suspension of sentence is a rule and its refusal an exception---Court, however can refuse the same if the case of accused falls within the proviso of subsection (1-A) of S.426, Cr.P.C.---Appellate Court while deciding such application is under obligation to ascertain that delay in decision of the appeal has not been occasioned by any act or omission of the accused or any person acting on his behalf.

Rana Muhammad Nawaz, for Petitioner
Muhammad Naeem Sheikh, Deputy Prosecutor-General for the State
Azam Nazeer Tarar, for the Complainant

ORDER

Through this criminal miscellaneous, Rashid Ahmad alias Shaddi, petitioner-appellant seeks suspension of his sentences on the statutory ground i.e. non-disposal of his appeal within the stipulated period mentioned in the latest amendment in section 426, Cr.P.C. The Petitioner/ appellant has been convicted and sentenced by the learned Addl. Sessions Judge, Faisalabad vide impugned judgment-dated 19-2-2007, as under:--

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

Life imprisonment with a compensation amounting to Rs.50,000 to be paid to the legal heirs of Muhammad Younus (deceased) or in default thereof to undergo Simple Imprisonment for six month

Under section 337-F(iii)/34, P.P.C.

Rigorous imprisonment for one year and to pay an amount of Rs.5,000 as Daman to Muhammad Din alias Manna injured/P.W.

Both the sentences were ordered to run concurrently and benefit of section 382-B, Cr.P.C. was also extended to the accused/petitioner.

2. Learned counsel for the petitioner contends that the petitioner/appellant was arrested on 11-11-2005 and has been convicted and sentenced by the learned trial court on 19-2-

2007; he has preferred appeal before this Court on 21-3-2007, but even after the lapse of more than five years his appeal has not been decided, therefore, in view of the amendment in section 426, Cr.P.C, he deserves suspension of his sentence.

3. Conversely, learned Deputy Prosecutor-General assisted by learned counsel for the complainant opposes this petition on the grounds that case against the petitioner has been proved beyond any shadow of doubt and he has been convicted and sentenced after a regular trial by the learned trial court; that earlier petition on the same subject filed on behalf of the petitioner, has already been dismissed by this Court. Further add that there is a fair chance of early fixation of the appeal of the petitioner as it relates to the year 2007 and this Court is dealing with such like appeals filed in the year 2006.

4. Heard. Record perused.

5. Prior to the promulgation of Act No. VIII of 2011, a petition of the petitioner for suspension of sentence was dismissed by this Court on 1-11-2007 through Criminal Miscellaneous No. 1 of 2007. The petitioner is behind the bars for the last about four years and four months. Appeal of the petitioner is pending since 21-3-2007 and it is not likely to be fixed in the near future for the reason that his co-accused Muhammad Aslam alias Nannha has been convicted and sentenced to death through the same judgment. As far as disposal of an earlier petition of the petitioner seeking the same relief is concerned, suffice it to mention that seeking suspension of sentence in view of the amended section 426(1-A), Cr.P.C. is an independent right and an accused can validly apply for the relief even after the dismissal of his petition on merits under section 426, Cr.P.C. Here we respectfully refer the case of Liaqat and another v. The State (1995 SCMR 1819) wherein the Hon'ble Supreme Court, in view of the insertion of old subsection (1-A) in section 426, Cr.P. Code has observed as under:--

"The effect of insertion of subsection (1-A) after subsection (1) of section 426, in the Code of Criminal Procedure in our view, is that the appellant/convict has been conferred a right to ask for bail pending his appeal, if the Court is unable to dispose of his case within the periods specified in sub-clauses (a) to (c) of section 426(I-A), Cr.P.C. This right of the convict/appellant is independent of his right to seek suspension of his sentence by the appellate Court on merits under section 426(1), Cr.P.C. The right conferred on the appellant/convict under section 426(1-A), Cr.P.C, therefore, can be exercised by him, notwithstanding the fact that the appellate Court, in exercise of its discretion had earlier declined his prayer for suspension of his sentence on merits under section 426 (1) Cr.P.C. As a necessary corollary, therefore, it follows that the appellate Court cannot decline to suspend the sentence of an appellant under section 426 (1 A), Cr.P.C. on the ground the appellant has no case on merits or that he would not be entitled to bail on merits or that he has been declined bail earlier on merits".
It is pertinent to mention here that subsection (1-A) of section 426, Cr.P.C. referred in the judgment of the Hon'ble Supreme Court was omitted on 10-10-2001 by the Ordinance LIV of 2001 but on 21-4-2011 by the Act No. VIII of 2011. It has been re-enacted as follows:-

426(1-A) Cr.P.C

An Appellate Court shall, except where it is of the 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) to imprisonment for a period not exceeding three years and whose appeal has not been decided within a period of six months of his conviction;

(b) to imprisonment for a period exceeding three years but not exceeding seven years and whose appeal has not been decided within a period of one year of his conviction; or

(c) to imprisonment for life or imprisonment exceeding seven years and whose appeal has not been decided within a period of two years of this 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 the Appellate Court, is a hardened, desperate or dangerous criminal or is accused of an act of terrorism punishable with death or imprisonment for life.

The above quoted latest amendment is the same (except the proviso) as was introduced in section 426, Cr.P.C. by the Law Reforms Ordinance, 1972, therefore, the rule laid down in the case of Liaqat Ali (supra) shall apply stricto senso to give effect to the re-enacted provision in section 426 mentioned above. As far as proviso to the newly-added subsection (1-A) is concerned, it is mentioned in the proviso that Court while dealing with the petition for suspension of sentence, can refuse to exercise its discretion if the convict is previously convicted offender or in the opinion of the Court is a hardened, desperate or dangerous criminal or is an accused of an act of terrorism punishable with death or imprisonment for life. The plain reading of the provision of law shows that the legislature has inserted the word "shall" purposely to make the same mandatory and in the case falling within the purview of subsection (1-A) of section 426, Cr.P.C., suspension of sentence is a rule and its refusal is an exception, however, Court can refuse the same if the case of the convict falls within the proviso referred above. Needless to add that an appellate court while deciding such an application, is under obligation to ascertain that delay in decision of the appeal has not been occasioned by any act or omission of the appellant or any person acting on his behalf. Keeping in view the facts and circumstances of this case, we are of the considered view that petitioner is not responsible for the delay in decision of his appeal in any manner whatsoever and further that case of the petitioner does not fall within the proviso of subsection (1-A) referred above, therefore, without touching the merits of the case, we allow this petition and suspend the sentence of the petitioner till the final disposal of his criminal appeal, subject to his furnishing bail bond in the sum of Rs.200,000 (Rupees two hundred thousand only) with one surety in the like amount to the satisfaction of the Deputy Registrar (Judicial) of this Court. However, the petitioner shall remain present before this Court on each and every date of hearing fixed in the main appeal.

N.H.Q./R-50/L Sentence suspended.

2012 Y L R 838
[Lahore]
Before Muhammad Anwaar ul Haq, J
Rana ZAHEER AHMAD and 3 others---Petitioners
Versus
THE STATE and another---Respondents

Criminal Miscellaneous No.11237-B of 20j 1, decided on 11th October, 2011.

Criminal Procedure Code (V of1898)---

----Ss.497(2) & 498---Penal Code (XLV of 1860), Ss.440, 448, 148 & 149---Police Order (22 of 2002), Art.155-C---Mischief committed after preparation made for causing death or hurt and house trespass--Pre-arrest bail, grant of---Delay of three months in lodging of F.I.R.---Pendency of civil litigation between parties regarding the same property---No specific role attributed to accused in F.LR.---Absence of medico-legal certificate in support of injury on person of complainant---Report of Senior DPO, showing F.LR. to be based on wrong facts and recommendatio[n] for registration of F.I.R. against Investigation Officer under Art. 155-C of Police Order, 2002---Application of S.440, P.P.C. to the case was prima facie matter of further inquiry---Guil[t] of accused in view of the facts could be validly determined after recording evidence---Recovery of mobile phone and cash from accused would be futile in absence of any specific allegation on record against accused---Accused were granted pre-arrest bail, in circumstances.

Muhammad Azam v. The State 1996 SCMR 71 and Muhammad Arshad v. The State 1996 SCMR 74 distinguished.
Muhammad Shahzad Mushtaq for Petitioners along with petitioners in person.
Mian Muhammad Awais Mazhar, Deputy Prosecutor-General for the State with Nasrullah S.-I. with record.
Ch. Muhammad Hussain for the Complainant.

ORDER

MUHAMMAD ANWAAR UL HAQ, J.---Through this petition, Rana Zaheer Ahmad, Rana Muhammad Aslam, Sheikh Aziz ur Rehman and Sheikh Abdur Rehman petitioners seek pre-arrest bail in case F.I.R. No. 617, dated 25-7-2011, under sections 440, 448 and 148/149, P.P.C., registered at Police Station Sambrial, District Sialkot.

2. Learned counsel for the petitioners contends that the petitioners are innocent and have falsely been roped in this case on the basis of mala fide of the complainant and the police; that there is delay of about three months in lodging of the F.I.R. without any plausible explanation; that there is an allegation in the F.I.R. that the petitioners along with 10/12 other unknown accused persons had caused injuries to the complainant and his maternal uncle namely Sheraz but no medical evidence in this regard is on the record; that petitioner Sheikh Aziz-ur-Rehman is in fact the real owner in possession of the property mentioned in the F.I.R., who purchased the same from one Muhammad Tufail through registered

document on 9-12-1990; that regarding the same property, civil litigation is pending between the parties before the Court of competent jurisdiction; that in view of previous civil litigation pending between the parties, offence under section 440, P.P.C. does not attract and as no specific role is assigned to the petitioners, therefore, question of vicarious liability of the petitioners is a matter of further inquiry into their guilt; that an inquiry was conducted by the D.S.P. Circle Sambrial, who has concluded that the F.I.R. is not based upon real facts and he has recommended for registration of case against Nasrullah, S.I./Investigating Officer under Article, 155-C of the Police Order, 2002 on the registration of this false case; that all the offences are bailable except offence under section 440, P.P.C.

3. Conversely, learned Deputy Prosecutor-General assisted by learned counsel for the complainant opposing this bail application contends that the complainant is a lady and after reporting the occurrence to Rescue 15 Police in time, she is not responsible for the delay in the F.I.R.; that all the petitioners are specifically nominated in the F.I.R. 'and specification of individual overt act, of the petitioners was not possible, in such like situation; that on 15-5-2002 Sh. Aziz-ur-Rehman petitioner had given his Power of Attorney to Rasheeda Begum regarding the property mentioned in the FIR., who had executed a gift deed in favour of one Fazal Hayat through registered gift deed dated 29-5-2002 and thereafter said Fazal Hayat got sanctioned site-plan in his favour through the concerned T.M.O. Union Council; that on 27-6-2003 Sh. Aziz-ur Rehman petitioner had filed suit for permanent injunction against aforesaid Fazal Hayat but the same was subsequently withdrawn on 10-12-2003; that learned civil court has also passed stay order in favour of the complainant party on 2-11-2009; that pre-arrest bail is an extra-ordinary relief and deeper appreciation of the merits of the case at this stage is not proper; that there is no mala fide or malice on the part of the complainant to falsely implicate the petitioners in this case and that recovery of cash amount and mobile phone mentioned in the F.I.R. is yet to be effected from the petitioners. Learned counsel for the complainant has placed reliance on the cases of Muhammad Azam v. The State (1996 SCMR 71) and Muhammad Arshad v. The State (1996 SCMR 74)

4. Heard. Record perused.

5. Be that as it may, prima facie, there is a delay of about three months in lodging of the F.I.R. civil litigation between the parties regarding the same property is admitted. No specific role is attributed to any of the petitioners, even no Medico-legal Certificate of the complainant and Sheraz injured is on the record. Police record reflects that the detailed inquiry in 1 this case was conducted by the S.D.P.O. concerned on the application of the petitioner Sh. Abdul Aziz, who has concluded that F.I.R. No. 617/11, Police Station Sambrial has been registered wrongly and is not based upon facts and investigation conducted by the Investigating Officer is also not on merits. He has opined that F.I.R. be registered against Nasrullah S.I./Investigating Officer, under Article 155-C of the Police Order, 2002 and other relevant sections, in the light of his report referred above.
In view of the above referred finding of the concerned S.D.P.O. and the previous civil litigation pending between the parties, I am of the considered view that application of offence under section 440, A P.P.C. is, prima facie, a matter of further inquiry and culpability of the petitioners can validly be determined after recording of some evidence by the learned trial court. As no specific allegation is available on the record against any of the

petitioners, therefore, recovery of unspecified mobile phone and cash amount, is inconsequential in the circumstances of the case. Case-law referred by the learned counsel for the complainant is quite distinguishable than the facts and circumstances of this case.

6. In view of all above, I do not find any convincing reason to send the petitioners behind the bars, therefore, without going into further details/merits of the case, ad interim pre-arrest bail already allowed to the petitioners by this court vide order dated 29-8-2011, is confirmed subject to their furnishing fresh bail bonds in the sum of Rs.50,000 (Rupees fifty thousand [B] only) each with one surety each in the like amount to the satisfaction of the learned trial Court/Area Magistrate within a period of ten days from today.

7. It is, however, clarified that observations made herein are just tentative in nature and strictly confined to the disposal of this bail petition.

S.A.K./Z-6/L Bail granted.

2012 Y L R 1270
[Lahore]
Before Muhammad Anwaarul Haq, J
ABDUL REHMAN---Petitioner
Versus
THE STATE and another---Respondents

Criminal Miscellaneous No.17424-B of 2011, decided on 19th January, 2012.

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

----S. 497(2)---Penal Code (XLV of 1860), Ss. 302, 148 & 149---Qatl-e-amd, rioting armed with deadly weapons---Bail, grant of---Further inquiry---Accused was nominated in the F.I.R. but there was no evidence connecting him with the alleged crime---Dead body of the deceased was found lying in the house of the co-accused and nothing regarding involvement of the accused was mentioned---Accused remained in physical custody of the police for fourteen days but nothing was recovered from him---Contention of complainant regarding previous enmity between the parties was a double edged weapon, which could be the reason for the murder of the deceased and at the same time could also be the cause for false implication of the accused in the case---Case against accused fell within the purview of S. 497(2), Cr.P.C and was one of further inquiry---Bail application of accused was accepted and he was released on bail.

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

----S. 497(2)---Penal Code (XLV of 1860), Ss. 302, 148 & 149---Qatl-e-amd, rioting armed with deadly weapons---Bail, grant of---Motive for implication of accused---Previous enmity---Scope---Motive in the shape of previous enmity was a double edged weapon, if, prima facie, it could be the reason for the murder of the deceased, it could also be the cause for false implication of the accused in the case.

Muhammad Ahsan Nizami for Petitioner.

Ch. Muhammad Akram Tahir, DDPP for the State with Intezar Hussain A.S.-I.
Rana Imtiaz Hussain Advocate for the Complainant.

ORDER

MUHAMMAD ANWAARUL HAQ, J.---Petitioner Abdul Rehman seeks post arrest bail in case F.I.R. No.165 dated 22-6-2011 under sections 302 and 148/149 P.P.C. registered at Police Station Sarai Mughal District Kasur.

2. Learned counsel for the petitioner contends that the F.I.R. does not disclose any evidence to connect the petitioner with the crime in any manner whatsoever; that the petitioner has falsely been involved in this case only on the basis of suspicion of the complainant that cannot be considered as legal evidence. Further contends that the petitioner remained on physical remand for fourteen days but nothing was recovered from him; that the deceased was involved in many murder cases and he might have been murdered by one of his other enemies.

3. On the other hand learned Deputy District Public Prosecutor assisted by learned counsel for the complainant while opposing this bail application contends that the petitioner is nominated in the F.I.R. with the specific role that the petitioner along with his co-accused committed murder of the deceased with their respective weapons; that the complainant while appearing before the learned trial court has categorically stated that she herself has seen the occurrence and she is the eye-witness of the same; that in the statement of the complainant before the learned trial court there is direct allegation against the petitioner. Further contends that the version of the complainant is fully corroborated by the medical evidence available on the record; that there is a strong motive in the shape of previous criminal litigation between the parties; that the case against the petitioner is at evidence stage, therefore, bail should not be granted to the petitioner to avoid any possible prejudice to either side. Reliance is placed upon 2006 SCMR 1265.

4. Heard. Record perused.

5. Although the petitioner is nominated in the F.I.R. yet there is no evidence at all connecting him with the alleged crime. According to the F.I.R. itself the dead body of the deceased was found lying in the house of co-accused Ameer Hamza alias Khari but nothing is mentioned that how the petitioner is involved in this occurrence. The petitioner also remained in physical custody of the police for fourteen days but nothing was recovered from him. The motive in the shape of previous enmity is a double edged weapon, if prima facie, it can be the reason for the murder of the deceased it can also be the cause for false implication of the petitioner in this case. In view of the above, case against the petitioner, prima facie, falls within the purview of sub-section (2) of section 497, Cr.P.C. and is one of further inquiry into his guilt. I, therefore, admit the petitioner to bail subject to his furnishing bail bonds in the sum of Rs.2,00,000 (Rupees two hundred thousand only) with two sureties each in the like amount to the satisfaction of the learned trial court.

6. It is, however, clarified that the observations given herein are just tentative in nature and strictly confined to the disposal of this bail petition.

M.W.A./A-47/L Bail granted.

2012 Y L R 2554
[Lahore]
Before Muhammad Anwaarul Haq and Syed Iftikhar Hussain Shah, JJ
NIAMAT ALI---Petitioner
versus
THE STATE---Respondent

Criminal Miscellaneous No.1 in Criminal Appeal No.1419 of 2011, decided on 14th December, 2011.

Criminal Procedure Code (V of 1898)---

----S. 426---Penal Code (XLV of 1860), Ss.302(b)/324/337-F(vi)/34/148/149---Qatl-e-amd, attempt to commit qatl-e-amd, ghayr - jaifah - mutalahimah, common intention, rioting armed with deadly weapons, unlawful assembly---Suspension of sentence---Delay in decision of appeal---Medical grounds---Contentions of the accused were that there was no allegation against him for causing any injury to any of the deceased; that only allegation against the accused was that he had caused injuries to the injured with carbine; that injury attributed to the said injured had been declared to be falling under S.337-F(iii), P.P.C; that accused was allowed bail by the High Court on the basis of his age and sickness and he remained present before the court during the whole trial; that there was no evidence against the accused to attract S. 34, P.P.C and such fact should finally be determined at the time of his appeal, which was not in sight in the near future---Validity---According to the prosecution the fatal shots had been attributed to the co-accused and allegations against the accused were that he waylaid the complainant party, caused injuries to the injured and raised 'lalkara'---Question as to whether the accused was vicariously liable for the act of his co-accused needed serious consideration at the time of hearing of the main appeal---Accused had remained on bail during the course of his trial and there was no likelihood of hearing of his appeal in the near future---Accused was more than 70 years old and his medical reports revealed that he was sick---Petition was allowed and sentence of accused was suspended till the final disposal of his appeal.

Maqsood v. Ali Muhammad and another 1971 SCMR 657 and Haji Mir Aftab v. The State 1979 SCMR 320 rel.

Naveed Inayat Malik for Petitioner.

Tariq Javed, Deputy District Public Prosecutor for the State, along with Muhamamd Yousaf, S.-I.

Asif Javed Qureshi for the Complainant.

ORDER

Criminal Miscellaneous No.1 of 2011.

Through this petition, petitioner/ appellant Niamat Ali seeks suspension of his sentence, who has been convicted and sentenced by the learned trial Court as under:--

(i) Imprisonment for Life under section 302(b)/34, P.P.C. on two counts with a compensation of Rs.200,000 under section 540-A, Cr.P.C. to the legal heirs of each deceased and in default of payment of compensation to further undergo six months' S.I. on two counts.

(ii) **Ten Years' R.I.** under section 324, P.P.C. with a fine of Rs.50,000 and in default of payment of fine to further undergo six months' S.I.

(iii) **Three Years' R.I.** under section 337-F(iii) as 'Ta'zir' with Daman of Rs.20,000 to injured Haq Nawaz.

(iv) Three Years R.I. under sections 148/149, P.P.C. with a fine of Rs.5000 and in default of payment of fine to further undergo six months' S.I.

All the sentences have been ordered to run concurrently and benefit of section 382-B, Cr.P.C. has been given to the petitioner.

2. Learned counsel for the petitioner, in support of this petition, contends that there is no allegation against the petitioner of causing any injury to any of the deceased; that the only allegation against the petitioner is that he has caused injury on the person of Haq Nawaz, injured P.W., with carbine; that the injury attributed to the petitioner has already been declared by the doctor falling under section 337-F(iii), P.P.C. Further contends that the petitioner was allowed bail by this Court on the basis of his old age, sickness and his role and he remained on bail till decision of the case; that the petitioner remained present before the court during the whole trial; that the petitioner has been convicted under section 302(b) read with section 34, P.P.C. whereas there is no such evidence which could attract the provisions of section 34, P.P.C. qua the petitioner and this fact even otherwise shall finally be determined at the time of hearing the main appeal which is not in sight in the near future.

3. On the other hand, learned Deputy District Public Prosecutor assisted by learned counsel for the complainant opposes this petition by contending that bail granting order during the trial has no significance after regular trial of the petitioner and his conviction in this case; that the petitioner has fully participated in this occurrence having a fire-arm and using the same; that in his statement under section 342, Cr.P.C. the petitioner has admitted his presence at the place of occurrence, therefore, the provisions of section 34, P.P.C. are fully attracted; that the petitioner waylaid the complainant party and being elder is responsible for commanding 'lalkara' culminatin into this occurrence; that all the diseases of the petitioner mentioned in the report of the Medical Officer are treatable in the jail hospital; that case against the petitioner has been proved beyond any shadow of doubt; that the petitioner has been convicted after a regular trial and he is not entitled for suspension of his sentence.

4. Heard. Record perused.

5. Learned Trial court while convicting the petitioner has observed as under:--

> "Accused Niamat Ali son of Lal Din has admitted his presence at the place of occurrence. The prosecution has proved on the record that he waylaid the complainant party with the intention to commit Qatl-e-Amd and actively participated in the occurrence by firing at the complainant party with the intention to commit Qatl-e-Amd and causing injury to Haq Nawaz P.W.9 beyond any shadow of doubt."

We have noticed that as per the prosecution case the fatal shots on the persons of both the deceased have been attributed to the co-convict Muhammad Zafar who has been sentenced to death by the learned trial Court and the allegation against the petitioner is that he waylaid the complainant party and caused injury to Haq Nawaz P.W.9 and further that he raised a commanding 'lalkara' at the time of occurrence. The question, whether the petitioner is vicariously liable for the act of his co-convict Muhammad Zafar needs serious consideration at the time of hearing of the main appeal. The petitioner remained on bail during the trial. Co-convict of the petitioner namely Muhammad Zafar has been sentenced to death and there is no likelihood of hearing of the appeal of the petitioner in near future. Moreover, the petitioner is of the age of more than 70 years and is a sick person, and vide order dated 25-10-2011, Medical Officer, Central Jail, Lahore was directed to submit a report regarding the ailment of the petitioner. Report has been received, wherein it is mentioned as under:--

> "The above said prisoner is admitted in Jail Hospital, he is suffering from Bronchial Asthma. Proper treatment is being provided to him. He was also examined by eye Surgeon and Surgeon from Services Hospital Lahore, their opinion is as under:--
> Opinion of Eye Surgeon: Eye Surgeon from Services Hospital Lahore examined him, Patient is suffering from RT Cataract, LT Pseudophokia.
> The Specialist has referred the patient to Services Hospital Lahore for refraction and cataract extraction opinion. The such facility is not available in Jail Hospital.
> Opinion of Surgeon:-- Dr. Muhammad Adil from Services Hospital Lahore examined him and diagnosed Haemorrhoids at 3, 7 O' clock and referred the patient to Services Hospital Lahore for Proctoscopy."

In the case of Maqsood v. Ali Muhammad and another (1971 SCMR 657), the Hon'ble Supreme Court of Pakistan has held as under:--

> "---High Court, in appeal, ordering suspension of sentence and releasing appellant on bail on ground of illness--Held: discretion exercised by High Court proper---Principle laid down in proviso to S.497(1), Cr.P.C. that such a person could be released on bail could be following in granting bail under S.426."

The above dictum has been following in the case of Haji Mir Aftab v. The State (1979 SCMR 320), while observing as under:--

> "On the contrary, once a person is found to be sick and infirm then his case could be covered by the second proviso of section 497, Cr.P.C. and it would not be open to a court to quantify his sickness and infirmity. It is implicit in the finding recorded by

the High Court that the petitioner was indeed a sick and infirm person but the learned Judges proceeded to distinguish his case from the convict in Maqsood's case, not only on fragile reasoning but on their own opinion as 'Medical Experts' which course, with respect, was not open to them. Furthermore, it was not disputed that the petitioner was at least 70 years of age and was suffering from duodenal uncler and eye trouble involving old trachoma. In these circumstances, the petitioner has indeed made out a case for the grant of bail within the ratio of Maqsood's case, moreso when throughout his trial he had remained on bail without there being any complaint against him that he has misused his bail."

6. In view of all above, without further commenting upon the merits of the case, we allow this petition and suspend the sentence of the petitioner till the final disposal of his criminal appeal, subject to his furnishing bail bonds in the sum of Rs.200,000 (Rupees two hundred thousand only) with one surety in the like amount to the satisfaction of the Deputy Registrar (Judicial) of this court. However, the petitioner shall remain present before this Court on each and every date of hearing fixed in the main appeal.

MWA/N-29/L Petition allowed.

2012 Y L R 2758
[Lahore]
Before Muhammad Anwaar-ul-Haq, J
MUHAMMAD RAMZAN---Petitioner
versus
THE STATE and others---Respondents

Criminal Miscellaneous No.4275-B of 2012, decided on 23rd May, 2012.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), Ss. 302/ 392/ 395/ 396/ 412---Qatl-e-amd, robbery, dacoity, dacoity with murder, dishonestly receiving property stolen in the commission of dacoity---Bail, refusal of---Contentions of the accused were that he had not been named in the F.I.R. and was subsequently introduced in the case through statement of the co-accused before the police; that test identification parade had no significance because the accused was shown to the complainant and the eye-witnesses before the identification parade; that apart from the statement of the recovery witness, there was no direct evidence connecting the accused with the commission of the alleged crime; that the recovery of the weapon from the accused was of no avail because he did not use the same during the occurrence; that recovery of ear-rings shown against the accused was a fabrication on part of the police, and that the trial of the accused had not been concluded within the statutory time limit for no fault of his or of any other person acting on his behalf---Validity---Accused had been introduced in the case through supplementary statement of the complainant recorded on the same day of the occurrence---Co-accused in his statement recorded before the police also specifically involved the accused in the case---Two prosecution witnesses fully supported the prosecution version and during the identification parade they properly identified the

accused---Recovery of weapon and ear-rings had been effected at the instance of the accused and prima-facie there was sufficient evidence to connect him with the alleged offences, which fell within the prohibitory clause of S.497, Cr.P.C---On certain dates of hearing prosecution witnesses were present but their statements could not be recorded due to absence of counsel of the accused---Delay in conclusion of the trial could not be attributed to the prosecution and the same was on the part of the defence side---Bail petition of the accused was dismissed, in circumstances.

PLD 2010 Lah. 156; 2008 PCr.LJ 135; 2003 PCr.LJ 1521; 2006 MLD 235; 2008 MLD 1527; 2005 PCr.LJ 557; 2007 MLD 444; 2000 PCr.LJ 1320 and PLD 2002 Kar. 402 distinguished.
1995 SCMR 1087 ref.
Abdur Rashid v. State 1998 SCMR 897 rel.
S.N. Khawar Khan for Petitioner.
Mirza Abid Majeed, Deputy Prosecutor-General for the State with Muhammad Iftikhar A.S.-I. with record.
Muhammad Taqi Khan and Rai Mehmood Hussain Kharal, for the Complainant.

ORDER

MUHAMMAD ANWAAR-UL-HAQ, J.---Through this 2nd petition Muhammad Ramzan petitioner seeks post-arrest bail in case F.I.R. No.512, dated 9-12-2009, registered at Police Station Warburton, Distkict Nankana Sahib in respect of offences under sections 302, 392, 395, 396 and 412, P.P.C. Earlier petition was dismissed having been withdrawn on 4-4-2011 through Criminal Miscellaneous No.3322-B of 2011.

2. It has been argued by the learned counsel for the petitioner that case against the petitioner is totally false and the story set up by the prosecution narrated in the F.I.R. is improbable; that petitioner has not been named in the F.I.R. rather he has subsequently been introduced in this case through the statement of his accused namely Mudassir Iqbal before the police on 22-12-2009; that test identification parade conducted in this case has no significance because petitioner was shown to the complainant and the eye-witness before the test I.D. parade and he has got recorded serious objections in this regard before the learned Area Magistrate at the time of test I.D. parade; that apart from the statement of recovery witnesses, there is no direct legal evidence connecting the petitioner with the commission of the alleged crime; that recovery of weapon of offence from the petitioner is of no avail to the prosecution because that was not used by the petitioner during the occurrence and recovery of two ear-rings shown against the petitioner is a fabrication on the part of the police; that in the circumstances, case against the petitioner is one of further inquiry into his guilt. Further contends that in this case petitioner is behind the bars since 22-12-2009 and his trial has yet not been concluded without any fault of the petitioner or any other person acting on his behalf, hence, he is otherwise entitled for bail on the statutory ground of delay in trial in view of the amendment in section 497, Cr.P.C. Placed reliance on the case-law PLD 2010 Lahore 156, 2008 PCr.LJ 135, 2003 PCr.LJ 1521, 2006 MLD 235 (Karachi), 2008 MLD 1527; 2005 PCr.LJ 557, 2007 MLD 444, 2000 PCr.LJ 1320 PLD 2002 Karachi 402.

3. Conversely, learned Law Officer assisted by learned counsel for the complainant vehemently opposing this bail application contends that it is a day-light occurrence and the complainant on 9-12-2009 i.e. on the same day of occurrence got recorded his supplementary statement before the police wherein he categorically stated that accused Mudassir Iqbal along with three unknown accused, who were present immediately after the occurrence at the spot, are responsible for this occurrence; that during the test I.D. parade two P.Ws. namely Muzammil Shehzad and Muhammad Junaid have properly identified the present petitioner; that there is sufficient incriminating evidence against the petitioner in the shape of statements of Muzammil Shehzad and Muhammad Junaid P.Ws.; that recovery of weapon of offence i.e. pistol .30 bore and recovery of two golden ear-rings have been effected at the instance of the petitioner, that is sufficient to connect him with the commission of the crime; that offences against the petitioner are very heinous in nature and fall within the prohibitory clause of section 497, Cr.P.C. and involvement of the petitioner in such heinous offences, does not entitle him for bail. Learned counsel for the complainant placing reliance on the case-law 1998 SCMR 897 1995 SCMR 1087 contends that the petitioner is not entitled for concession of bail even on the statutory ground because the complainant and the prosecution witnesses are regularly appearing before the learned trial Court but the petitioner is delaying the trial on one pretext or the other and even his conduct is that he has recently appointed his learned counsel on 12-4-2012.

4. Heard. Record perused.

5. 1 have noticed that earlier bail petition of the petitioner was dismissed having been withdrawn after arguing the matter at full length on 4-4-2011 through Criminal Miscellaneous No.3322-B of 2011.

Be that as it may, petitioner has been introduced in this case through supplementary statement of the complainant recorded on the same day of occurrence i.e. 9-12-2009 wherein he has categorically stated that accused Mudassir Iqbal along with three unknown accused, who were present immediately after the occurrence at the spot, are responsible for this occurrence, subsequently, said Mudassir Iqbal in his statement recorded before the police on 22-12-2009 has also specifically involved the present petitioner in this case. Besides the complainant, there are two P.Ws. namely Muzammil Shehzad and Muhammad Junaid, who are fully supporting the prosecution version and even during the test I.D. parade they have properly identified the present petitioner. Recovery of weapon of offence i.e. pistol .30 bore and of two golden ear-rings has been effected at the instance of the petitioner and prima facie, there is sufficient evidence available on the record to connect the petitioner with the alleged offences, falling within the prohibitory clause of section 497, Cr.P.Code All the contentions raised by the learned counsel for the petitioner need deeper appreciation of evidence that is not permissible at this stage.

As regards the contention of the learned counsel for the petitioner that petitioner is entitled far bail on the statutory ground of delay in trial in view of the amendment in section 497, Cr.P.C, suffice it to observe that attested copy of the order sheet of the learned trial Court attached with the file reflects that on certain dates of hearing i.e. 25-10-2010, 17-

1-2011, 8-3-2011, 5-4-2011, 20-4-2011, 8-5-2011, 28-6-2011, 17-7-2011, 21-7-2011, 22-8-2011, 22-9-2011, 19-10-2011, 23-11-2011 and 8-12-2011 prosecution witnesses were present but their statements could not be recorded due to absence of learned defence counsel. Case-law referred by the learned counsel for the petitioner is quite distinguishable than the facts and circumstances of this case.

6. In view of all above, placing reliance on the case of Abdur Rashid v. State 1998 SCMR 897 I am of the view that the delay in conclusion of the trial cannot be attributed to the prosecution and the same is on the part of the defence and I an not inclined to grant bail to the petitioner and this bail petition being devoid of any force is, therefore, dismissed. However, learned trial Court is directed to conclude the trial against the petitioner within a period of three months after the receipt of this order.

7. It is clarified that observations made herein are just tentative in nature and strictly confined to the disposal of this bail petition.

MWA/M-214/L Bail dismissed.

PLJ 2012 Cr.C. (Lahore) 362

Present: Muhammad Anwaarul Haq, J.

ZAFAR IQBAL--Petitioner

versus

STATE etc.--Respondents

Crl. Misc. No. 565-B of 2012, decided on 15.2.2012.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 302 & 34--Bail, grant of--Prayer for--Collective role--Prima facie--Unchallenged result of investigation--Ipsi dixit of police was not binding upon Court--Validity--Although name of accused was figured in FIR yet there was collective role assigned to the accused and his brother to effect that both caused injuries to deceased with dagger--Although accused was found present at spot yet he was empty handed and he did not cause any injury to deceased--Ipsidixit of police was not binding upon the Court yet in view of unchallenged result of investigation, prima facie, possibility of false implication of the accused, being real brother of principal accused could not be ruled out--Accused was behind bars and his further detention in jail for an indefinite period would not serve any useful purpose--Bail was allowed. [P.] A

Mr. Tahir Iqbal Tarar, Advocate for Petitioner.

Ch. Muhammad Akram Tahir, Deputy District Public Prosecutor for State.

Mr. Zil-e-Husnain Sherazi, Advocate for Complainant.

Date of hearing: 15.2.2012.

Order

Through this petition, Zafar Iqbal petitioner has sought post arrest bail in case F.I.R. No. 346, dated 23.08.2011, for an offence under Section 302 PPC read with Section 34 PPC registered at Police Station Vanike Tarrar, District Hafizabad.

2. Learned counsel for the petitioner contends that the story narrated in the F.I.R. is totally fabricated and the petitioner has falsely been roped in this case being real brother of the principal accused namely Mazhar Iqbal; that there is collective role assigned to the petitioner and his brother Mazhar Iqbal that they both caused injuries to the deceased with a dagger; that during the investigation no weapon of offence has been recovered from the petitioner, he has successfully proved his plea of innocence and police has opined that although petitioner was present at the spot, yet he was empty handed and he did not cause any injury to the deceased; that in these circumstance, case against the petitioner is one of further inquiry into his guilt. Further contends that the petitioner has no previous criminal record and is behind the bars since 15.09.2011 without any progress in the trial.

3. Conversely, learned Law Officer assisted by the learned counsel for the complainant opposing this bail petition contends that petitioner is specifically nominated in a promptly lodged F.I.R., he was present at the spot while armed with a dagger, and he along with his co-accused has caused injuries to the deceased, even otherwise, he is vicariously liable for every act of his co-accused; that ipsi dixit of the police is not binding upon the Court and especially when that is not based upon any cogent evidence; that complainant and two witnesses are fully supporting the prosecution version, the medical evidence available on the record also corroborates the prosecution version; that deeper appreciation of the merits of the case at bail stage is not desirable; that charge in this case has already been framed and case is fixed for recording of prosecution witnesses; that offence under Section 302, PPC falls within the prohibitory clause of Section 497, Cr.P.C.

4. Heard. Record perused.

5. Be that as it may, although name of the petitioner has been figured in the F.I.R. yet there is collective role assigned to the petitioner and his real brother Mazhar Iqbal to the effect that they both caused injuries to the deceased with a dagger. Investigating Officer present with record confirms that although petitioner was found present at the spot yet he was empty handed and he did not cause any injury to the deceased. Ipsi dixit of the police is not binding upon the Court yet in view of the unchallenged result of investigation, prima-facie, possibility of false implication of the petitioner, being real brother of the principal accused, cannot be ruled out. Petitioner is behind the bars since 15.09.2011 and his further detention in jail for an indefinite period shall not serve any useful purpose.

In view of all above, case against the petitioner, prima-facie, is one of further inquiry into his guilt as contemplated under subsection 2 of Section 497 Cr.P. Code, hence, this petition is allowed and the petitioner is admitted to post-arrest bail subject to his furnishing bail bonds in the sum of Rs. 2,00,000/- (Rupees two lac only) each with two sureties each in the like amount to the satisfaction of the learned trial court.

6. It is, however, clarified that observations made herein are just tentative in nature and strictly confined to the disposal of this bail petition.

(R.A.) Bail allowed.

PLJ 2012 Cr.C. (Lahore) 471
Present: Muhammad Anwaarul Haq, J.
MUHAMMAD SALEEM--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 13038-B of 2011, decided on 27.10.2011.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), S. 324--Bail, grant of--Further inquiry--Cross-version--Petitioner, who was accused of cross-version had been alleged to have caused a firearm injury on the left side of buttock of injured that was kept under observation at the time of medical examination of the said injured--Medical Officer had declared that injury attributed to co-accused and was an exit wound--Weapon of offence had not been recovered from the petitioner during the investigation--Injured who was also accused of the FIR had been granted pre-arrest bail by trial Court, in view of the conflict between the ocular account and the medical evidence, case against the petitioner squarely fell within the purview of sub-section 2 of Section 497 Cr.P.C. and was one of further inquiry into his guilt--Bail admitted. [P. 473] A

Mr. Faiz Rasool Khan Jalbani, Advocate for Petitioner (in Crl. Misc. No. 13038-B/2011).

Syed Zulfiqar Ali Bukhari, Advocate for Petitioner (in Crl. Misc. No. 14220-B/2011).

Ch. Muhammad Akram Tahir, DDPP for State.

Date of hearing: 27.10.2011.

Order

Petitioner Muhammad Saleem through Crl. Misc. No. 13038-B/2011, accused of cross-version under Section 324 PPC whereas petitioners Nadeem Akram and Akbar Ali through Crl. Misc. No. 14220-B/2011, accused of case FIR No. 353 dated 27.06.2011 under Sections 302, 324, 109 & 148/149 PPC registered at P.S Mochiwala District Jhang, have sought their post arrest bail. Since both the petitions mentioned above have arisen out of same FIR soare being disposed of together through this single Order.

2. Learned counsel for petitioner Muhammad Saleem contends that the petitioner is the accused of cross-version that was recorded on the next date of the occurrence only to save the skin of the accused of FIR that is totally fabricated; that the petitioner was badly injured by the accused of main FIR who received four blunt weapon injuries. Further contends that medical evidence does not corroborate the version of the complainant mentioned in the cross-version, as the injury attributed to the petitioner is an exit wound of Injury No. 1 attributed to co-accused of the petitioner namely Kashif; that the doctor while declaring the result of under observation injuries has categorically stated that Injuries No. 1 & 2 are entry and exit wounds of a single injury and Injury No. 2 is continuation of Injury No. 1 that is an exit wound. Further contends that no weapon of offence was recovered from the petitioner during the investigation; that in view of glaring contradiction between the medical evidence and the ocular account furnished by the complainant of the cross-version, case against the petitioner is one of further inquiry into his guilt.

While opposing the bail petition of the accused/petitioners of the main FIR, learned counsel contends that they are nominated in the FIR with the specific role of firing at the injured PWs; that weapons of offence have been recovered from them; that they are also vicariously liable for the every act of their co-accused and that motive is also attributed to petitioner Nadeem Akram.

3. On the other hand learned counsel appearing on behalf of petitioners Nadeem Akram and Akbar Ali contends that no specific role has been attributed to the petitioners and there is general allegation of firing against them. Further contends that infact the complainant party of the FIR was aggressor at the time of occurrence and they suppressed the injuries having been received by three persons of accused side that reflects their malafide; that no injury has been attributed to the petitioners on the person of the deceased in this case. Further adds that seven accused mentioned in the FIR have already been allowed bail by the learned trial Court and case of the petitioners is at par with the case of said co-accused except the alleged recovery of weapons of offence and that petitioner Akbar Ali was allegedly armed with a repeater .12-bore but during the investigation the police has shown recovery of a pistol from him.

While opposing bail petition of Muhammad Saleem, accused of cross-version, learned counsel submits that after thorough investigation, complainant side of FIR has been found to be aggressor; that mere informing the police at the first instance does not give licence of truthfulness; that the petitioner is nominated in the cross-version with a specific, role of firing at the injured Usman Ali and he is not entitled for bail.

4. Heard. Record perused.

5. Petitioner Muhammad Saleem who is accused of cross-version has been alleged to have caused a firearm injury on the left side of buttock of Usman Ali that was kept under Observation at the time of medical examination of the said injured. Subsequently, the Medical Officer has declared that Injury No. 2 is continuation of Injury No. 1 which has been attributed to co-accused Kashif and Injury No. 2 is an exit wound. Weapon of offence has not been recovered from the petitioner during the investigation. Injured Usman Ali who is also accused of the FIR has been granted pre-arrest bail by the learned trial Court. In view of the conflict between the ocular account and the medical evidence, case against the petitioner squarely falls within the purview of sub-section (2) of Section 497 Cr.P.C. and is one of further inquiry into his guilt.

6. So far as petitioners Nadeem Akram and Akbar Ali, who are accused of FIR, are concerned; it is a case of cross-version and the FIR is silent about the injuries having been sustained by the accused party of the FIR during the same occurrence. No specific role has been attributed to the petitioners in the FIR and only collective allegation of firing at the injured PWs has been levelled against him. They have not been alleged to have caused any injury to the deceased. Petitioner Akbar Ali has been shown to be armed with repeater .12-bore in the FIR, however, a pistol has allegedly been recovered from him during the investigation. In view of the above, case against the petitioners, prima facie, fails within the purview of sub-section (2) of Section 497 Cr.P.C and is one of further inquiry into his guilt.

7. For what has been discussed above, I admit both Muhammad Saleem, accused of cross-version and Nadeem Akram and Akbar Ali, accused of FIR, to bail subject to their

furnishing bail bonds in the sum of Rs. 1,00,000/- (Rupees one hundred thousand) each with two sureties each in the like amount to the satisfaction of the learned trial Court.

8. It is, however, clarified that the observations made herein are just tentative in nature and strictly confined to the disposal of these bail petitions.

(A.S.) Bail admitted.

PLJ 2012 Lahore 692
Present: Muhammad Anwaar-ul-Haq, J.
MUHAMMAD YAR--Petitioner
versus
STATION HOUSE OFFICER, POLICE STATION, CITY DEPALPUR, DISTRICT OKARA and 4 others--Respondents

W.P. No. 6932 of 2010, heard on 28.3.2012.

Constitution of Pakistan, 1973--

----Art. 199--Criminal Procedure Code, (V of 1898)--S. 550--Pakistan Penal Code, (XLV of 1860), S. 411--Cancellation of superdari--Application for cancelling the case as well as superdari was accepted--Challenge to--Entitled for superdari of cattle--Validity--Controversy agitated through same could not be resolved in proceedings as it required investigation--SHO should challenge the orders of superdari before revisional Court in proper proceedings does not come in way of SHO while applying for cancellation of superdari of his cattle--Respondent was found innocent during reinvestigation of criminal cases registered against him and cancellation reports prepared by police in that cases had been agreed by Magistrate, therefore, Magistrate was right in canceling superdari of the property and directing SHO to take custody of the case property and to proceed in accordance with law--Petition was dismissed. [P. 694] A, B & C

Mr. Muhammad Maqsood Buttar, Advocate for Petitioner.

Mr. Raza-ul-Karim Butt, Asstt.A.G. for State.

Malik Mushtaq Ahmad Nonari, Advocate for Respondent No. 4.

Date of hearing: 28.3.2012.

Judgment

Brief facts of the case relevant for the disposal of this writ petition are that petitioner is the complainant of case F.I.R. No. 328/2000 dated 26.07.2000 under Section 411, PPC, Police Station City, Depalpur District Qkara, regarding the theft of his three cows and two calves valuing Rs. 48,000/-, which were recovered by the police from Respondent No. 4 Muhammad Ashraf and were taken into possession under Section 550, Cr.P.C. vide Rapat No. 11 dated 23.06.2000. Thereafter, the said cattle were handed over to the petitioner on supurdari by the order of the learned Magistrate dated 28.07.2000. On 02.04.2005, Respondent No. 4 Muhammad Ashraf moved an application before the learned Area

Magistrate for cancellation of supurdari of the cattle in favour of the petitioner on the ground that a false and fictitious case was registered against him, which was re-investigated by the Senior Superintendent of Police, Okara on the order of the Lahore High Court and ultimately finding the case baseless a cancellation report has been prepared by the police, therefore, by canceling the case as well as supurdari in favour of the petitioner, the cattle may be handed over to him. The application was accepted by the learned Magistrate vide order dated 06.11.2009 and by recalling the order dated 28.07.2000 the S.H.O concerned was directed to take custody of the case property from the supurdar (present petitioner) and to proceed further in accordance with law. The review petition of the petitioner for recalling the order dated 06.11.2009 was also dismissed by the learned Magistrate on 24.11.2009. Against the orders dated 06.11.2009 and 24.11.2009 passed by the learned Magistrate, the petitioner filed a revision petition, which too has been dismissed by the learned Additional Sessions through the impugned judgment dated 09.02.2010.

2. Learned counsel for the petitioner contends that before the learned trial Court, both the parties have agreed that in fact the then S.H.O of the Police Station City, Depalpurnamely Ghulam Jillani had misappropriated the cattle, no cattle were handed over to the petitioner on supurdari and he was falsely shown as supurdar by the police, and all the proceedings of supurdari were fake. Further contends that while disposing of Writ Petition No. 16599/2000 on 16.12.2002 this Court has directed the Respondent No. 4 to approach the revisional Court regarding his grievance about the order of supurdari regarding the disputed cattle but Respondent No. 4 did not approach the revisionalCourt and opted to file an application for cancellation of supurdari before the learned trial Court after the lapse of four years time and the learned trial Court has passed the order without taking into consideration the real facts and circumstances of the case as well as law on the point, which order has erroneously been upheld by the learned Additional Sessions Judge.

3. On the other hand, learned counsel for Respondent No. 4 contends that there is a concurrent finding of the Courts below regarding the supurdari against the petitioner; that only to prolong the proceedings and to illegally retain the cattle after passing of the order of cancellation of supurdari, the petitioner has filed this writ petition; that both the impugned orders passed by the learned Area Magistrate and by the learned Additional Sessions Judge are quite in accordance with law.

4. Learned Assistant Advocate General contends that claim of the petitioner in this writ petition is totally bogus and in fact according to the available record, Respondent No. 4 is entitled for supurdari of the cattle.

5. Heard. Record perused.

6. I have noticed that Writ Petition No. 16599 of 2000 was filed by Respondent No. 4 with the prayer that false criminal cases have been registered against him, therefore, the police be restrained from arresting him in any criminal case and from causing harassment to him and his family members. During the hearing of that writ petition, vide order dated 01.07.2002 this Court has necessitated the re-investigation of all the cases by the S.S.P, Okara registered against Respondent No. 4 during the period from June 2000 to December 2000. I have also noted that on the order of this Court passed in Writ Petition No. 16599 of 2000, all the criminal cases registered against Respondent No. 4 were re-investigated by the S.S.P, Okara, who finding the cases false and baseless had recommended for their cancellation and

cancellation reports in this regard were submitted by the S.H.O, Police Station, City Depalpur before the learned Area Magistrate and the learned Area Magistrate has agreed with the same. Writ Petition No. 16599 of 2002 was disposed of by this Court on 16.12.2002 with a view that the controversy agitated through the same could not be resolved in those proceedings as it required investigation/inquiry. Therefore, in my view the observation of this Court in the order dated 16.12.2002 that Respondent No. 4 should challenge the orders of supurdari before the revisional Court in proper proceedings does not come in the way of Respondent No. 4 while applying for cancellation of supurdari of his cattle in favourof the petitioner and the argument of the learned counsel for the petitioner in this regard is misconceived.

7. As Respondent No. 4 was found innocent during the re-investigation of the criminal cases registered against him and the cancellation reports prepared by the police in that cases have been agreed by the learned Area Magistrate, therefore, the learned Magistrate was right in canceling the supurdari of the case property in favour of the petitioner and directing the S.H.O concerned to take the custody of the case property from the petitioner and to proceed further in accordance with law, which order has validly been upheld by the learned Additional Sessions Judge while observing as under:--

"It is settled proposition of law that Supardari is always given to Supardar with the condition that the property handed over on Supardari, shall be produced/returned before the Court, if and when ordered by the Court. The Court granting the Supardari has ample legal power to order the Supardar to produce the case property. I have gone through the order dated 06.11.2009 and found that the learned Magistrate has discussed the reasons for cancellation of the Supardari. The cases got lodged against the Respondent No. 2 Muhammad Ashraf i.e. mentioned above stood cancelled and tampering was also found in the record of the Police i.e. Register No. 19. There is no irregularity committed by learned Magistrate, which can be termed as illegality."

I am of the considered view that in the peculiar facts and circumstances of this case, the impugned orders passed by both the Courts below are quite in accordance with law and there is no illegality or infirmity in the same, calling for interference by this Court. Resultantly, this writ petition being devoid of any force is dismissed.

(R.A.) Petition dismissed

PLJ 2012 Cr.C. (Lahore) 693
Present: Muhammad Anwaarul Haq, J.
MUHAMMAD RAMZAN alias BHOLA--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 3553-B of 2012, decided on 26.3.2012.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 324 & 34--Bail dismissal of--Offence falls within prohibitory clause--Fugitive from law--Nominated in FIR with specific role of causing a fire-arm injury on right thigh of injured--Injured was medically examined without any delay--Weapon of offence was effected from the accused--No enmity between the witnesses and accused for false implication--Double punishment--Validity--Examination-in-chief of PWs had already been recorded and accused was avoiding trial, as cross-examination of the PWs had been reserved--Offence against the accused falls within prohibitory clause of S. 497, Cr.P.C.--Accused also remained fugitive from law for about ten months for which no plausible explanation was submitted--No case for bail after arrest was made out in favour of the accused and instant bail petition being devoid of any force was dismissed. [P. 694] A & B

Mr. Moazzam Iqbal Gill, Advocate for Petitioner.

Ch. Muhammad Akram Tahir, DDPP for State.

Mian Shahid Ali Shakir, Advocate for Complainant.

Date of hearing: 26.3.2012.

Order

Petitioner Muhammad Ramzan alias Bhola seeks post arrest bail in case FIR No. 803 dated 26.10.2010 under Sections 324/34, PPC registered at Police Station Khurrianwala District Faisalabad.

2. Learned counsel for the petitioner contends that case against the petitioner is totally false and fabricated; that the injury allegedly attributed to the petitioner on the person of injured is self-inflicted and the medical evidence has been procured in connivance with the police and the Medical Officer. Further contends that the complainant and the injured are desperate criminals and eight cases have been registered against him; that there is no allegation of repetition of the fire shot and the alleged injury is on the non-vital part of the body of injured Kamran Rafique. Further contends that the petitioner is behind the bars since 25.08.2011 without any substantive progress in his trial.

3. On the other hand learned Deputy District Public Prosecutor assisted by learned counsel for the complainant while opposing this bail application contends that the petitioner is nominated in the FIR with a specific role of causing a fire-arm injury on the right thigh of the injured; that Section 324, PPC entails double punishment, one for the attempt to commit murder and the second for the hurt caused. Further contends that the petitioner was medically examined on the day of occurrence and the medical evidence fully corroborates the version given in the FIR; that the offence against the petitioner falls within the

prohibitory clause of Section 497 Cr.P.C. and that the petitioner remained absconder for a period of about eleven months, therefore, he is not entitled for bail.

4. Heard. Record perused.

5. The petitioner is nominated in the FIR with a specific role of causing a fire-arm injury on the right thigh of injured Kamran Rafique. The injured was medically examined on the day of occurrence without any delay and the Medico Legal Report corroborates the allegation levelled against the petitioner. The statements of injured KamranRafique and other witnesses namely Muhammad Sajjad and Aamir Hussain recorded under Section 161 Cr.P.C. further strengthen the version of the complainant. The weapon of offence i.e. 12-bore repeater pump action gun has also been effected from the petitioner. There is no enmity between the witnesses and the petitioner for his false implication in this case. Double punishment has been provided in Section 324, PPC, one for the attempt to commit murder and the other for the hurt caused. Examination-in-chief of three prosecution witnesses has already been recorded and petitioner is avoiding the trial, as cross-examination of these witnesses has been reserved since 23.12.2011. The offence against the petitioner falls within the prohibitory clause of Section 497, Cr.P.C. He also remained fugitive from law for about ten months for which no plausible explanation has been submitted.

In view of the above, no case for bail after arrest is made out in favour of the petitioner and this bail petition being devoid of any force is dismissed.

6. It is, however, clarified that the observations made herein are just tentative in nature and strictly confined to the disposal of this bail petition.

(R.A.) Bail dismissed.

PLJ 2012 Cr.C. (Lahore) 875 (DB)

[Multan Bench Multan]

Present: Muhammad Anwaar-ul-Haq and Sardar Muhammad Shamim Khan, JJ.

MUHAMMAD ISHFAQ and others--Appellants

versus

STATE and others--Respondents

Crl. Apeal No. 45 & 74 of 2007, M.R. No. 279 of 2007 and Crl. Rev. No. 57 of 2007, heard on 21.9.2011.

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

----Ss. 302(b), 148 & 149--Qanun-e-Shahadat Order, (10 of 1984), Art. 129(g)--Conviction and sentence was recorded against accused by trial Court--Challenge to--Ocular account--Medical evidence was in direct conflict with ocular account--From injuries pellets and wad were recovered and were sealed into parcel and handed over to police but police did not send to FSL for comparison or expert opinion--Not overt act or any injury was attributed to accused--Validity--No weapon of offence, as alleged in FIR was recovered from accused and pistol allegedly recovered from accused was sent to FSL alongwith empties recovered from place of occurrence, but there was no report on record and because of such serious lapse on part of prosecution, recovery of weapon from the accused had no significant in

instant case--Prosecution with mala fide intention had withheld most important evidence i.e. report of FSL and High Court had no option except to draw an adverse inference against prosecution in view provision of Art. 129(g) of Order, 1984--Convictions and sentences were set aside and accused were acquitted of charges. [P. 885, 886] A, B & E

Motive--

----In view of admitted long standing criminal litigation between the parties, no importance can be given to motive that in such like cases is a double edged weapon. [P. 886] C

Chance witness--

----It is settled principle of criminal jurisprudence evidence of a witness who was inimical to the accused and a chance witness, as matter of caution and for safe administration of justice cannot be believed unless corroborated by independent, unimpeachable and trustworthy source. [P. 886] D

Interested Witness--

----Eye-witnesses were interested being closely related inimical and chance witnesses, therefore, they could not be believed without strong corroboration. [P. 886] E

2008 SCMR 158 ref.

Interested Witness--

----It is well settled principle that if inimical, interested and chance witnesses were disbelieved qua some of accused, they cannot be believed against other accused without some strong and independent corroboration available on record. [P. 887] F

PLJ 2008 SC 269 rel.

Ocular Account--

----No implicit reliance can be placed on ocular account--Prosecution had miserably been failed to prove its case against accused beyond any shadow of doubt. [P. 887] G

Benefit of doubt--

----It is cardinal principle of criminal jurisprudence that single instance causing a reasonable doubt in mind of Court entitled accused to benefit of doubt not as a matter of grace but as a matter of right. [P. 887] H

2009 SCMR 230 rel.

Appreciation of Evidence--

----Reasons given by trial Court for acquittal were quite in accordance with law and based upon settled principles of appreciation of evidence. [P. 888] J

Double Presumption of Innocence--

----When an accused was acquitted by trial Court, he enjoys doubt presumption of innocence and to dislodge that presumption very strong and convincing reasons were required, but no such reasons were reflected from record, therefore, acquittal of accused as ordered by trial Court was maintained. [P. 888] K

Sheikh Jamshed Hayat, Advocate for Appellants (in Crl. Appeal No. 45 of 2007).

Mr. Munir Ahmad Sial, D.P.G. for State.

Mr. Muhammad Noor Khan Hans, Advocate for Complainant/Appellant (in Crl. Appeal No. 74 of 2007 and Petitioner in Crl. Revision No. 57 of 2007).

Date of hearing: 21.9.2011.

Judgment

Muhammad Anwaar-ul-Haq, J.--Muhammad Ishfaq, lqbal Hussain and Mureed Hussain (appellants in Criminal Appeal No. 45 of 2007), and Imtiaz Hussain, Iqbal s/o Bagh Ali and Mukhtar Shahzad (Respondents No. 1 to 3 in Criminal Appeal No. 74 of 2007) were tried in

the case F.I.R. No. 439/2003 dated 26.11.2003, registered at Police Station Basti Malook District Multan in respect of offence under Sections 302, 148, 149, PPC. After conclusion of the trial, learned trial Court vide its judgment dated 31.01.2007 has convicted and sentenced the appellants Muhammad Ishfaq, lqbal Hussain and Mureed Hussain as under:--

Ishfaq:

(i) Death sentence under Section 302(b), PPC as Ta'zir' for committing the murder of Sher Muhammad deceased with a compensation of Rs.50,000/- under Section 544-A, Cr.P.C. to the legal heirs of the deceased and in default of payment of compensation to further undergo six months S.I.

(ii) Imprisonment for Life as `Ta'zir' under Section 302(b)/149, PPC for committing the murder of Mushtaq alias Kala deceased with a compensation of Rs.50,000/- under Section 544-A, Cr.P.C. to the legal heirs of the deceased and in default of payment of compensation to further undergo six months S.I.

(iii) Two Years R.I, under Sections 148/149, PPC with a fine of Rs.5000/- and in default of payment of fine to further undergo six months S.I.

Benefit of Section 382-B, Cr.P.C. has been extended to the appellant.

lqbal & Mureed Hussain:

(i) Imprisonment for Life each under Section 302(b), PPC as `Ta'zir' for the murder of Sher Muhammad deceased with a compensation of Rs.25,000/- each under Section 544-A, Cr.P.C. to the legal heirs of the deceased and in default of payment of compensation to further undergo six months-S.I. each.

(ii) Imprisonment for Life each under Sections 302(b)/149, PPC as 'Ta'zir' for the murder of Mushtaq alias Kala deceased with a compensation of Rs.25,000/- each under Section 544-A, Cr.P.C. to the legal heirs of the deceased and in default of payment of compensation to further undergo six months S.I. each.

(ii) Two Years R.I, each under Sections 148/149, PPC with a fine of Rs.5000/- each and in default of payment of fine to further undergo six months S.I. each.

Both the sentences were ordered to run concurrently and benefit of Section 382-B, Cr.P.C. has been extended to appellants.

Whereas Accused/Respondents No. 1 to 3 in Criminal Appeal No. 74 of 2007 namely Imtiaz Hussain, Iqbal s/o Bagh Ali and Mukhtar Shahzad have been acquitted from the charges.

Murder Reference No. 279 of 2007 for confirmation or otherwise of death sentence awarded to appellant Ishfaq and Criminal Appeal No. 74 of 2007 filed by the complainant against acquittal of accused Imtiaz Hussain, Iqbal and Mukhtar Shahzad as well as Criminal Revision No. 57 of 2007 for enhancement of sentence awarded to Mureed Hussain and Iqbal Hussain shall also be disposed of through this Single judgment.

2. The F.I.R. (Ex.PF/1) was registered on the statement (Ex.PF) of the complainant Muhammad Iqbal (PW-12) recorded on 26.11.2003 at 7:25 a.m. by Ijaz Akram, S/I/S.H.O. (PW-16). According to the statement (Ex.PF), on 26.11.2003 at about 6:30 a.m. the complainant was present in the house of his father-in-law namely Sher Muhammad situated at Chah Budhanwala on the eve of `Eid' and Muhammad Shahzad (PW-13) alongwith his

son Mushtaq alias Kala had also come there last evening to give `Eidi' to his daughters Mst. Kausar Bibi and Mst. Iqbal Mai (daughters-in-law of Sher Muhammad); at about 6:30 a.m. Mushtaq alias Kala went towards the cattle shed to wash his hands and face by a hand pump and at that time on report of firing the complainant, Shahbaz and Sher Muhammad came outside and saw that Altaf Hussain armed with rifle .222-bore, Muhammad Iqbal s/o Jamal armed with pistol .30-bore, Imtiaz armed with gun .12-bore, Ishfaq armed with pistol .30-bore alongwith Muhammad Iqbal s/o Bagh Ali and Mureed Hussain were present there on two motorcycles in starting position; Altaf Hussain raised lalkara that today they have come to take vengeance of the murder of their relatives Abid Hussain and Liaqat Hussain and made fire hitting Mushtaq alias Kala on his chest who fell down; Sher Muhammad stepped forward to rescue Mushtaq alias Kala and lshfaq made fire which hit Sher Muhammad in between his right shoulder and neck; then Imtiaz made fire hitting Sher Muhammad on his forehead and lshfaq made fire which also hit Sher Muhammad in between his right shoulder and neck; thereafter, lshfaq made fire hitting Sher Muhammad on his right elbow and fire made by Altaf landed on the right knee of Sher Muhammad; on hearing hue and cry, Allah Bakhsh and other inhabitants of the locality attracted to the place of occurrence and the assailants fled away on their motorcycles while making firing, whereas both Mushtaq alias Kala and Sher Muhammad succumbed to their injuries at the spot.

Motive behind the occurrence, as stated by the complainant, was that two sons of Sher Muhammad (deceased) namely Shabbir Ahmad and Tanvir Ahmad had committed the murder of Abid and Liaqat, relatives of the accused party.

3. It is pertinent to mention here that co-accused Abdul Rasool, Allah Ditta, Manzoor and Altaf were declared proclaimed offenders and perpetual non-bailable warrants of arrest have been issued against them by the learned trial Court.

4. On submission of challan and after completion of the procedural formalities, the accused were formally charge sheeted by the learned trial Court under Sections 302, 148, 149, PPC, to which they pleaded not guilty and claimed trial. The prosecution examined as many as 21 witnesses to prove the charge against the accused. Dr. Bashir Ahmad (PW-3) provided medical evidence; Muhammad Baskhsh S.I (PW-6), Bashir Ahmad, S.I (PW-8), Mushtaq Ahmad, S.I (PW-10), Muhammad Ramzan, S.I (PW-14), Abdul Majeed, Inspector (PW-15), Ijaz Akram Siyal, S.I (PW-16), Nazar Mehmood, S.I (PW-17), Shaukat Murtaza, D.S.P (PW-20) and Khurshid Aalam Bukhari, DIG (the then S.S.P) (PW-21) conducted investigation of this case, whereas Muhammad Iqbal, complainant (PW-12), and Muhammad Shahbaz (PW-13) had furnished the ocular account and Riaz Hussain (PW-18) and Talib Hussain (PW-19) are witnesses of abetment alleged against the accused Mukhtar Shehzad.

5. On 27.11.2003, Dr. Bashir Ahmad (PW-3) conducted post-mortem examination of Sher Muhammad deceased and found the following injuries:--

(i) Multiple lacerated firearm wound of entry on the right side of the right shoulder blade including right neck in an area of 8 cm x 6 cm, the wounds were in five in number, largest being 1« cm in diameter. A piece of led pellet found on dissecting the wound.

(ii) A lacerated firearm wound at the back of right elbow joint. It was wound of entry covering an area of 10 cm x 7 cm. The exit wound was present on the back of right arm near the axilla. These were multiple lacerated wounds covering an area of 16 cm x 8 cm. On

dissection a led pellet was found. Wad was present. Lower end of humerus and elbow joint was broken.

(iii) Two lacerated firearm wounds of entry on the inner side of right knee 3/4 cm in diameter inch. Two lacerated wounds (exit wound) were present in front of the right knee joint, 1 1/2 cm in diameter each. One led pellet was found in dissecting the wound.

(iv) Five lacerated wounds (exit wound) were on the back of the left shoulder 9 cm x 7 cm, on dissecting two led pellets were found. Left scapula was fractured.

In his opinion, Injury No. 1 was sufficient to cause death in ordinary course of nature; duration between injury and death was immediate and between death and postmortem 30 to 36 hours.

On the same day, said doctor (PW-3) conducted post-mortem examination of Mushtaq alias Kala deceased and found the following injuries:--

(i) A firearm lacerated wound (exit wound) 1 cm x 3/4 cm in front of the left chest 3 cm from the inner end of the clavicle and 2 cm from midline. On dissection the fracture of the fourth left rib near the sternum was present.

(ii) A firearm wound lacerated in nature 3/4 cm x 3/4 cm on the back of the left chest (entry wound) 3 cm below the inferior angle of the left scapula, 10 cm from the midline, margins were inverted, blackening was present.

(iii) A lacerated wound of firearm 3/4 cm x 3/4 cm at the back of the left arm 19 cm above the left elbow. Margins were inverted, blackening present (entry wound). The exit wound was present in front of the left elbow 1 cm x 3/4 cm, 12 cm from elbow on the upper arm.

(iv) A lacerated wound of firearm 1 1/2 cm in circle on the mid of the palmer aspect of the left hand, 3 cm above wrist. This was entry wound. The exit wound was 2 cm x 3/4 cm, on the medial end of the left wrist.

In his opinion, Injury No. 2 was sufficient to cause death in ordinary course of nature; duration between injury and death was immediate and between death and postmortem 30 to 36 hours.

6. Learned DDA after tendering in evidence the reports of the Chemical Examiner (Ex.PS & Ex.PS/1) and that of the Serologist (Ex.PT & Ex.PT/1) has closed the prosecution case.

7. Thereafter, statements of the accused as required under Section 342, Cr.P.C. were recorded, in which they refuted all the allegations levelled against them and professed their innocence. While answering to question (Why this case against you and why the PWs have deposed against you?), the appellants have replied as under:--

Ishfaq:

"This is a false case. The alleged occurrence is an unseen occurrence. In fact nobody goes to give Eid to his daughters and sisters on the day of Eid. People used to go to their daughters or sisters one or two weeks before the Eid approaches. On the day of Eid, question of visit of the complainant at the place of occurrence does not arise. The complainant has told a lie with regard to his presence and the presence of his brother at the place of occurrence. The case was investigated first and thereafter it was registered by making and thinking out false

story. There is no eye-witness at the place of occurrence and the prosecution story is absolutely false. All the witnesses produced by the prosecution are not residing at the place of occurrence and they are residents of far of place rather they were chance witnesses and they have told lie. The case remained in investigation more than two years and the accused persons were not arrested by the police as the police itself was not of the view with regard to implication of the accused in the above said occurrence. The accused persons have been involved in this case with the connivance of the complainant party. During the investigation of case, Imtiaz, Altaf, Iqbal son of Bagh Ali and Iqbal son of Jamal were found innocent. Mukhtar Shahzad is the complainant of a murder case which was registered against the complainant party and they were having grudge against the accused and for that reason he has been named in the FIR. The other accused persons Muhammad Iqbal s/o Muhammad Jamal is the eye-witness of the case registered by Mukhtar Shahzad against the complainant party under Section 302, PPC and the other accused persons are the first cousins of Mukhtar Shahzad and in order to pressurize them and to net reconciliation of case against in law of the complainant "Tanveer and Shabbir" who have been sentenced to death and life imprisonment on two counts, and for that reason we have been involved in this case. Even otherwise, senior police officers investigated the case who declared the above said accused to be innocent and also held the ease doubtful. There is a complaint titled as "Sardar Muhammad Ayyaz vs. Muhammad Iqbal etc." under Section 302, PPC filed by Sardar Muhammad Ayyaz - brother of Sher Muhammad (deceased), who had deposed in the complaint that the murder of Sher Muhammad and Mushtaq Ahmad alias Kala was committed by the complainant and his companions. No recovery of pistol 30-bore took place from me and the recovery of pistol has been fabricated by the police by joining hands with the complainant party in order to strengthen the prosecution case."

Appellant Mureed Hussain has offered the same answer as given by the appellant Ishfaq.

Iqbal Hussain:

"The case is absolutely false. The real facts have been badly distorted and abundant fabrication has been made to involve us unjustifiably and unwarrantedly. The case hinges round the statements of two witnesses only namely Muhammad Iqbal PW-12 and Shahbaz PW-13, they both are not residing at or near the place of occurrence and as a matter of fact their abode is at a distance of 3/4 K.M. Their presence at the place in the early hours of morning is therefore, unnatural, improbable and unbelievable. Besides they are inimical towards us. Our false implication in this case has been managed with no other object but to pressurize us with this dire threat of a fake charge of double murder. This incident is in fact unseen and un-witnessed and it is why that some three versions in respect of this very incident have been carpeted including the one which is advanced by Sardar Muhammad Ayyaz in which the present complainant namely Muhammad Iqbal is the principle culprit because as per that case, he is the assailant who fired a shot from his gun hitting the shoulder-cum-neck region of Sher Muhammad and the best way to wriggle out of that situation was nothing else except to assume the role of complainant and to throw the claim of an eye-witness of the case by extorting the previous incident in which two innocent persons had been killed. Zubair and Imtiaz yet another set of eye-witness of this very incident, talk of and implicate Abdul Rasool, Manzoor, Ismail and Allah Ditta as the real culprit of this case. It goes without saying that the trouble initially originated from the house of Abdul Rasool when his womenfolk altercated with the womenfolk of the family of Sher

Muhammad and his sons Shabbir and Tanveer. Aabid and Liaqat were the unfortunate victims as they were closely related to said Abdul Rasool. The fact that in the entire case of the prosecution not even a single person from the public other than Muhammad Iqbal complainant and Shahbaz PW, speaks for itself that the present case as put forth by Muhammad Iqbal complainant is devoid of truth and is the result of hostility. The evidence led at the trial by the prosecution is highly discrepant, contradictory and inconsistent and does not inspire any amount of confidence in any manner. I am innocent."

All the accused/appellants did not opt to appear as their own witness under Section 340(2), Cr.P.C. and have also not produced any defence evidence.

8. After conclusion of the trial, Accused/Respondents No. 1 to 3 in Criminal Appeal No. 74 of 2007 namely Imtiaz Hussain, Iqbal s/o Bagh Ali and Mukhtar Shahzad were acquitted from the charges, whereas appellants Muhammad Ishfaq, Iqbal Hussain and Mureed Hussain have been convicted and sentenced by the learned trial Court, as mentioned earlier.

9. Learned counsel for the appellants in support of Criminal Appeal No. 45 of 2007 contends that the F.I.R. was registered after due deliberations and consultations which is clear from the fact that post-mortem on the dead bodies of both the deceased was conducted on the next date i.e. 27.11.2003; that in the post-mortem reports, the doctor intentionally and in connivance with the prosecution did not mention the date and time of death and the time of post-mortem in the relevant columns and left these columns blank to fill the same subsequently as per desire of the prosecution. Further contends that according to the post-mortem report, Sher Muhammad deceased received injuries from a close range as the doctor had recovered pieces of wad from the injury of Sher Muhammad deceased, whereas in the site-plan (Ex.PG), distance between Mushtaq deceased and Ishfaq accused was 41 feet and between the deceased Sher Muhammad and accused Iqbal has been shown as 77 feet; that pieces of wad and pellets after recovery from the dead body of Sher Muhammad were duly sealed and handed over to the police but the prosecution did not send the same material to the Forensic Science Laboratory for its proper determination; that in fact, report of the Forensic Science Laboratory was received to the prosecution but as the same was in the negative, therefore, the prosecution with mala fide intention has withheld the same. Further contends that both the eye-witnesses were not present at the spot and even otherwise they are chance witnesses and the reason for their being present at the time of occurrence is not plausible at all; that both the witnesses claim themselves to be residents of a place at a distance of about 3/4 kilometers from the place of occurrence and their non-returning to their homes before the Eid does not appeal to reason; that investigation conducted by several investigating Officers reflects that it could not be ascertained as to who has committed this occurrence and it has come on the record that the assailants were different than the persons mentioned in the F.I.R.

10. On the other hand, learned Deputy Prosecutor General assisted by learned counsel for the complainant contends that the F.I.R in this case was promptly lodged as such there was no chance of deliberations and consultations; that it was dawn time occurrence and sufficient light was available at the time of occurrence, therefore, there is no question of any misidentification of the assailants in this case; that the ocular account furnished by PW-12 and PW-13 is sufficient to prove the guilt of the accused in this case; that both the eye-witnesses, even after lengthy cross-examination, remained consistent on material aspects of the case; that the witnesses did not improve their statements even after recording of

statement of the doctor, which reflects that they are natural and truthful witnesses. Further contends that mere enmity between the parties is not a ground to discard the ocular account in the circumstances of the case when it is otherwise confidence inspiring; that PW-13 Muhammad Shahbaz went to give `Eidi' to his two daughters and the complainant Muhammad Iqbal was also present there to celebrate 'Eid' with his father-in-law; that the medical evidence and the evidence of recovery of weapons of offence are only corroborative pieces of evidence; that in this case the substantive evidence is ocular account coupled with the motive and that is sufficient for conviction of the accused/appellants. Learned counsel for the complainant further adds that ipsi dixit of police is not binding on the Court; that filing of a private complaint by step-brother of Sher Muhammad deceased was an attempt to save the skin of the appellant as he was in league with the accused party and that complaint has already been dismissed and thereafter appeal against acquittal was also dismissed in limine by this Court; that any defect in the investigation or dishonest investigation conducted by any police officer cannot extend any benefit to the accused in the presence of reliable ocular account; that as both the parties are closely related, hence there is no scope of false implication of any of the appellants in this case.

11. As far as Criminal Appeal No. 74 of 2007 is concerned, learned counsel for the appellant/complainant contends that the Accused/Respondents No. 1 & 2 namely Imtiaz Hussain and Iqbal were nominated in the F.I.R with specific roles; that there is sufficient evidence against the Accused/Respondent No. 3 Mukhtar Shahzad in the shape of PW-18 Riaz Hussain and PW-19 Talib Hussain; that all the three Accused/Respondents No. 1 to 3 have fully participated in the occurrence and were vicariously liable for the act of their co-accused, but they have been wrongly acquitted by the learned trial Court.

12. In support of Criminal Revision No. 57 of 2007, learned counsel contends that there was no reason with the learned trial Court to take a lenient view against the Accused/Respondents No. 1 and 2 namely Mureed Hussain and Iqbal Hussain and to award them lesser sentence; that there was no ground of mitigation, hence the Accused/Respondents No. 1 and 2 are liable for awarding of the capital punishment.

13. We have heard the learned counsel for the parties at length, have given anxious consideration to their arguments and have also scanned the record with their able assistance.

14. The prosecution case only rests upon the ocular account furnished by PW-12 Muhammad Iqbal and PW-13 Muhammad Shahbaz. However, the medical evidence in this case is in direct conflict with the ocular account furnished by both the PWs. It is the prosecution case that the appellants Muhammad Ishfaq and Iqbal Hussain had fired at the deceased Sher Muhammad with pistols .30-bore, but the doctor (PW-3), during the post-mortem, found the following injuries on the person of Sher Muhammad deceased:--

(i) Multiple lacerated fire-arm wound of entry on the right side of the right shoulder blade including right neck in an area of 8 cm x 6 cm, the wounds were in five in number, largest being 1« cm in diameter. A piece of led pellet found on dissecting the wound.

(ii) A lacerated fire-arm wound at the back of right elbow joint. It was wound of entry covering an area of 10 cm x 7 cm. The exit wound was present on the back of right arm near the axilla. These were multiple lacerated wounds covering an area of 16 cm x 8 cm. On dissection a led pellet was found. Wad was present, Lower end of humerus and elbow joint was broken.

(iii) Two lacerated fire-arm wounds of entry on the inner side of right knee 3/4 cm in diameter inch. Two lacerated wounds (exit wound) were present in front of the right knee joint, 1« cm in diameter each. One led pellet was found in dissecting the wound.

(iv) Five lacerated wounds (exit wound) were on the back of the left shoulder 9 cm x 7 cm, on dissecting two led pellets were found. Left scapula was fractured.

It is significant to note that from the injuries, pellets and wad were recovered and were sealed into parcel and handed over to the police, but the police did not send the same to the Forensic Science Laboratory for comparison or expert opinion. Medical evidence clearly reflects that the deceased Sher Muhammad received .12-bore fire-arm injuries and the doctor during the cross-examination has categorically stated that injuries on the person of the deceased Sher Muhammad were pellet injuries. Therefore, medical evidence in this case is not in line with the ocular account furnished by the above mentioned eye-witnesses.

15. We have noticed that no overt act or any injury is attributed to Mureed Hussain appellant and the only allegation against him is of his mere presence at the time of occurrence. We have also noted that no weapon of offence, as alleged in the F.I.R., was recovered from the appellant Iqbal Hussain and the pistol allegedly recovered from the appellant Muhammad Ishfaq was sent to the Forensic Science Laboratory alongwith the empties recovered from the place of occurrence, but there is no report on the record in this regard and because of this serious lapse on the part of the prosecution, recovery of weapon from the appellant Muhammad Ishfaq has no significance in this case. We are in agreement with the learned counsel for the appellants that the prosecution with mala fide intention has withheld the most important evidence in this case, i.e. report of Forensic Science Laboratory and we have no option except to draw an adverse inference against the prosecution in view the provisions of Article 129(g) of Qanun-e-Shahadat Order, 1984.

16. As far as motive in this case is concerned, in view of the admitted long standing criminal litigation between the parties, no importance can be given to motive, that in such like cases is a double edged weapon.

17. As the medical evidence and recovery of weapons of offence do not support the prosecution case, there remains only the ocular account furnished by PW-12 and PW-13, but we are not going to believe the same for the following reasons:--

(i) Both the witnesses are inimical towards the appellants as admittedly there is long standing enmity between the parties.

(ii) Both the witnesses are residents of a place three kilometers away from the place of occurrence and both are chance witnesses. The fact that PW-13 Muhammad Shahbaz went to give `Eidi' to his daughters one day prior to the day of occurrence and did not return back to his own house just at the distance of three kilometers where his other family members are residing, does not appeal to reason; same is the position with the complainant/PW-12 Muhammad Iqbal, who remained fail to explain his presence at the time of occurrence.

(iii) The medical evidence, as discussed earlier, is totally in conflict with the evidence furnished by PW-12 and PW-12.

It is a settled principle of criminal jurisprudence that evidence of a witness who is inimical to the accused and a chance witness, as a matter of caution and for safe administration of justice, cannot be believed unless corroborated by some independent, unimpeachable and

trustworthy source. In this case, both the eye-witnesses are interested being closely related, inimical and chance witnesses, therefore, they cannot be believed without strong corroboration. We respectfully refer the case of Muhammad Khalid Khan vs. Abdullah and others (2008 SCMR 158), wherein the Hon'ble Supreme Court of Pakistan has held as under:--

"Testimony of eye-witnesses including the complainant did not inspire confidence, who were chance witnesses and they had not reasonably explained their presence at the spot at the relevant time. ---------- Eye-witnesses being admittedly inimical towards the accused, unimpeachable evidence was required to corroborate the ocular, testimony for sustaining conviction, which was lacking in the case."

Moreover, the learned trial Court has not believed the prosecution evidence qua the acquitted accused namely Imtiaz Hussain, lqbal and Mukhtar Shahzad. It is well settled principle that if inimical, interested and chance witnesses are disbelieved qua some of the accused, they cannot be believed against other accused without some strong and independent corroboration available on the record. Here, we respectfully refer the judgment reported as Akhtar Ali and others vs. The State (PLJ 2008 SC 269), wherein the following principle has been highlighted by the Hon'ble Supreme Court of Pakistan:

"It is settled law that eyewitnesses found to have falsely implicated five out of eight accused then conviction of remaining accused on the basis of same evidence cannot be relied upon without independent corroboration. See Ghulam Muhammad's case (PLJ 1976 SC 29), Sheral alias Sher Muhammad's case (1999 SCMR 697) and Ata Muhammad's case (1995 SCMR 599). It is also a settled law that credibility of the ocular evidence is not divisible. See Faiz Bakhsh's case (PLD 1959 PC 24), Nadia's case (42 Cr.L.J. 53), Muhammad's case (PLD 1954 FC 84), Sher Bahadar's case (1972 SCMR 651) and Muhammad Afsar's case (PLD 1954 FC 171)."

It is duty of the prosecution to prove its case against the accused beyond any shadow of doubt. In this case, as observed earlier, no implicit reliance can be placed on the ocular account; therefore, we are of the considered view that the prosecution has miserably been failed to prove its case against the appellants beyond any shadow of doubt. It is cardinal principle of criminal jurisprudence that a single instance causing a reasonable doubt in the mind of the Court entitles the accused to the benefit of doubt not as a matter of grace but as a matter of right. In this context, we respectfully rely on the case of Muhammad Akram vs. The State (2009 SCMR 230), wherein the Hon'ble Supreme Court has held as under:

"The nutshell of the whole discussion is that the prosecution case is not free from doubt. It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

Therefore, Criminal Appeal No. 45 of 2007 is allowed, the convictions and sentences recorded by the learned trial Court against the appellants through the impugned judgment dated 31.01.2007 are set aside and they are acquitted of the charges. The appellants are in

jail, they shall be released forthwith if not required in any other case. Death sentence of convict Ishfaq is not confirmed and Murder Reference No. 279 of 2007 is answered in the Negative.

18. As far as Criminal Appeal No. 74 of 2007 against acquittal of Accused/Respondents No. 1 to 3 namely Imtiaz Hussain, Iqbal and Mukhtar Shahzad is concerned, the allegation of injury attributed to Respondent No. 1 Imtiaz Hussain on the forehead of the deceased Sher Muhammad with .12-bore gun is not supported by the medical evidence as no injury whatsoever was found on the forehead of Sher Muhammad deceased. Whereas, Respondent No. 2 Iqbal was shown to be present at the scene of occurrence empty handed and Respondent No. 3 Mukhtar Shahzad is not even nominated in the F.I.R and was subsequently involved in this case through the supplementary statement of the complainant, that too only to the extent of abetment under Section 109, PPC. We have gone through the judgment passed by the learned trial Court and are in agreement with the learned trial Court as far as the acquittal of the said respondents is concerned. We are of the considered view that the reasons given by the learned trial Court for acquittal of the respondents are quite in accordance with law and based upon settled principles of appreciation of evidence. It has been held by the Honourable Supreme Court of Pakistan in the judgment reported as Haji Amanullah vs. Munir Ahmad and others (2010 SCMR 222) that when an accused person is acquitted by the trial Court, he enjoys double presumption of innocence and to dislodge that presumption very strong and convincing reasons are required, but no such reasons are reflected from the record, therefore, the acquittal of Respondents No. 1 to 3 Imtiaz Hussain, Iqbal and Mukhtar Shahzad as ordered by the learned trial Court is maintained and Criminal Appeal No. 74 of 2007 stands dismissed.

19. In the light of our above findings regarding acquittal of the appellants Iqbal Hussain and Mureed Hussain, Criminal Revision No. 57 of 2007 for enhancement of their sentence has lost its relevance and is, therefore, dismissed.

20. Needless to add that observations hereinbefore are strictly confined to the case of the appellants and the learned trial Court while deciding the case against the proclaimed offenders in this case shall not be influenced in any manner whatsoever and shall decide the case against them on its own merits strictly in accordance with law.

(R.A.) Appeal dismissed.

PLJ 2012 Cr.C. (Lahore) 889
Present: Muhammad Anwaar-ul-Haq, J.
CH. FAROOQ ALAM--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 10112-B of 2012, decided on 13.8.2012.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), S. 489-F--Bail, grant of--Disputed cheque was issued without date as guarantee in backdrop regarding transaction mentioned in FIR--Matter between parties was purely of rendition of accounts--Held: Alleged dishonest

intention of accused can validly be determined by trial Court after recording of some evidence and case against the accused, prima facie, falls within S. 497(2), Cr.P.C.--Accused was behind bars whereas maximum punishment provided for offence u/S. 489-F, PPC was imprisonment for three years and it does not fall within prohibitory clause, grant of bail in such like case is a rule and refusal is an exception--Bail was allowed. [P. 891] A

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

----S. 497(2)--Abscondance--If an accused is found entitled for bail on merits and his case is otherwise one of further inquiry into his guilt as contemplated u/S. 497(2), Cr.P.C. accused cannot be refused bail merely on ground of abscondance. [P. 891] B

2009 SCMR 299, ref.

Ch. Zulfiqar Ali, Advocate for Petitioner.
Mirza Abid Majeed, Deputy Prosecutor-General for State.
Syed M. Nisar Safdar, Advocate for Complainant.
Date of hearing: 13.8.2012.

Order

Through this petition Farooq Alam petitioner seeks post-arrest bail in case F.I.R, No. 1305/11, dated 12.12.2011, registered at Police Station Shah Bagh, Lahore in respect of an offence under Section 489-F, PPC.

2. Learned counsel for the petitioner contends that the petitioner is innocent and has falsely been roped in this case; that there is an inordinate delay of more than two months in lodging of the F.I.R. without any explanation; that in fact the disputed cheque mentioned in the F.I.R. was issued without date as a guarantee to the complainant in the backdrop of a business transaction and on the basis of the alleged cheque, complainant got lodged the instant F.I.R; that there is no documentary evidence whatsoever regarding the transaction mentioned in the F.I.R.; that the matter between the parties is purely of rendition of accounts but the complainant with the connivance of the police, converted the same into a criminal case; that prior to lodging of the instant F.I.R. civil suit between the parties regarding the disputed cheque is also pending before the learned Court of competent jurisdiction; that the offence against the petitioner does not fall within the prohibitory clause of Section 497, Cr. P.C.; that in the circumstances case against the petitioner is one of further inquiry into his guilt and that petitioner is behind the bars since 17.05.2012 without any progress in his trial.

3. Conversely, learned Law Officer assisted by learned counsel for the complainant opposing this bail application contends that the petitioner has deprived the innocent complainant from a huge amount of Rs.6,00,000/- that nothing is on the record that cheque was issued to the complainant as a guarantee in a business transaction; that in fact the petitioner took a loan from the complainant as he is his paternal uncle and has no reason to falsely implicate the petitioner in this case; that issuance of the disputed cheque by the petitioner is admitted and dishonouring of the same is sufficient to constitute an offence under Section 489-F, PPC; that delay in lodging of the F.I.R. has properly been explained in the F.I.R.; that petitioner is a habitual offender and three other cases i.e. F.I.R. Nos. 1094/11, 1304/11 and 36/12, under the similar offence, have also been registered against him; that petitioner remained fugitive from law for a considerable period of about four months; that contentions raised by the learned counsel for the petitioner need deeper appreciation of the

evidence of the case and that is not permissible at bail stage and that mere non-falling of an offence within prohibitory clause does not entitle any accused to be released on bail as a matter of right. Learned counsel for the complainant has placed reliance on case law 2011 MLD 299, 2010 YLR 3034, 2010 MLD 760, 2009 SCMR 174, 2009 YLR 1786, 2009 YLR 904, 2008 MLD 303, 2008 MLD 255, PLD 1984 SC 157 and PLD 2009 Cr. C (Lahore) 1004.

4. Heard. Record perused.

5. Be that as it may, F.I.R. does not speak about the nature and details of the transaction between the parties, even there is no documentary evidence whatsoever regarding the transaction mentioned in the F.I.R. The alleged dishonest intention of the petitioner can validly be determined by the learned trial Court after recording of some evidence and case against the petitioner, prima facie, falls within sub-section (2) of Section 497, Cr.P.C. and is one of further inquiry into his guilt. Petitioner is behind the bars since 17.05.2012 whereas the maximum punishment provided for the offence under Section 489-F, PPC is imprisonment for three years and it does not fall within the prohibitory clause of Section 497, Cr.P.C., grant of bail in such like cases is a rule and refusal is an exception. Learned counsel for the petitioner states at bar that in two cases i.e. F.I.R. Nos. 1304/11 and 36/12, petitioner has already been allowed bail. Further states that petitioner is previously non-convict.

As far as abscondance of the petitioner is concerned, it has by now well settled that if an accused is found entitled for bail on merits and his case is otherwise one of further inquiry into his guilt as contemplated under sub-section (2) of Section 497, Cr.P. Code, he cannot be refused bail merely on the ground of his abscondance. Reference in this context is placed on the case law Mitho Pitafi versus The State (2009 SCMR 299). Case law referred above by the learned counsel for the complainant is quite distinguishable than the facts and circumstances of the case.

6. In view of all above, I accept this petition and admit the petitioner to bail subject to his furnishing bail bonds in the sum of Rs.2,00,000/- (Rupees two hundred thousand only) with two sureties each in the like amount to the satisfaction of the learned trial Court/ Area Magistrate.

7. It is, however, clarified that observations made herein are just tentative in nature and strictly confined to the disposal of this bail petition.

(R.A.) Bail accepted.

K.L.R. 2012 Cr.C 97

[Lahore]

Present: **MUHAMMAD ANWAARUL-HAQ and SYED IFTIKHAR HUSSAIN SHAH, JJ.**

Nasar Hayat

Versus

Waseem Iqbal and others

Crl. Misc No. 1765-M of 2011, decided on 17th January, 2012.

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

---S. 417(2-A)---Appeal against acquittal---Limitation---Time limit for filing appeal against acquittal is thirty days. (Para 7)

APPEAL AGAINST ACQUITTAL---(Condonation of delay)

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

---S. 417(2-A)---Limitation Act, 1908, Ss. 29(2), 5---Pakistan Penal Code, 1860, Ss. 302/34---Criminal acquittal appeal---Limitation---Time limit for filing appeal against acquittal is thirty days---Instant appeal was filed after delay of more than one and half year---Condonation of delay---It was pleaded that delay in filing of appeal was neither intentional nor deliberate rather it could not be filed due to negligence of clerk of respondent counsel---Validity---Delay could be condoned only when it was shown that petitioner was actually kept out of knowledge or was prevented by some act of respondents themselves to come before Court in time---Reason stated by petitioner in support of application for condonation of delay was totally vague and petitioner had failed to make out any case for condonation of delay in filing appeal---Even otherwise, provisions of S. 5 of Limitation Act are not applicable to appeal against acquittal---Petition dismissed.

(Paras 6,8)

Ref. *1999 SCMR 795, 2008 SCMR 54, 2011 P.Cr.L.J. 200, 441, 2005 MLD 1333, 2008 MLD 187 and 1998 P.Cr.L.J. 1950.*

(c) Appeal against acquittal and condonation of delay---

---Law---Settled---The delay in filing the appeal against acquittal is condoned only in those cases where the petitioner is prevented by an act of the accused person to file the petition for special leave to appeal in time---The delay can be condoned only when it is shown that petitioner was actually kept out of knowledge or was prevented by some act of the respondents themselves to come before the Court in time. (Para 6)

[Appeal against acquittal of charge of murder was barred by time. Dismissed].

For the Petitioner: **Mian Muhammad Sikandar Hayat, Advocate.**

Date of hearing: **17th January, 2012.**

ORDER

Nasar Hayat, petitioner, has filed this petition under Section 5 of the Limitation Act, 1908 for condonation of delay in filing of appeal under Section 417(2A), Cr.P.C. against the judgment dated 4.9.2009 passed by the learned Sessions Judge, Khushab in case F.I.R. No.

8, dated 10.11.2008 registered under Sections 302/34, PPC at Police Station, Mitha Tiwana, District Khushab.

2. Learned counsel for the petitioner has contended that the precious rights of the appellant are at stake as respondent No. 1 Waseem Iqbal, is an accused of the murder of his Behnoi Wali Muhammad and if the appeal is not decided on merits it would go scot-free from prosecution. The delay in filing of appeal is neither intentional nor deliberate. It could not be filed due to the negligence of the clerk of Mr. Muhammad Asghar Khan Rokhari, learned Advocate, who drafted the appeal, signed the same and directed his clerk to file it, who did not file the same within time. Therefore, the delay in filing appeal is liable to be condoned under Section 5 of the Limitation Act, 1908. Learned counsel for the petitioner has relied on *Taiq Mahmood v. Mehfooz Hussain and 3 others* (2005 P.Cr.L.J. 1747), *Muhammad Sharif v. Jamshed Ali and others* (PLD 1996 Lahore 471), *Mst. Zeenat Sultan v. Mumtaz Khan and 9 others* (PLD 1994 SC 667) and *Hussain Bakhsh v. Allah Bakhsh, etc.* (PLJ 1981 SC 619), 2009 P.Cr.L.J. 199 (FSC).

3. We have heard the learned counsel for the petitioner and perused the available record.

4. The case was decided on 4.9.2009 whereas the appeal has been preferred on 5.7.2011 after the delay of more than one and a half year.

5. It is settled law that the delay in filing the appeal against the acquittal is condoned only in those cases where the petitioner is prevented by an act of the accused person to file the petition for special leave to appeal in time. The delay can be condoned only when it is shown that the petitioner was actually kept out of knowledge or was prevented by some act of the respondents themselves to come before the Court in time. The right to life is the basic right that human beings possess. Once a charge for a capital offence, duly tried, results in acquittal, the accused person acquires a very precious right and he should not therefore be put in jeopardy of his life by an appeal filed out of time and the law which enables interference with the acquittal must be strictly applied in favour of the accused person. The reasons stated by the petitioner in support of application for condonation of delay are totally vague and the petitioner has failed to make out any case for condonation of delay in filing the appeal.

6. Furthermore, sub-section (2-A) of Section 417, Cr.P.C. has been inserted *vide* Act XX of 1994, dated 14.11.1994 at the time when provisions of Section 5 of Limitation Act, 1908 were in existence. A bare reading of sub-section (2-A) of Section 417, Cr.P.C. expressly provides time limit for filing appeal against acquittal as thirty days. Section 29(2) of Limitation Act, 1908 reads as under:--

> (2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefore by the First Schedule, the provisions of Section 3 shall apply, as if such period were prescribed therefor in that Schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law:--
>
> (a) the provisions contained in Section 4, Sections 9 to 18, and Section 22 shall apply only insofar as, and to the extent of which they are not expressly excluded by such special or local law; and
>
> (b) the remaining provisions of this Act shall not apply.

7. We are of the considered view that in the presence of bar mentioned above, the provisions of Section 5 of the Limitation Act are not applicable to the appeals against acquittal. It has been held in the cases of *Fakhar-ud-Din v. Fazal Karim and others*(1999 SCMR 795) and *Aziz-ur-Rehman Hamid v. Crescent Commercial Bank* (2008 SCMR 54) that application under Section 5 of the Limitation Act, 1908 is not maintainable in appeal against acquittal and the same principle has been followed by the Courts, therefore, we respectfully refer the cases of *Messrs Pehlwan Marble Factory through Muhammad Asif v. The State and another* (2011 P.Cr.L.J. 200), *Abdul Ghaffar v. Muhammad Asif and another* (2011 P.Cr.L.J. 441), *Muhammad Sharif and others v. The State and others* (2005 MLD 1333), *Toshan v. Muhammad Saleh and 2 others* (2008 MLD 187), *Sikandar v. Abdul Wahab and others* (1998 P.Cr.L.J. 1950). In view of well-settled legal position discussed above, the instant petition being devoid of any legal justification is hereby dismissed *in limine*.

Crl. Misc. dismissed.

K.L.R. 2012 Criminal Cases 175

[Lahore]

Present: **MUHAMMAD ANWAARUL HAQ and SYED IFTIKHAR HUSSAIN SHAH, JJ.**

Mohsin Ashraf

Versus

Spl. Judge, ATC and others

Writ Petition No. 25057 of 2011, decided on 10th November, 2011.

(a) Ant-Terrorism Act (XXII of 1997)---

---S. 6---Act of terrorism---Application criteria---It would be imperative to go through the allegations made in the F.I.R. and to examine that the ingredients of alleged offence have got any nexus with the object of the case---The motivation, object, design or purpose behind the act is to be seen---It is also to be seen as to whether the said act has created a sense of fear and insecurity in the public or any sector of the public or community or in any sect.

(Para 10)

OFFENCE WHETHER AN ACT OF TERRORISM OR NOT---(Criteria)

(b) Constitution of Pakistan (1973)---

---Art. 199---Pakistan Penal Code, 1860, Ss. 302/324/148/149/34/109 r/w Ss. 7, 6, 23, ATA---Occurrence of three deceased---Transfer of case to Court of ordinary jurisdiction---Criteria---Whether a particular act is an act of terrorism or not, the motivation, object, design or purpose behind said act is to be seen---It is also to be seen as to whether the said act has created a sense of fear and insecurity in the public or any sector of the public or community or in any sect---Alleged offence took place because of previous enmity and private vendetta---Said occurrence neither reflected any act of terrorism or it was a sectarian matter---In fact it was a murder committed due to previous enmity between parties---Trial Court had rightly transferred case to Court of ordinary jurisdiction for trial---Impugned order was in accordance with law---Writ petition dismissed. (Paras 12,13)

Ref. PLD 2009 SC 11 and 2008 PSC SC (Crl.) 989.

[Occurrence of murder was outcome of previous enmity and therefore, alleged offence did not attract provision of ATA. Case was rightly transferred to ordinary Court. High Court dismissed writ petition].

For the Petitioner: **Aish Bahadur Rana, Advocate.**

Date of hearing: **10th November, 2011.**

ORDER

The petitioner Mohsin Ashraf, Advocate who is the complainant of case F.I.R. No. 848/2011 under Sections 302/324/148/149/34/109, PPC and Section 7, ATA registered at Police Station, Nawankot, Lahore has assailed the legality of order dated 3.11.2011 passed by the learned Special Judge Anti-Terrorism Court No. I, Lahore whereby an application made by respondents Nos. 2 and 3 under Section 23 of the Anti-Terrorism Act, 1997 for transfer of the afore-mentioned case to the Court of ordinary jurisdiction was accepted.

2. Faisal Mehmood and Muhammad Farooq, who were facing trial before the learned Judge Anti-Terrorism Court, Lahore-I in the case referred above made a petition for the transfer of this case to the Court of ordinary jurisdiction on the ground that the occurrence of this case was on outcome of the previous enmity.

3. Learned counsel for the petitioner has contended that the occurrence had taken place in the Bazar wherein even an unknown passerby was also injured, panic was created in the Bazar and the shopkeepers had to close their shops and the passerby saved their lives by lying on the road but the learned Trial Court had not looked into this aspect of the case and had dismissed the application arbitrarily. Relies on "PLD 2004 SC 917", PLD 2005 Karachi 344", "2010 P.Cr.L.J. 23 Lahore", 2009 YLR 886" and "PLD 2003 SC 224".

4. We have heard the learned counsel for the petitioner and have also gone through the available record annexed with the petition.

5. Allegedly, on 26.6.2011 at about 8:40 p.m. accused Muhammad Farooq armed with kalashinkov and Faisal armed with rifle 222 alongwith three unknown accused while armed with fire-arm attacked upon the complainant party when Malik Muhammad Ashraf father, Muhammad Azhar *alias* Ajji brother, Amina sister of the complainant alongwith Muhammad Hussain *alias* Aasi were sitting in the street, made indiscriminate firing as a result of which Malik Muhammad Ashraf, Malik Muhammad Azhar and Muhammad Hussain *alias* Aasi were murdered whereas a passerby lady and one Amna Ashraf were injured.

6. The motive behind this occurrence as mentioned in the F.I.R. is that one Naveed, brother of accused Farooq and Faisal and cousin of accused Ali Adnan, alongwith his co-accused had murdered the younger brother of the complainant namely Babar wherein four of the accused persons had been convicted and their appeals are pending before the High Court and the accused had been compelling the father of the complainant for compromise.

7. The very object to promulgate Anti-Terrorism Act, 1997 was to control the acts of terrorism, sectarian violence and other heinous offences as defined in Section 6 of the Act and their speedy trials. To bring an offence within the ambit of the Act, it is essential to examine that the said offence should have nexus with the object of the Act and the offences covered by its Sections 6, 7 and 8. On bare perusal of sub-clauses (b), (d), (h) and (i) of sub-section (1) of Section 6 of the Act, it is abundantly clear that the offence which creates a

sense of fear or insecurity in society, causes death or endangers a person's life, involves firing on religious congregations, mosques, imambargahs, churches, temples and all other places of worship, or random firing to spread panic, or involves any forcible takeover of mosques or other places of worships, falls within its ambit. But in this case the occurrence has taken place in the street in front of house of the complainant and the motive behind the occurrence is admittedly the previous enmity, therefore, the facts of the present case are quite different from the case titled "*Muhammad Farooq Vs. Ibrar and 5 others* (PLD 2004 SC 917)." In the said case the occurrence had taken place in a mosque during Juma prayer where a large number of persons had assembled to offer prayer.

8. Similarly, in case titled "*Khizar Hayat Vs. Judge Special Court Anti-Terrorism, Rawalpindi* (1) (2009 YLR 886 [Lahore])" the occurrence had taken place a Adda Jalab where an accused who while armed with kalashinkov came in truck, resorted firing on the complainant party resulting in murder of two persons and causing injuries to six other persons.

9. In a case titled "*Amir Khan Vs. The State* (PLD 2005 Karachi 344)", the firing was made to sabotage the transparent process of the bye-election and to spread terrorism or fear in the people, so the facts and circumstances of the present case are quite different from the facts of the present case.

10. The case-law relied upon by the learned counsel for the petitioner is not directly applicable to the facts and circumstances of the present case. In order to ascertain as to whether an offence will fall within the ambit of Section 6 of the Anti-Terrorism Act, 1997 or not, it would be imperative to go through the allegations made in the F.I.R. and to examine that the ingredients of the alleged offence have got any nexus with the object of the case as contemplated under Sections 6, 7 and 8 thereof. Whether a particular act is an act of terrorism or not, the motivation, object, design or purpose behind said act is to be seen. It is also to be seen as to whether the said act has created a sense of fear and insecurity in the public or any section of the public or community or in any sect.

11. Examining the case in hand, it is manifest on the face of it that the alleged offence took place because of the previous enmity and private vendetta. The occurrence had taken place in the street in front of the house of the complainant where all the three deceased persons were sitting on chairs and it is admitted in the F.I.R. itself that motive behind the occurrence is the enmity *inter se* between the parties on account of the murder of one Babar, the younger brother of the complainant and the accused were pressurizing the complainant and his father Malik Muhammad Ashraf and his uncle Muhammad Azhar *alias* Ajji for effecting compromise in the said case.

12. The motive behind the occurrence is admittedly previous enmity, therefore, we are of the considered view that the application of Section 7 of the Anti-Terrorism Act, 1997 which primarily requires the spread of sense of insecurity and fear in the common mind is lacking in the present case. The occurrence neither reflects any act of terrorism nor it was sectarian matter and in fact it was a murder committed due to previous enmity between the parties. Reliance can be safely placed on case titled "*Bashir Ahmad Vs. Muhammad Siddique* (PLD 2009 Supreme Court 11)".

13. The learned Trial Court has rightly accepted the application made under Section 23 of the Anti-Terrorism Act, 1997 and the impugned order is in accordance with

law, the same is hereby maintained and the writ petition in hand stands dismissed *in limine* being without any merits.

Petition dismissed.

K.L.R. 2012 Cr.C. 226
[Lahore]
Present: **MUHAMMAD ANWAAR-UL-HAQ and SYED IFTIKHAR HUSSAIN SHAH, JJ.**
Muhammad Mursaleen
Versus
Ehsan Ullah and others

Crl. Appeal No. 225 of 2010, decided on 15th February, 2012.

(a) Acquittal---
---Principle of criminal administration of justice---Stated---When an accused is acquitted from a case after regular trial, he enjoys the double presumption of innocence and his acquittal cannot be disturbed without any strong and exceptional reason. (Para 5)
Ref. *2010 SCMR 222 and 2004 SCMR 1185.*

ACQUITTAL---(Presumption of innocence)

(b) Criminal Procedure Code (V of 1898)---
---S. 417(2A)---Pakistan Penal Code, 1860, S. 302---Criminal acquittal appeal---Double presumption of innocence---Evidence of 'Wajtakkar'---Appraisal of---Recovery of alleged weapon of offence was only a supportive piece of evidence---Mere recovery without any substantive evidence did not advance prosecution case---Even otherwise, when an accused is acquitted from a case after regular trial, he enjoys the double presumption of innocence and his acquittal cannot be disturbed without any strong and exceptional reason---Acquittal of respondent was based upon sound and cogent analysis and appreciation of evidence available on record---Criminal acquittal appeal dismissed. (Para 5)
Ref. *2004 SCMR 1185, 2010 SCMR 222 and 2010 SCMR 97.*
[Appeal against acquittal from charge of murder was dismissed].
For the Appellant: **Rai Muhammad Usman, Advocate.**
Date of hearing: **15th February, 2012.**

ORDER

This appeal is directed against the judgment dated 18.12.2009 passed by the learned Additional Sessions Judge, Gujranwala, whereby respondent No. 1 Ehsan Ullah has been acquitted from the charge in the case F.I.R. No. 478/2008, dated 13.12.2008, registered at Police Station, Qila Didar Singh District Gujranwala, in respect of offence under Section 302, PPC, with the allegation that on 13.12.2008 at about 4.30 a.m. Muhammad Saleem (deceased) was proceeding to the '*Daira*' of Ch. Muhammad Ashraf for collection of milk, followed by Sana Ullah (PW-1) at some distance when some unknown assailant resorted to firing upon Muhammad Saleem (deceased), which occurrence was informed to the complainant Muhammad Mursaleen (brother of the deceased) by said Sana Ullah

telephonically and he alongwith Qaisar PW reached at the place of occurrence and saw that his brother had succumbed to the injuries.

2. Respondent No. 1 Ehsan Ullah was involved in this case on the basis of statements made by PWs Azmat Ullah and Faisal alleging that on 13.12.2008 at 4.45/5.00 a.m. they were proceeding on their motor-cycle to village Bahmni *via* Minor Gobindpur; when they reached near Pulli Abdullahpur, in the light of motor-cycle they saw Ehsan Ullah coming towards them in running position who was holding 12-bore pump action gun; when he reached near to them they called him and asked what happened who replied that it is all right and crossed the Pulli and they proceeded to village Bahmni where they received telephone of Mursaleen who informed about the hitting of fire-shot by some unknown person to Saleem deceased whereupon they arrived at the place of occurrence and informed about their 'Wajtakkar' with Ehsan Ullah.

3. Learned counsel for the appellant in support of this appeal contends that there is sufficient evidence in the shape of 'Wajtakkar' comprising of PW-8 Azmat Ulah, medical evidence, motive and recoveries; that the complainant/appellant had no *mala fide* intention to falsely involve the respondent No. 1 in this case; that it is a case of single accused and there was no reason for substitution; that during the investigation the police has found the respondent No. 1 fully involved in this occurrence; that recovery of weapon of offence (12-bore gun) at the instance of respondent No. 1 and positive report of the Forensic Science Laboratory were sufficient to strengthen the prosecution version; that acqulttal of respondent No. 1 is the result of mis-reading and non-reading of the prosecution evidence on record; that in the afore-referred circumstances, the learned Trial Court was not justified to acquit respondent No. 1 from the charge of murder of Muhammad Saleem and that he is liable to be convicted and sentenced in accordance with law.

4. Heard. Record perused.

5. After going through the impugned judgment, we are of the considered view that the learned Trial Court has given convincing and plausible reasons for acquittal of respondent No. 1 Ehsan Ullah while observing as under:--

> "Sana Ullah PW-1 claims himself as the eye-witness of the occurrence committed by unknown assailants on 13.12.2008 at 4.25 a.m. when Muhammad Saleem deceased was proceeding ahead of him at a distance of 1-½ or 2 acres when unknwon persons fired at Saleem near to the Bore of tube-well of Saif Ullah Tarrar. This PW stated that on the day of occurrence, was the month of December. It was cold and foggy night and at that time Fajar Azan has not yet been pronounced. He accepted that it is correct due to fog and darkness he could not recognize the culprit. Thereafter, there comes evidence of PW-8 Azmat Ullah in the shape of wajtakkar…… This PW is husband of sister of the deceased in his second marriage and the deceased was husband of the daughter of this PW. The place of wajtakkar is open fields all around and the time of occurrence advanced by PW-1 Sana Ullah is 4.25 a.m. whereas time advanced by Azmat Ullah PW-8 for wajtakkar is 4.45 or 5.00 a.m. meaning thereby that the difference between the time of occurrence and that of wajtakkar is hardly 20 or 30 minutes approximately. Taking into consideration the scenario of occurrence as month of December, cold and foggy night PW-1 Sana Ullah could not recognize the culprits due to fog and darkness besides the fact that PW-1 Sana Ullah was a young man of 32 years of age

then PW-8 Azmat Ullah aged about 55 years, riding on a motor-cycle in the cold foggy weather at 4.45 a.m. or 5.00 a.m. the recognition of the accused by the said PW-8 Azmat Ullah is not appealable to the ordinary prudence."

As far as recovery of gun at the instance of respondent No. 1 and positive report of the Forensic Science Laboratory are concerned, suffice it to say that recovery of weapon of offence is only a supportive piece of evidence in a murder case and mere recovery without any substantive evidence does not advance the prosecution case. In this context, we respectfully rely on the case of *Noor Muhammad Vs. The State and another* (2010 SCMR 97) wherein the Hon'ble Supreme Court of Pakistan has observed as under:-

"Even otherwise the recovery of crime-empty or rifle with matching report of F.S.L. is a corroborative piece of evidence, which by itself is not sufficient to convict the accused in the absence of substantive evidence. Reference is invited to *Ijaz Ahmed v. State* (1997 SCMR 1279). It was held in the case of *Asadullah Muhammad Ali* (PLD 1971 SC 541), that corroborative evidence is meant to test the veracity of ocular evidence. Both corroborative and ocular testimony is to be read together and not in isolation. In the case of *Saifullah v. The State* (1985 SCMR 410), it was held that when there is no eye-witness to be relied upon, then there is nothing which can be corroborated by the recovery."

Even otherwise, it is a settled principle of the criminal dispensation of justice that when an accused is acquitted from a case after regular trial, he enjoys the double presumption of innocence and his acquittal cannot be disturbed without any strong and exceptional reason. In this context we rely on the case of *Haji Amanullah Vs. Munir Ahmed and others* (2010 SCMR 222) and the case of *Iftikhar Hussain and others Vs. The State* (2004 SCMR 1185).

In view of all above, the findings of the learned Trial Court cannot be said to be the result of any misreading or non-reading of the evidence and we find that acquittal of the respondent No. 1 is based upon sound and cogent analysis and appreciation of the evidence available on the record. Resultantly, this appeal against acquittal of respondent No. 1 Ehsan Ullah has no merits and is hereby dismissed, *in limine*.

Criminal appeal dismissed.

2012 P.Cr.R. 343

[Lahore]

Present: **SYED IFTIKHAR HUSSAIN SHAH and MUHAMMAD ANWAARUL HAQ, JJ.**

Muhammad Saeed and others

Versus

The State and others

Crl. Appeal No. 1191 of 2011, decided 19th January, 2012.

SUSPENSION OF SENTENCE---(Acquittal from main case)

Criminal Procedure Code (V of 1898)---

---S. 426---Pakistan Penal Code, 1860, Ss. 337-F(iii), 324---Suspension of sentence and grant of bail---Petitioner had been acquitted of charge u/S. 302, PPC on basis of same evidence---Four of co-accused had been acquitted by Trial Court---Petitioner remained on

*bail till disposal of case---**Held:** Prosecution evidence needed reappraisal qua role of petitioner---Impugned sentence of 7 years' R.I. was suspended by High Court and petitioner was admitted on bail---Sentence suspended. (Para 5)*

[On the same evidence petitioner was acquitted of the charge u/S. 302, PPC. Impugned sentence awarded u/S. 324, PPC was suspended].

For the Petitioner: **Munir Ahmad Bhatti, Advocate.**

For the Complainant: **Mian Muhammad Aslam Pervaiz, Advocate.**

For the State: **Ch. Muhammad Mustafa, D.P.G.**

Date of hearing: **19th January, 2012.**

ORDER

The petitioner Muhammad Aslam has filed this petition under Section 426, Cr.P.C. seeking suspension of his sentence awarded by the learned Additional District Judge, Jaranwala *vide* judgment dated 28.6.2011. The applicant was convicted for attempt to commit Qatl-i-Amd and causing injuries to Muhammad Ramzan as under:--

Under Section 337-F(iii), PPC sentenced to rigorous imprisonment for three years and to pay Daman of Rs. 10,000/- to injured Muhammad Ramzan.

Under Section 324, PPC sentenced to rigorous imprisonment for seven years.

All the sentences of imprisonment were ordered to run concurrently with the benefit of Section 382-B, Cr.P.C.

2. Learned counsel for the petitioner has contended that the petitioner has already been acquitted from the charge under Section 302, PPC and the petitioner has been convicted under Section 324, PPC for rigorous imprisonment for seven years and under Section 337-F(iii), PPC for rigorous imprisonment for three years; that the involvement of the petitioner on the basis of same evidence needs re-appraisal of evidence.

3. Learned DPG assisted by the learned counsel for the complainant has opposed this petition and contended that there is direct role of causing fire-arm injury against the petitioner, who after having been found fully involved in this case has been convicted and sentenced after regular trial, as such he is not entitled to the concession of bail.

4. We have heard learned counsel for the petitioner, learned DPG for the State and also perused the available record.

5. The co-accused of the petitioner namely Muhammad Saeed has been sentenced to death and appeal of the present petitioner filed alongwith the co-accused Muhammad Saeed was filed on 2.7.2011. Four of the co-accused have been acquitted by the learned Trial Court and the petitioner has also been acquitted from the charge under Section 302, PPC on the basis of same evidence and available record. The petitioner remained on bail till the disposal of the case. In this view of the matter, the prosecution evidence needs reappraisal *qua* the role of the petitioner. Therefore, without commenting upon the merits of the case while suspending the impugned judgment dated 28.6.2011 to the extent of sentence of the petitioner, we admit the petitioner on bail subject to his furnishing bail bonds in the sum of Rs. 2,00,000/- with two sureties in the like amount to the satisfaction of the Deputy Registrar (J) of this Court. However, the petitioner shall appear on all subsequent dates fixed by this Court in his appeal.

Sentence suspended.

2012 P.Cr.R. 376
[Lahore]
Present: **MUHAMMAD ANWAARUL HAQ, J.**
Khizar Hayat
Versus
The State and 2 others

Crl. Revision No. 209 of 2011, decided on 17th March, 2011.

AGE OF ACCUSED---(Medical report)

Criminal Procedure Code (V of 1898)---

*---S. 439---Juvenile Justice System Ordinance, 2000, S. 7---Criminal trial---Question of determination of age of accused---Specific procedure---A Court is required to hold inquiry that includes a medical report to ascertain age of accused if any question arises regarding the same---**Held:** Impugned order was based upon personal assessment of the Presiding Officer of the Court and that too just on basis of physical appearance of petitioner regarding his age---Impugned order was set aside/Case remanded. (Para 5)*

Ref. *PLD 2004 SC 758.*
[In the event of dispute, medical report was necessary to determine age of accused. High Court remanded the case].
For the Petitioner: **Naveed Ahmad Khawaja, Advocate.**
For the State: **Tasawar Ali Khan Rana, D.P.G.**
Date of hearing: **17th March, 2011.**

JUDGMENT

MUHAMMAD ANWAARUL HAQ, J. --- Through this petition, Khizar Hayat petitioner assails the impugned order dated 26.1.2011 passed by the learned Additional District Judge, Gujranwala whereby he was dismissed the application of the petitioner for conducting his trial under Juvenile Justice System Ordinance, 2000.

2. It has been contended by the learned counsel for the petitioner that learned Trial Court while dismissing the application of the petitioner has failed to consider the fact that as per Birth Certificate the date of birth of the petitioner is 15.10.1995 whereas the occurrence took place on 9.9.2010 and in this view of the matter petitioner is, *prima facie*, a minor and is entitled to be tried under the Juvenile Justice System Ordinance, 2000. Learned counsel further contends that learned Trial Court could not determine the age of the accused without obtaining opinion from the Medical Board; that order of learned Trial Court is against the settled legal proposition.

3. Learned Deputy Prosecutor-General frankly concedes that order of the learned Trial Court is not a legal order as required under Section 7 of the Juvenile Justice System Ordinance, 2000 that provides a specific procedure to resolve the question of determination of the age of the accused, if he claims minority. He adds that he has no

objection if the matter is remanded back to the learned Trial Court to hold an inquiry under Section 7 of the Ordinance *ibid*.

4. I have heard the arguments from both the sides and gone through the record.

5. Impugned order is apparently based upon the personal assessment of the learned Trial Judge and that too just on the basis of physical appearance of the petitioner regarding his age. I am quite in agreement with the learned counsel for the petitioner and learned Law Officer that impugned order is out rightly against the petitioner given in Section 7 of the Juvenile Justice System Ordinance, 2000, that requires a Court to hold an inquiry that includes a medical report to ascertain the age of the accused if any question arises regarding the same.

I, therefore, allow this revision petition, set aside the impugned order and remand back the matter to the learned Trial Court to hold an appropriate inquiry under Section 7 of the Juvenile Justice System Ordinance, 2000, keeping in view the guidelines provided by the Hon'ble Supreme Court of Pakistan in the case of *Sultan Ahmed Vs. Additional District Judge-I, Mianwali and 2 others* (PLD 2004 Supreme Court 758) in this regard.

Case remanded.

2012 P.Cr.R. 381
[Lahore]
Present: **MUHAMMAD ANWAARUL HAQ, J.**
Abdul Waheed
Versus
The State and another

Crl. Misc. No. 6090/B of 2011, decided on 21th June, 2011.

BAIL BEFORE ARREST (DACOITY)---(Rule of consistency)

Criminal Procedure Code (V of 1898)---

*---Ss. 498/497(2)---Pakistan Penal Code, 1860, Ss. 399/402---Bail before arrest matter---Ground of consistency---Co-accused having similar role had already been allowed bail by Trial Court---**Held:** Case of petitioner was at par with case of his co-accused already allowed bail after arrest---There was no justifiable reason to send petitioner behind bars only to require him to file another bail application for his post-arrest bail---Ad-interim post-arrest bail confirmed.* *(Para 5)*

Ref. *2007 YLR 1159.*
[Co-accused with identical role had already been granted post-arrest bail. Bail before arrest was allowed to petitioner].
For the Petitioner: **Naveed Ahmad Khawaja, Advocate.**
For the State: **Shahid Bashir, DPG.**
Date of hearing: **21th June, 2011.**

ORDER

MUHAMMAD ANWAARUL HAQ, J. --- The petitioner seeks post-arrest bail in case F.I.R. No. 212, dated 2.5.2011 under Sections 399 and 402, PPC registered at Police Station, Shakar Gharr.

2. Learned counsel for the petitioner contends that the case against the petitioner is based upon *mala fide* of the police; that three co-accused of the petitioner have already been granted post-arrest bail by the learned Trial Court on 21.5.2011, therefore, the petitioner is also entitled to post-arrest bail on the rule of consistency. Places reliance on 1986 SCMR 1380, 2007 YLR 1159 and 2009 P.Cr.L.J. 729. Further contends that no useful purpose would be served by sending the petitioner behind the bars.

3. On the other hand learned Deputy Prosecutor-General while vehemently opposing this bail application contends that no *mala fide* on the part of the police has been pointed out by the learned counsel for the petitioner, which is *sine qua non* for the grant of post-arrest bail.

4. Heard. Record perused.

5. It is an admitted fact that co-accused of the petitioner namely Muhammad Shahzad, Muhammad Shahbaz and Ahmad having similar role have already been allowed after arrest bail by the learned Trial Court on 21.5.2011. As the case of the petitioner is at par with the case of his co-accused already allowed bail after arrest, therefore, I do not find any justifiable reason to send the petitioner behind the bars only to require him to file another bail application for his post-arrest bail on the ground of consistency. I respectfully rely on the case of "*Shafaqat Hussain Vs. The State* (2007 YLR 1159)" wherein this Court has observed as under:--

> "It may not be out of place to mention here that two co-accused of the petitioner namely Imran and Saqlain have already been admitted to post-arrest bail by this Court *vide* order dated 17.10.2006 passed in Criminal Miscellaneous No. 7758-B of 2006. On the merits of the case the petitioner has a better case for bail than the said co-accused but the only difference is that the petitioner is seeking post-arrest bail whereas the said co-accused had been admitted to post-arrest bail. It is, thus, quite likely that in case of dismissal of the present petition for post-arrest bail the petitioner may immediately become entitled to post-arrest bail on the above-mentioned ground. In the case of *Muhammad Ramzan v. Zafar Ullah and another*(1986 SCMR 1380) it had been held by the Honourable Supreme Court of Pakistan that post-arrest bail of an accused person may not be cancelled where he has a good case for post-arrest bail on the ground of consistency."

In view of all above, post-arrest bail already granted to the petitioner on 25.5.2011 is hereby confirmed subject to his furnishing fresh bail bond in the sum of Rs. 50,000/- (Rupees fifty thousand only) with one surety in the like amount to the satisfaction of the learned Trial Court/Area Magistrate within ten days.

Ad-interim post-arrest bail confirmed.

2012 P.Cr.R. 834
[Lahore]
Present: **MUHAMMAD ANWAAR-UL-HAQ, J.**
Farasat
Versus
The State etc.

Criminal Misc. No. 363 of 2012, decided on 26th January, 2012.

BAIL --- (Self-inflicted injuries)

Criminal Procedure Code (V of 1898)---

*---S. 497(2)---Pakistan Penal Code, 1860, Ss. 337-F(iii), 337-A(i), 337-F(i), 341, 337-H(2)/34---Self-inflicted injuries---Vicarious liability---Bail concession---**Held:** Standing Medical Board constituted on application of petitioner for re-examination of injured was of the opinion that possibility of fabrication regarding injury in question on person of injured could not be ruled out---Question of vicarious liability of petitioner in circumstances of case could validly be determined by Trial Court only after recording of evidence---There was delay of 4 days in medical examination of injured whereas there was seven days' delay in lodging of the F.I.R---Injuries attributed to petitioner having already been declared falling u/Ss. 337-F(iii) and 337-F(i) did not catch prohibition---Case against petitioner, prima facie was one of further inquiry---Bail after arrest granted. (Paras 5, 6)*

[FIR was delayed by 7 days. Medical Board opined that possibility of self inflicted injuries could not be ruled out. Bail was granted].
For the Petitioner: **Haji Khalid Rehman, Advocate.**
For the State: **Ch. Muhammad Akram Tahir, Deputy District Public Prosecutor with Zahoor Ismaiel, S.I. with record.**
Abdul Razzaq complainant in person.
Date of hearing: **26th January, 2012.**

ORDER

MUHAMMAD ANWAARUL HAQ, J. --- Through this petition, Farasat petitioner has sought post arrest bail in case F.I.R. No. 961, dated 01.10.2011, under Sections 337-F(iii), 337-A(i), 337-F(i), 341, 337-H(2)/34 and 377/511, PPC, registered at Police Station Saddar, District Jhang.

2. Learned counsel for the petitioner contends that case against the petitioner is totally false and fabricated; that there is an inordinate delay of about seven days in lodging of the F.I.R. even the medical examination of the injured was conducted after four days of the occurrence; that the injuries attributed to the petitioner have already been declared falling under Sections 337-F(iii) and 337-F(i), PPC; that Standing Medical Board constituted on the application of the petitioner, is of the opinion that possibility of fabrication regarding injury No. 3 on the person of the injured, cannot be ruled out; that the offences against the

petitioner do not fall within the prohibitory clause of Section 497, Cr.P.C.; that petitioner is behind the bars since 08.12.2011 without any substantive progress in the trial; and that in the circumstances case against the petitioner is one of further inquiry into his guilt.

3. Conversely, learned Law Officer vehemently opposing this bail petition contends that petitioner is duly nominated in the F.I.R. with specific role of causing two injuries on the person of the injured Abdul Rehman, who was medically examined through police as such, the delay in lodging the F.I.R. in the circumstances of the case is insignificant and that cannot be attributed to the complainant; that version of the complainant as given in the F.I.R. is fully supported by the statements of PWs recorded under Section 161, Cr.P. Code and the medico-legal report of the injured; that there is no *mala fide* on the part of the complainant or the police to falsely involve the petitioner in this case; that petitioner is vicariously liable for every act of his co-accused and that during the investigation, petitioner has been found fully involved in the occurrence; that mere non-falling of an offence within the prohibitory clause of Section 497, Cr.P.C. itself is not sufficient to enlarge the petitioner on bail and that it is a case of attempt to commit sodomy that is heinous in nature, hence, petitioner is not entitled for bail.

4. Heard. Record perused.

5. Be that as it may the injuries attributed to the petitioner have already been declared falling under Sections 337-F(iii) and 337-F(i), PPC and the maximum punishment provided for the offences is imprisonment for three years and one year, respectively and do not fall within the prohibitory clause of Section 497, Cr.P.Code. The Standing Medical Board constituted on the application of the petitioner for re- examination of injured Abdul Rehman, is of the opinion that possibility of fabrication regarding injury No. 3 on the person of the injured, cannot be ruled out. Question of vicarious liability of the petitioner in the circumstances of the case can validly be determined by the learned Trial Court only after recording of some evidence. There is delay of 4 days in the medical examination of the injured whereas there is seven days' delay in lodging of the F.I.R. Petitioner is behind the bars since 08.12.2011 without progress in the trial.

6. In view of all above, case against the petitioner, *prima facie*, is one of further inquiry into his guilt as contemplated under sub-section (2) of Section 497, Cr.P.Code. I, therefore, accept this petition and admit the petitioner to post-arrest bail subject to his furnishing bail bond in the sum of Rs. 50,000/- (Rupees fifty thousand only) with one surety in the like amount to the satisfaction of the learned Trial Court .

Bail after arrest granted.

2012 P.Cr.R. 984
[Lahore]
Present: **MUHAMMAD ANWAAR-UL-HAQ, J.**
Muhammad Rafique and 6 others
Versus
The State and 4 others

Writ Petition No. 3713 of 2010, decided on 1st March, 2012.

CONCLUSION

(1) The pendency of civil litigation between the parties in respect of the disputed property by itself is no ground to oust the jurisdiction of a Magistrate to exercise the power u/S. 145, Cr.P.C., if the Civil Court had not passed any order regulating the possession of the disputed land.

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

---S. 145---Nature of proceedings---**Held:** Proceedings under said section are of temporary nature and are subservient to the findings of the Civil Court---The pendency of civil litigation between the parties in respect of the disputed parties by itself is no ground to oust the jurisdiction of a Magistrate to exercise the powers under said section if the Civil Court had not passed any order regulating the possession of the disputed land. (Para 6)

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

---S. 145---Initiation of proceedings---Intent and scope---The rationale of said section is to prevent the breach of peace relating to the dispute over the land and to make an interim order for protecting a person in possession of the land as well as to meet an emergency as a stop-gap to maintain peace and to enable the parties to seek their redress about title or claim of right to possess the disputed property in a Civil Court and for this purpose a person who has been forcibly and wrongfully dispossessed within a period of two months can be treated as if he had been in possession of the land at such date and such possession is subject to the decision of Civil Court of competent jurisdiction regarding title or possession of the disputed law. (Para 6)

INITIATION OF PROCEEDINGS U/S. 145, Cr.P.C.---(Validity)

(c) Constitution of Pakistan, 1973---

---Art. 199---Apprehension of breach of peace---Initiation of proceedings u/S. 145, Cr.P.C.---Pendency of civil litigation---Validity---Pendency of civil litigation between the parties in respect of the disputed property by itself is no ground to oust the jurisdiction of a Magistrate to exercise the powers u/S. 145, Cr.P.C., if the Civil Court had not passed any order regulating the possession of the disputed land---In instant case, there was no order of Civil Court regulating possession of disputed land---Keeping in view conflicting claims regarding possession of disputed land at time of apprehension of breach of peace, Magistrate had

rightly conducted proceedings u/S. 145, Cr.P.C. and held an inquiry on the point that which party was in possession of disputed land within a period of two months before submission of report and decided the matter accordingly, which order had validly been upheld by lower revisional Court---Even otherwise, assertion of facts in instant Constitution petition related to civil rights and may ultimately fall within the realm of factual controversy, which task could not be undertaken in exercise of writ jurisdiction---Writ petition dismissed.

(Paras 6,7)

Key Terms:- Proceedings u/S. 145, Cr.P.C.
[There was no order of Civil Court regulating possession of land in dispute. Writ petition was dismissed against impugned proceedings u/S. 145, Cr.P.C.].
For the Petitioner: **Ms. Erum Sajjad Gul, Advocate.**
For the Respondent No. 4: **S.M. Masud, Advocate.**
For the State: **Raza-ul-Karim Butt, Assistant Advocate-General.**
Date of hearing: **1st March, 2012.**

ORDER

MUHAMMAD ANWAAR-UL-HAQ, J. --- Brief facts of the case relevant for the disposal of this writ petition are that a dispute arose between the petitioner and respondent No. 4 regarding the land measuring 5 kanals and 1 marla and for possession of the same both the parties were at daggers drawn, therefore, an application under Section 145, Cr.P.C. was moved by the S.H.O., Police Station, Aroti District Toba Tek Singh, upon which, the disputed property was attached by the order of the learned Magistrate with a direction to the concerned Tehsildar to manage the affairs of the said property and the parties were directed to produce their evidence regarding the fact that who was in possession of the disputed property two months earlier from the date of attachment. Both the parties produced their evidence and the learned Magistrate through the impugned order dated 28.1.2009 de-attached the disputed property directing the concerned Tehsildar to hand over the possession thereof to respondent No. 4 Muhammad Aslam with the further observation that since the civil litigation between the parties is already underway, therefore, parties were left open to avail remedies in the Civil Court for the recovery of possession etc. Against the order of the learned Magistrate, revision petition filed by the petitioner has been dismissed by the learned Additional Sessions Judge through the impugned order dated 16.2.2010; hence, this writ petition.

2. Learned counsel for the petitioner contends that the proceedings under Section 145, Cr.P.C. conducted by the learned Magistrate are contrary to law; that the disputed property being already regulated by the Civil Court was out of the jurisdiction of the Magistrate; that the S.H.O. initiated the proceedings under Section 145, Cr.P.C. in collusion with respondent No. 4; that the impugned orders passed by both the Courts below do not contain any reason and are based upon misreading and non-reading of the record; that both the impugned decisions being absolutely against law and facts of the case are not sustainable in the eyes of law. Reliance has been placed upon *Muhammad Sadiq Vs. Muhammad Rafiq and others* (2006 SCMR 1470), *Mst. Zama Bibi Vs. Saadat Khan and*

another (2005 SCMR 1630), *Haji Nasrullah and 12 others Vs. Molvi Abdul Haleem and 8 others* (2005 P.Cr.L.J. 1410), *Mehr Muhammad Sarwar and others Vs. The State and others* (PLD 1985 SC 240) and *Muhammad Afzal Vs. Muhammad Bashir and 2 others* (2007 MLD 1535).

3. On the other hand, learned counsel for respondent No. 4 contends that in the peculiar circumstances of this case the learned Magistrate was justified to interfere in the proceedings under Section 145, Cr.P.C., most particularly when a complaint under Section 3 of the Illegal Dispossession Act, 2005 filed by the petitioner had already been dismissed by the learned Court of competent jurisdiction; that both the impugned orders are based upon proper appreciation of facts and circumstances of this case.

4. Heard. Record perused.

5. The learned Magistrate while passing the impugned order dated 28.1.2009 has observed as under:--

> "A perusal of Ex.A.3 reveals that DDO (R), Kamalia has rectified in khasra girdwari and the name of Muhammad Aslam is shown in possession of land measuring 5 kanals, 1 marla in acre No. 16. A perusal of said document is sufficient to clarify the picture that in fact Muhammad Aslam had purchased the disputed land from Muhammad Muzammal *vide* mutation No. 456 and had assumed the possession of specific portion owned by vendor in acre No. 16. Moreover, when Muhammad Rafique purchased property *vide* mutation No. 516 in the same killa, Muhammad Aslam filed a suit for possession through pre-emption which has been decreed in his favour *vide* judgment of Mr. Muhammad Iqbal, learned Civil Judge, Kamalia dated 16.5.2007, which is placed on record as Ex.A.4. According to police report, Muhammad Aslam s/o Tharaj was found to be in possession of the disputed property. Muhammad Rafique respondent had filed an application for the registration of case against Muhammad Aslam. Application alongwith relevant record is placed as Ex.A.7, which reveals that due to civil litigation between the parties, learned Additional Sessions Judge, Toba Tek Singh refused to register any criminal case against Muhammad Aslam etc. Police report was sought in the said petition filed by Muhammad Rafique, according to which, Muhammad Aslam was found to be in possession of the disputed property."

While dismissing the revision petition of the petitioner, against the order of the learned Magistrate, the learned Additional Sessions Judge in his order dated 16.2.2010 has observed as follows:--

> "It is crystal clear that Muhammad Aslam purchased the land measuring 5 kanals, 1 marla from one Muhammad Muzammal *vide* mutation No. 456 and took the possession of specific portion owned by vendor and Muhammad Rafique subsequently purchased the property *vide* mutation No. 516, dated 8.9.2001 in the same killa (Ex.A.2) and that is with regard to specific portion on account of family settlement from Waryam. RW-1 in his cross-examination admits that said Waryam

and Muzammal have partitioned their share mutually and were in their separate possession and killa No. 16 is 10 kanals, 6 marlas, this witness admits that Muhammad Aslam has filed pre-emption suit against land of 5 kanals and now Muhammad Aslam pre-emptor has become owner of 5 kanals, 6 marlas and appeal against this decree is pending before the Hon'ble Lahore High Court.

So obviously the land under pre-emption appeal though part of killa No. 16 of square No. 12 but is different/separate from the disputed land and possession over disputed land by Muhammad Aslam is even proved by the petition (Ex.A.7) made by Muhammad Rafique. Muhammad Rafique also filed complaint against Muhammad Aslam under Section 3 of Illegal Dispossession Act, 2005, stating therein that they were dispossessed from disputed property seven months prior to the filing of complaint *i.e.* 6.2.2006 (Ex.A.20), meaning thereby they were dispossessed somewhere in August, 2005, while they were required to establish their possession over disputed property within two months of their dispossession for initiating proceedings u/S. 145, Cr.P.C. The complaint under revision by the police was filed on 29.4.2006 and Muhammad Rafique own documents negate his contention, therefore, it is proved that Muhammad Aslam s/o Tharaj was in possession of disputed property measuring 5 kanals, 1 marla comprising of killa No. 16, square No. 12 situated in Chak No. 758/G.B, Tehsil Kamalia, District T.T. Singh two months prior to the order of attachment passed by the then learned Area Magistrate, therefore, he is entitled to retain the possession. Reliance in this regard is placed on case-law 2002 SCMR 1280."

6. The rationale of Section 145, Cr.P.C. is to prevent the breach of peace relating to the dispute over the land and to make an interim order for protecting a person in possession of the land as well as to meet an emergency as a stop-gap to maintain peace and to enable the parties to seek their redress about title or claim of right to possess the disputed property in Civil Court and for this purpose a person who has been forcibly and wrongfully dispossessed within a period of two months can be treated as if he had been in possession of the land at such date, and such possession is subject to decision of the Civil Court of competent jurisdiction regarding title or possession of the disputed land. The proceedings under Section 145, Cr.P.C. are of temporary nature and are subservient to the findings of the Civil Court. The pendency of civil litigation between the parties in respect of the disputed property by itself is no ground to oust the jurisdiction of a Magistrate to exercise the powers under Section 145, Cr.P.C. if the Civil Court had not passed any order regulating the possession of the disputed land. In this case, there was no order of the Civil Court regulating the possession of the disputed land, therefore, keeping in view the conflicting claims regarding the possession of the disputed land at the time of apprehension of the breach of peace, the learned Magistrate has rightly conducted the proceedings under Section 145, Cr.P.C. and held an inquiry on the point that which party was in possession of the disputed land within a period of two months before submission of the report and decided the matter accordingly, which order has validly been upheld by the learned Additional Sessions Judge.

7. I am of the considered view that there is no illegality or infirmity in the impugned orders and the same are based upon proper appreciation of law and facts of this case, calling for no interference by this Court. Even otherwise the assertion of facts in this

writ petition relates to the civil rights and may ultimately fall within the realm of factual controversy, which task cannot be undertaken in the exercise of writ jurisdiction. The judgments relied upon by the learned counsel for the petitioner, are quite distinguishable and are not applicable to the facts and circumstances of this case. Resultantly, this writ petition being devoid of any force is dismissed.

Petition dismissed.

2012 P.Cr.R. 1041
[Lahore]
Present: **MUHAMMAD ANWAARUL HAQ, J.**
Hafiz **Muhammad Ramzan**
Versus
The State and another

Crl. Misc. No. 5735-B of 2011, decided on 25th May, 2011.

BAIL (DACOITY)---(Exonerative affidavits)

Criminal Procedure Code (V of 1898)---

*---S. 497(2)---Pakistan Penal Code, 1860, Ss. 395/412---Exonerative affidavits---Bail concession---Complainant/PWs had confirmed contents of respective affidavits in High Court that petitioner was not involved in alleged occurrence---**Held:** In view of conceding statements of said PWs, case of petitioner fell within purview of further inquiry---Bail after arrest granted.* *(Paras 7,8)*

Key Terms:- *Bail on conceding statements.*
[Affidavits of complainant and PWs regarding innocence of petitioner in the occurrence of dacoity. Bail was allowed by High Court].
For the Petitioner: **Nassir Ahmad Awan, Advocate.**
For the State: **Tasawar Ali Khan Rana, Deputy Prosecutor-General.**
Date of hearing: **25th May, 2011.**

ORDER

MUHAMMAD ANWAARUL HAQ, J. --- This is 2nd petition of the petitioner before this Court, first one was disposed of having not been pressed on 10.5.2011 through Crl. Misc. No. 5111-B of 2011.

2. Through this petition Hafiz Muhammad Ramzan has sought post-arrest bail in case F.I.R. No. 65, dated 8.3.2011, registered at Police Station, Saddar Renala Khurd, District Okara in respect of offences under Sections 395 and 412, PPC.

3. At the very outset, learned counsel for the petitioner contends that case against the petitioner is based upon some misunderstanding of the complainant; that the complainant and his two eye-witnesses, present before this Court have tendered their respective affidavits to the effect that the petitioner is not involved in the alleged crime and

they do not oppose this bail petition; that the petitioner in this case is only involved with the purchase of vehicle mentioned in the F.I.R. from one Munawar Khan; that the offence under Section 395, PPC does not attract in the circumstances of this case and even keeping in view the alleged recovery of the stolen vehicle from the possession of the petitioner, *prima facie* offence under Section 411, PPC is applicable and maximum punishment provided for the offence is three years whereas the petitioner is behind the bars since 31.3.2011 without any substantive progress in his trial and that in view of the affidavits of the complainant and two eye-witnesses, case against the petitioner is one of further inquiry into his guilt.

4. Conversely, learned Deputy Prosecutor-General while opposing this bail application contends that apparently it seems that the complainant and his eye-witnesses have entered into compromise with the petitioner; that the petitioner is involved in an offence that is heinous in nature and falls within the prohibitory clause of Section 497, Cr.P.C.; that recovery of the stolen vehicle has also been effected from the petitioner that is sufficient to connect him with the commission of the alleged crime; that there is no *mala fide* or ulterior motive on the part of the police to falsely implicate him in this case and involvement of the petitioner in such-like heinous offence disentitles him for the concession of bail.

5. Heard. Record perused.

6. Manzoor Hussain, A.S.I./Investigating Officer present in person after consulting the record confirms that there is no previous criminal record against the petitioner.

7. Syed Naseem Haider Shah complainant of this case and his two eye-witnesses namely Shehzad Shah and Nawaz Shah, duly identified by Manzoor Hussain, A.S.I./Investigating Officer, present before this Court, have confirmed the contents of their respective affidavits and State that the petitioner is not involved in the alleged occurrence.

8. Be that as it may, in view of the conceding statements of all the three prosecution witnesses of the occurrence, case against the petitioner squarely falls within the purview of sub-section (2) of Section 497, Cr.P.C. and is one of further inquiry into his guilt. I, therefore, admit the petitioner to post-arrest bail subject to his furnishing bail bond in the sum of Rs. 1,00,000/- (Rupees one hundred only) with one surety in the like amount to the satisfaction of the learned Trial Court.

9. It is, however, clarified that observations made herein are just tentative in nature and strictly confined to the disposal of this bail petition.

Bail after arrest granted.

2012 P.Cr.R. 1152
[Lahore]
Present: **MUHAMMAD ANWAAR-UL-HAQ and SYED IFTIKHAR HUSSAIN SHAH, JJ.**
Muhammad Imran *alias* Mani and another
Versus
The State and others

Crl. Misc. No. 15673-B of 2011, decided on 30th January, 2012.

BAIL (MURDER)---(Vicarious liability)

Criminal Procedure Code (V of 1898)---

---S. 497(2)---Pakistan Penal Code, 1860, Ss. 302/109/379/427/148/149---Bail after arrest, grant of---Vicarious liability---Further inquiry---Validity---Collective allegation of making firing at deceased had been levelled against ten accused persons---No specific injuries on persons of deceased had been attributed to petitioner---No weapon of offence was recovered from petitioner---Names of petitioners were placed in column No. 2 of report prepared u/S. 173, Cr.P.C.---Question of vicarious liability of petitioner and alleged plea of alibi could validly be determined by Trial Court at time of trial---Case of petitioners, prima facie, fell within the ambit of further inquiry---Bail after arrest granted. (Paras 5,6)

[Collective allegation of firing on deceased/No recovery of weapon of offence was effected from petitioner and their names were placed in column No. 2 of challan. Bail was allowed.].
For the Petitioners: **M.A. Zafar, Advocate with Shoaib Zafar, Advocate.**
For the Complainant: **Sher Afghan Asadi, Advocate.**
For the State: **Tariq Javed, Deputy District Public Prosecutor.**
Date of hearing: **30th January, 2012.**

ORDER

Through this petition, petitioners Muhammad Imran *alias* Mani and Tanveer Hussain *alias* Chammi seek post-arrest bail in case F.I.R. No. 529/2011, dated 19.5.2011, offence under Sections 302/109/379/427/148/149, PPC and Section 7 of ATA, 1997, registered at Police Station, Factory Area District Sheikhupura.

2. Learned counsel for the petitioners contends that there is collective allegation against ten accused persons of making firing at the deceased and no specific role has been attributed to the petitioners; that no recovery of any weapon of offence was effected from the petitioners; that in three consecutive investigations conducted by three different police officers both the petitioners were found innocent and the police has placed their names in column No. 2 of the report prepared under Section 173, Cr.P.C.; that the police after thorough investigation has declared that only two nominated accused namely Khizar Hussain and Akmal Shehzad participated in this occurrence; that motive is also not directly attributed to the petitioners and during the course of investigation they have successfully

proved their plea of *alibi*; that in circumstances, case against the petitioners is one of further inquiry into their guilt and they are entitled for the bail.

3. On the other hand, learned Deputy District Public Prosecutor assisted by learned counsel for the complainant vehemently opposing this bail petition contends that in this broad day light occurrence four persons have lost their lives; that the petitioners are nominated in a promptly lodged F.I.R.; that specification of injuries in this occurrence was impossible and the F.I.R. has been registered on the basis of natural statement of the complainant; that it is a case of vicarious liability and every accused is responsible for every act of his other co-accused; that declaration of innocence of the petitioners is a *mala fide* on the part of the police; that initially both the petitioners were challaned showing their names in column No. 3 of the report under Section 173, Cr.P.C. but that report is not available on the record and the petitioners with connivance of the police managed disappearance of the same; that deeper appreciation of evidence especially the plea of *alibi* taken by the petitioners is not permissible at bail stage; that challan in this case has already been submitted and all the accused including the petitioners have been summoned by the learned Trial Court.

4. Heard. Record perused.

5. Be that as it may, admittedly the collective allegation of making firing at the deceased has been levelled against ten accused persons and no specific injury on the persons of the deceased has been attributed to the petitioners. No weapon of offence was recovered from the petitioners. During the investigation the petitioners have taken the plea of *alibi* that at the time of occurrence they were present in the Court of learned Additional District Judge, Ferozewala in connection with the case F.I.R. No. 1299/2007 and in this regard, statements of two Advocates and Reader of the Court are available on the record and on the basis of the same, petitioners were found innocent in three consecutive investigations and their names were placed in column No. 2 of the report prepared under Section 173, Cr.P.C. In view of all above, question of vicarious liability of the petitioners and evidentiary value of the plea of *alibi* taken by them can validly be determined by learned Trial Court after recording of some evidence. However, case against the petitioners, in our view, *prima facie* falls within the purview of sub-section (2) of Section 497, Cr.P.C. and is one of further inquiry into their guilt. We, therefore, accept this petition and admit the petitioners to post-arrest bail subject to their furnishing bail bonds in the sum of Rs. 3,00,000/- (Rupees three hundred thousand only) each with two sureties each in the like amount to the satisfaction of the learned Trial Court.

6. It is, however, clarified that observations made herein above are just tentative in nature and strictly confined to the disposal of this bail petition.

Bail after arrest granted.

2012 L N 410

[Lahore]

Present: **MUHAMMAD ANWAARUL-HAQ and SYED IFTIKHAR HUSSAIN SHAH, JJ.**

Munawar Ahmad

Versus

The State and 3 others

Intra-Court Appeal No. 584 of 2011, decided on 6th February, 2012.

SECOND F.I.R. --- (Different version of one occurrence)

Law Reforms Ordinance (XII of 1972)---

*---S. 3---Constitution of Pakistan, 1973, Art. 199---Criminal Procedure Code, 1898, S. 154---Second F.I.R---Impugned order---Validity---Incident had been described altogether with different style by both parties---Respondent was claiming that his son had been done to death in a fake police encounter whereas police had brought its own stance through said F.I.R. to the effect that deceased had been murdered in genuine police encounter---**Held:** Depriving father of deceased to prove murder of his son according to his own style would not serve interests of justice---No hard and fast rule exists that another F.I.R. cannot be registered in respect of a different version given by an aggrieved party of the same occurrence---Intra-Court Appeal dismissed. (Paras 5, 6)*

Ref: *2011 PSC Crl. (SC Pak.) 109, 2011 SCMR 45, 2010 MLD 128, 1997 P.Cr.L.J. 2069, PLD 1997 Lah. 1453), 1999 SD 308.*

Key Terms:- *Second F.I.R.*

[According to complainant/father his son was done to death in a fake police encounter whereas police perjuring it to be a genuine encounter managed to register F.I.R. ICA against impugned order for registration of second F.I.R. about occurrence at the instance of complainant was dismissed].

For the Appellant: **Ch. Waseem Ahmad Gujjar, Advocate.**

For the Respondents No. 1, 3 and 4: **Waqar Ahmad Chaudhary, Assistant Advocate-General with Shaukat Ali, SI and Akmal, SI with record.**

For the Respondent No. 2: **Ch. Shahid Hanif Jatt, Advocate.**

Date of hearing: **6th February, 2012.**

ORDER

Through this appeal under Section 3 of the Law Reforms Ordinance, 1972 Munawar Ahmad appellant has called in question the order dated 23.09.2011 passed by a learned Single Judge-in-Chamber wherein he has directed the Station House Officer concerned to register a criminal case on the application of respondent No. 2/father of Sarfraz deceased.

2. The learned counsel for the appellant contends that second information in respect of one and the same incident is deprecated by the superior Courts of the country. The cross-version of respondent No. 2 in respect of the same incident has already been recorded

by the police on the direction of the learned *Ex-Officio* Justice of Peace and the same has been found incorrect. Respondent No. 2 just as to save the skin of co-accused of the deceased namely Kashif who is involved in case F.I.R. No. 620 registered at Police Station Nishter Colony, Lahore on 13.07.2010 in respect of an offence under Section 381-A, PPC wants registration of an independent F.I.R.

3. On the other hand the learned Assistant Advocate-General assisted by the learned counsel for respondent No. 2 while opposing this appeal contends that the son of respondent No. 2 has been murdered in this case by some policemen and they managed to report incident themselves after distorting the real facts. Father of the deceased is making all possible efforts to become complainant of this case but the police is creating hurdles in his way. There lies no legal impediment for lodging another criminal case regarding the same incident especially when the set of accused and set of witnesses are different. Reliance in this regard is placed on the case *Muhammad Asif v. Umar Farooq Khan, Inspector Police and 5 others*(2010 MLD 128).

4. Heard. Record perused.

5. We have gone through the contents of F.I.R. No. 621 lodged by Muhammad Yaseen, Constable No. 1265/C and also perused the application moved by respondent No. 2/father of Sarfraz deceased before the learned *Ex-Officio* Justice of Peace for registering of a separate criminal case and observed that incident has been described altogether with different style by both the parties. Respondent No. 2 is claiming that his son had been done to death in a fake police encounter whereas police has brought its own stance through the instant F.I.R. to the effect that the deceased had been murdered in a genuine police encounter. The application of respondent No. 2 bears entirely different facts to that of the F.I.R. lodged by the police. In the backdrop of such a situation depriving the father of the deceased to prove the murder of his son according to his own style would not serve the interests of justice. Law is quite settled on the point that no hard and fast rule exists that another F.I.R. cannot be registered in respect of a different version given by an aggrieved party of the same occurrence. We respectfully place reliance on the cases of *Mushtaq Hussain and another v. The State* (2011 SCMR 45), *Muhammad Asif v. Umar Farooq Khan, Inspector Police and 5 others* (2010 MLD 128), *Mrs. Ghanwa Bhutto and another v. Government of Sindh and another* (PLD 1997 Karachi 119), *Haji Ahmad v. S.S.P. Rahim Yar Khan and others* (1997 P.Cr.L.J. 2069), *Muhammad Aslam v. SHO Police Station City Pattoki and others* (PLD 1997 Lahore 1453) and *Mst. Razia Sultana alias Gogi Butt v. D.I.G. Police, etc*. (1999 SD 308). The learned counsel for the petitioner remained unable to point out any impropriety in the conclusion arrived at by the learned Single Judge-in-chamber in his order dated 23.09.2011 so as to warrant interference into the same.

6. For what has been discussed above, we have not found any force in this appeal which is hereby dismissed.

I.C.A. dismissed.

2012 LAW NOTES 535
[Lahore]
Present: **MUHAMMAD ANWAR-UL-HAQ and SYED IFTIKHAR HUSSAIN SHAH, JJ.**
Mst. **Saima Bibi and others**
Versus
The State and others

Crl. Appeal No. 2381 of 2010, decided on 25th January, 2012.

CONCLUSION

(1) It is well-settled by now that where grounds urged required deeper appreciation of evidence that exercise cannot be gone into at bail stage.

SUSPENSION OF SENTENCE (MURDER)---Circumstantial evidence)

Criminal Procedure Code (V of 1898)---

---S. 426---Pakistan Penal Code, 1860, S. 302(b)---Murder appeal---Matter of suspension of impugned sentence of life---Ailment of convict---Circumstantial evidence---Contention---Validity---T.B. was not a disease that could not be treated in jail premises---Whether evidence of "extra-judicial confession", "*Wajtakkar*" and "identification parade" in instant case was sufficient or not to convict petitioner was a question that could only be appreciated by going through entire prosecution evidence---Suspension of sentence application dismissed. (Paras 5,6)

Ref. 1980 SCMNR 305.
[T.B. was not a disease that could not be treated in jail premises. Contentions regarding 'extra-judicial confession' and 'identification parade' could not be assessed at bail stage. High Court refused to suspend impugned sentence of life in murder appeal].
For the Petitioner: **Ch. Muhammad Yousaf, Advocate.**
For the Complainant: **Shahid Mehmood Aleem, Advocate.**
For the State: **Tariq Javed, Deputy District Public Prosecutor.**
Date of hearing: **25th January, 2012.**

ORDER

Through this petition, the petitioner/appellant No. 2 Muhammad Qasim seeks suspension of his sentence, who has been convicted and sentenced by the learned Trial Court as under:--

Imprisonment for life under Section 302(b), PPC and to pay compensation of Rs. 1,00,000/- to the legal heirs of the deceased under Section 544-A, Cr.P.C. and in default thereof to further undergo three months' S.I.

Benefit of Section 382-B, Cr.P.C. has been extended to the petitioner.

2. Learned counsel for the petitioner contends that health condition of the petitioner is very serious as he is suffering from tuberculosis and the same is not treatable in the jail hospital. On merits, he contends that it is a case of circumstantial evidence; that the only evidence available on the record against the petitioner is extra-judicial confession and there is no other evidence whatsoever connecting the petitioner with the crime; that the petitioner is behind the bars since 29.9.2008 and there is no hope for disposal of his appeal in near future as co-accused of the petitioner namely Inam-ul-Haq has been sentenced to death and Murder Reference is already pending before this Court.

3. On the other hand, learned Deputy District Public Prosecutor assisted by learned counsel for the complainant opposing this petition contends that there is sufficient material available on the record against the petitioner in the shape of evidence of extra-judicial confession furnished by PW-4 Afsar Ali and PW-5 Muhammad Islam; that identification parade was also conducted in this case wherein PW-6 Shahbaz has duly identified the petitioner; that there is also evidence of '*Wajtakkar*' comprising of PW-6 and PW-7; that medical evidence in this case corroborates the other circumstantial evidence and there is no ground for suspension of sentence of the petitioner.

4. Heard. Record perused.

5. So far as the medical ground urged by the learned counsel for the petitioner is concerned, in compliance of the order of this Court dated 19.12.2011 the Medical Officer, Central Jail, Lahore has submitted his report dated 3.1.2012 regarding the health condition of the petitioner, mentioning therein as under:--

> "The above-said prisoner is old T.B. patient and has completed his treatment for Tuberculosis. Now the patient complains for pain in epigastrium for which necessary treatment is being provided to him. No other remarkable disease could be detected clinically at the time of examination."

We respectfully refer the case of *Zarin Khan Vs. The State* (1980 SCMR 305), wherein the Hon'ble Supreme Court of Pakistan has not considered the T.B. a disease that cannot be treated in jail premises.

In view of the medical report of the petitioner referred above and the case-law on the subject, the contention of the learned counsel for the petitioner that condition of the petitioner is very serious and his health is deteriorating day by day has no force and is discarded.

6. On merits, we have noticed that the learned Trial Court has convicted and sentenced the petitioner on the basis of evidence of extra-judicial confession furnished by the complainant/PW-4 Afsar Ali and PW-5 Muhammad Islam, evidence of '*Wajtakkar*' given by two witnesses namely Shahbaz (PW-6) and Sarfraz (PW-7 and identification parade conducted in this case wherein PW-6 Shahbaz had duly identified the petitioner. We have also noticed that during the investigation, the petitioner was found fully involved in this occurrence. Whether the evidence of 'extra-judicial confession', 'Wajtakkar' and 'identification parade' in this case was sufficient or not to convict the petitioner is a question

that can only be appreciated by going through the entire prosecution evidence. It is well-settled by now that where grounds urged required deeper appreciation of evidence that exercise cannot be gone into at bail stage. Therefore, we are of the considered view that no case for suspension of sentence is made out. The instant petition is accordingly, dismissed.

Suspension of sentence petition dismissed.

2012 L N 628
[Lahore]
Present: **MUHAMMAD ANWAARUL HAQ, J.**
Muhammad Imran
Versus
The State and another

Crl. Misc. No. 13579/B of 2011, decided on 21th October, 2011.

BAIL (SELLING AND BUYING OF WOMEN)---Absence of medical)

Criminal Procedure Code (V of 1898)---

*---S. 497(2)---Pakistan Penal Code, 1860, Ss. 371-A/371-B---Bail concession---Absence of medical evidence---**Held:** In absence of any allegation of selling and buying of women for purpose of zina, female co-accused had already been allowed bail---There was no medical evidence available on record corroborating comission of alleged zina---Petitioner had no previous criminal record---Case was one of further inquiry---Bail after arrest granted.*

(Para 5)

[No medical evidence was on record. Bail was allowed in offence regarding selling and buying women for purpose of zina.]
For the Petitioner: **Shahid Zaheer Syed, Haji Khalid Rehman and Ghulam Haider, Advocates.**
For the State: **Khurram Khan, Deputy Prosecutor General.**
Date of hearing: **21th October, 2011.**

ORDER

MUHAMMAD ANWAARUL HAQ, J. --- Through this Crl. Misc. No. 13579-B/2011 as well as Crl. Misc. No. 13594-B/2011, petitioners Muhammad Imran, Muhammad Nadeem and Shamas-ud-Din have sought their post-arrest bail. I shall dispose of both these petitions through this single order, as arising out of same F.I.R. No. 1562, dated 4.10.2011 offence under Sections 371-A, 371-B, PPC, registered at Police Station, Peoples Colony, Faisalabad.

2. Learned counsel for the petitioners contended that case against the petitioners is totally false; that female co-accused of the petitioners, namely, *Mst.* Samina and *Mst.* Saima have already been allowed by the learned Trial Court; that offences under Sections

371-A and 371-B, PPC do not attract in the circumstances of the case as there is no evidence regarding selling and buying of women for the purpose of prostitution; that there is no medical evidence regarding the allegations contained in the F.I.R. Further contend that petitioners have no previous criminal record; that there is no statement under Section 161, Cr.P.C. of any public witness or any staff of the hotel.

3. On the other hand, learned Deputy Prosecutor General while opposing this petition contends that the offence is heinous in its nature and an immoral act of the petitioners; that the offence falls within the prohibitory clause of Section 497, Cr.P.C., therefore, they are not entitled for grant of bail.

4. Heard. Record perused.

5. Investigating Officer present in Court with record confirms the following facts:--

(a) that petitioners have no previous criminal record;

(b) that female co-accused of the petitioners have already been allowed bail by the learned Trial Court;

(c) that there is no statement of anyone from the hotel staff or any public witness in this case; and

(d) that no medical evidence is available on the record regarding allegation of committing zina mentioned in the F.I.R.

In the absence of any allegation of selling and buying of women for the purpose of zina, the female co-accused have already been allowed bail, the petitioners have no previous criminal record and there is no medical evidence available on the record corroborating commission of zina, all above make the case of the petitioners one of further inquiry into their guilt as contemplated under sub-section (2) of Section 497, Cr.P.C. Therefore, I admit the petitioners to bail subject to their furnishing of bail bonds in the sum of Rs. 1,00,000/- (Rupees one hundred thousand only) each with one surety each in the like amount to the satisfaction of the learned Trial Court/Area Magistrate.

Bail after arrest granted.

2012 LAW NOTES 914
[Lahore]
Present: **MUHAMMAD ANWAARUL HAQ, J.**
Adnan *alias* Dana
Versus
The State and another

Criminal Miscellaneous No. 13798-B of 2010, decided on 15th December, 2010.

CONCLUSION

(1) Awaiting report of Chemical Examiner, petitioner/accused may seek indulgence of Court to the grant of bail in offence of sodomy.

BAIL (SODOMY) --- (Juvenility of accused/absence of report of Chemical Examiner)

Criminal Procedure Code (V of 1898)---

---S. 497(2)---Pakistan Penal Code, 1860, S. 377---Juvenile Justice System Ordinance, 2000, S. 10(7)---Sodomy---Awaiting report of Chemical Examiner---Juvenile accused---Bail concession---**Held:** No mark of victim was observed by M.O. at time of medical examination---Report of Chemical Examiner had not yet been received---Moreover, petitioner was a juvenile---Case fell within purview of further inquiry---Bail after arrest granted. (Paras 5,6)

Key Terms:- Sodomy.
[Allegation regarding commission of sodomy/Report of Chemical Examiner was still awaiting. Petitioner was a juvenile. Bail was allowed].
For the Petitioner: **Nisar Ahmad Awan, Advocate.**
For the State: **Tasawar Ali Khan, D.P.G. with Mahmood Ahmad, ASI with record.**
For the Complainant: **Malik Nazim Ali, Advocate.**
Date of hearing: **15th December, 2010.**

ORDER

MUHAMMAD ANWAARUL HAQ, J. --- Adnan, petitioner by way of the instant petition has sought his post-arrest bail in case F.I.R. No. 370/2009, dated 15.07.2009 under Section 377, P.P.C. registered at Police Station Muradpur, District Sialkot.

2. Learned counsel for the petitioner contends that petitioner is innocent and he has been falsely implicated in this case; that report of chemical examiner has yet not been received in this case; that on the date of occurrence as per School Leaving Certificate the age of the petitioner was 15-years and his abscondence was due to fear of the police; that according to the Medico-Legal Certificate no mark of violence was observed by the Medical Officer at the time of examination of the victim; that observations of learned Sessions Judge, Sialkot given in the order dated 03.05.2010 that earlier a case F.I.R. No. 566/2004 under Section 377, P.P.C. was got registered by the complainant against the present petitioner with

the same allegations are based on some misunderstanding as in the above-referred F.I.R., although the victim is same but accused was one Irfan and not the present petitioner; that the petitioner is behind the bars since 01.03.2010 without any substantive progress in his trial; that according to section 10(7) of Juvenile Justice System Ordinance the trial of the petitioner has not been concluded and is entitled for concession of bail.

3. On the other hand, learned Deputy Prosecutor General assisted by learned counsel for the complainant opposed this petition with the contentions that the petitioner is nominated in the F.I.R.; that petitioner is involved in a heinous offence; that non-receipt of report of the Chemical Examiner is the fault of the police and not of the complainant; that no *mala fide* has been pointed out by the petitioner against the complainant. Hence, he is not entitled for the concession of bail.

4. Arguments heard. Record perused.

5. Medico-Legal Report of the victim available on file reflects that no mark of violence was observed by the Medical Officer at the time of medical examination. Learned Deputy Prosecutor-General after consulting the record confirms that the report of the Chemical Examiner has not yet been received and that the petitioner is a juvenile. In view of the above *prima facie* case against the petitioner falls within the purview of sub-section (2) of Section 497, Cr.P.C. and is one of further inquiry into his guilt. Petitioner is behind the bars since 01.03.2010 without any substantive progress in his trial.

6. I, therefore, admit the petitioner to bail subject to his furnishing bail bond in the sum of Rs. 1,00,000/- (Rupees one hundred thousand only) with one surety in the like amount to the satisfaction of the learned Trial Court.

7. It is, however, clarified that observations made herein are just tentative in nature and strictly confined to the disposal of this bail petition.

Bail after arrest granted.

2012 LAW NOTES 916
[Lahore]
Present: **MUHAMMAD ANWAARUL HAQ and CH. IFTIKHAR HUSSAIN, JJ.**
Shahbaz Masih
Versus
The State and another

Criminal Miscellaneous No. 4362-B of 2010, decided on 6th May, 2010.

CONCLUSION

(1) Uncertainty *qua* application of section of law furnishes a valid ground for the grant of bail.

BAIL (LIQUOR CASE) --- (Uncertainty *qua* application of offence)

Criminal Procedure Code (V of 1898)-------S. 497(2)---Control of Narcotic Substances Act, 1997, S. 9(b)---Petitioner was alleged to have possessed 200 bottles of liquor alongwith

a drum filled with 100 liters liquor---Bail concession---Uncertainty *qua* application of section in question---**Held:** Question of ultimate responsibility of committing an offence under said Act was to be determined at trial---It was not deemed proper to decline relief merely for reason` that there were other cases against petitioenr or that he was a previous convict---Bail after arrest granted. (Paras 5,6)

[Recovery of liquor/whether offence attracted S. 9(b), C.N.S.A. or not, was uncertain. Bail was allowed].

For the Petitioner: **Nisar Ahmad Awan, Advocate.**

Chaudhry Jamshaid Hussain, Deputy Prosecutor-General on behalf of State with Muhammad Ramzan, S.I. with police record.

Date of hearing: **6th May, 2010.**

ORDER

The learned counsel for the petitioner has filed the certified copy of order dated 26.04.2010, recorded on the petitioner's earlier, similar petition bearing Criminal Miscellaneous No. 3982-B of 2010.

2. He has requested to allow him to delete the offence under Article 3/4 of Prohibition (Enforcement of Hadd) Order No. IV of 1979 and Section 13 of Pakistan Arms Ordinance (XX) of 1965 in the instant bail petition. He has been allowed to do so. He has made the necessary deletion with his signatures before the view of the Court today.

3. Shahbaz Masih petitioner by way of the instant petition seeks post-arrest bail in case F.I.R. No. 102 under Section 9(b) of the C.N.S.A., 1997 registered with Police Station Johar Abad, District Khushab on 06.03.2010.

4. Briefly, the prosecution's case as contained in the F.I.R. is that on 06.03.2010 at about 09.00 p.m. Nadeem Masih and Naeem Masih, who were in police custody, in connection with case F.I.R. No. 100/10 of the said Police Station, had disclosed that Shahbaz Masih was present in a rented house in Ramzan Colony and he was processing liquor there. On their such disclosure, the police party raided the house of Shahbaz Masih (petitioner). On seeing the raiding party, an accused, who was present there namely Masood ran away throwing a plastic shopper, which contained 120 grams *charas,* while Shahbaz Masih (petitioner) was apprehended and he had possessed 200 bottles of liquor alongwith a drum filled with 100 liters liquor.

5. After hearing the learned counsel for the parties and going through the record, we find that if at all the allegation against him may be taken true as it is, but still it is to be seen at trial that if he ultimately can be held responsible for committing an offence under the provisions of Act of 1997. According to the learned Deputy Prosecutor-General, he is involved in three other cases and had been convicted in two cases of the present type. We in such circumstances, when, are of the view that the question of his ultimate responsibility of committing an offence under the Act *Supra* is to be determined at trial, do not deem it proper to decline him the relief merely for the reason that there are other cases against him or that he is a previous convict, as nothing was recovered from him to bring his

case within the ambit of any provisions of the said Act. In such scenario, we find it an appropriate case to release him on bail.

6. In this view of the matter, we accept this petition and admit him to bail subject to his furnishing bail bonds in the sum of Rs. 1,00,000/- (Rupees one hundred thousand only) with one surety in the like amount to the satisfaction of the learned Trial Court.

7. We may observe that the above observations are tentative in nature and meant only for the disposal of the matter in hand and the same shall not influence the mind of the learned Trial Court in any manner.

Bail after arrest granted.

2013 Y L R 374
[Lahore]
Before Muhammad Anwaarul Haq, J
IMTIAZ AHMED---Petitioner
Versus
The STATE and another---Respondents

Criminal Miscellaneous No.9745-B of 2011, decided on 26th August, 2011.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), S.489-F---Dishonestly issuing a cheque---Bail, grant of---Accused had given dishonoured cheque to the complainant in the backdrop of a business deal of purchase of rice and the accused had already paid part of purchase price to the complainant---Remaining amount of purchase price was withheld owing to a dispute as to the quality of the supplied consignment---Whether the cheque was issued dishonestly in the circumstances of the case, was a matter to be determined by the Trial Court after recording of evidence---Accused had been behind bars for more than three months without any progress in his trial---Alleged offence against accused not falling within prohibitory clause of S. 497, Cr.P.C and accused having no previous criminal record, he was admitted to bail.

Rana Shahbaz Ali Khan for Petitioner.
Mirza Abid Majeed, Deputy Prosecutor-General for the State.
Nemo for the Complainant.

ORDER

MUHAMMAD ANWAARUL HAQ, J.---Through this petition, Imtiaz Ahmed petitioner has sought post-arrest bail in case F.I.R. No.192, dated 16-3-2011, for an offence under section 489-F, P.P.C. registered at Police Station Muradpur, District Sialkot.

2. Learned counsel for the petitioner contends that the petitioner is innocent and has falsely been roped in this case; that the matter between the parties is purely of rendition of accounts as admittedly there was a business deal of purchase of rice and the complainant admits that an amount of Rs.18,24,000 was paid by the petitioner to him. Further contends that remaining amount of Rs.2,76,000 was withheld because of the poor quality of the product and the disputed cheque mentioned in the F.I.R. was given to the complainant as a guarantee; that the offence against the petitioner does not fall within the prohibitory clause of section 497, Cr.P.C.; that the petitioner has no previous criminal record; that in the circumstances case against the petitioner is one of further inquiry into his guilt and that he is behind the bars since 24-5-2011 without any substantive progress in his trial.

3. Conversely, learned Deputy Prosecutor-General opposing this bail application contends that the petitioner is specifically nominated in the F.I.R; that he has deprived the innocent complainant from an amount of Rs.2,76,000; that issuance of the disputed cheque

by the petitioner is admitted and dishonouring of the same is sufficient to constitute an offence under section 489-F, P.P.C.; and that mere non-falling of an offence within prohibitory clause does not entitle any accused to be released on bail as a matter of right.

4. Heard. Record perused.

5. Admittedly, the dishonoured cheque was given by the petitioner to the complainant in the backdrop of a business deal of purchase of rice and the petitioner had already paid an amount of Rs.18,24,000 to the complainant. Statedly remaining amount of Rs.2,76,000 was withheld as there was a dispute on the quality of the supplied consignment. The question whether the cheque was issued dishonestly in the peculiar circumstances of the case, is a matter to be determined by the learned trial Court after recording of some evidence. Petitioner is behind the bars since 24-5-2011 i.e. more than three months without any progress in his trial whereas the maximum punishment provided for the offence under section 489-F, P.P.C. is imprisonment for three years and it does not fall within the prohibitory clause of section 497, Cr.P.C., grant of bail in such like cases is a rule and refusal is an exception. Investigation Officer present with record states that the petitioner has no previous criminal record.

6. In view of all above, I accept this petition and admit the petitioner to bail subject to his furnishing bail bond in the sum of Rs.2,00,000 (Rupees two hundred thousand only) with one surety in the like amount to the satisfaction of the learned trial Court/Area Magistrate.

7. It is, however, clarified that observations made herein are just tentative in nature and strictly confined to the disposal of this bail petition.

MWA/I-4/L Bail allowed.

2013 Y L R 435
[Lahore]
Before Muhammad Anwaarul Haq, J
MUSHTAQ AHMED---Petitioner
Versus
The STATE and another---Respondents

Criminal Miscellaneous No.564-B of 2012, decided on 24th January, 2012.

Criminal Procedure Code (V of 1898)---

----S. 497(2)---Penal Code (XLV of 1860), S.489-F---Dishonestly issuing a cheque---Bail, grant of---Further inquiry---F.I.R. stated that dishonoured cheque was given by the accused to the complainant in the backdrop of a business deal of purchase of some crop, but there was no documentary evidence regarding the deal mentioned in the F.I.R.---Dishonest intention of accused could validly be determined by the Trial Court after recording of evidence---Case of accused fell within S. 497(2), Cr.P.C and was one of further inquiry into his guilt---Accused was in jail for more than three months, without any progress in his trial

and offence with which he was charged did not fall within prohibitory clause of S.497, Cr.P.C---Bail petition of accused was accepted and he was admitted to bail.

Naseem Ullah Khan Niazi for Petitioner.

Ch. Muhammad Akram Tahir, Deputy District Public Prosecutor for the State with Basharat Hussain S.I., with record.

Nemo for the Complainant.

ORDER

MUHAMMAD ANWAARUL HAQ, J.---Through this petition Mushtaq Ahmed petitioner seeks post-arrest bail in case F.LR. No.165, dated 7-10-2011, for an offence under section 489-F PPC registered at Police Station Katha Saghral, District Khushab.

2. Learned counsel for the petitioner contends that the petitioner is innocent and has falsely been roped in this case; that there is no documentary evidence whatsoever regarding the transaction mentioned in the F.I.R.; that the offence against the petitioner does not fall within the prohibitory clause of section 497, Cr.P.C.; that in the circumstances case against the petitioner is one of further inquiry into his guilt and that petitioner is previously non-convict and is behind the bars since 8-10-2011 without any substantive progress in his trial.

3. Conversely, learned Law Officer opposing this bail application contends that the petitioner has deprived the innocent complainant from a huge amount of Rs.6,14,000; that issuance of the disputed cheque by the petitioner is admitted and dishonouring of the same is sufficient to constitute an offence under section 489-F, P.P.C.; that there is no mala fide alleged by the petitioner against the complainant to falsely implicate him in this case and that mere non-falling of an offence within prohibitory clause does not entitle any accused to be released on bail as a matter of right.

4. Heard. Record, perused.

5. Be that as it may, prima facie, F.I.R. speaks itself that the dishonoured cheque was given by the petitioner to the complainant in the backdrop of a business deal or purchase of tomato crop but there is no documentary evidence whatsoever regarding the transaction mentioned in the F.I.R. The alleged dishonest intention of the petitioner can validly be determined by the learned trial Court after recording of some evidence and case against the petitioner, prima facie, falls within subsection (2) of section 497, Cr.P.C. and is one of further inquiry into his guilt. Petitioner is behind the bars since 8-10-2011 i.e. more than three months without any progress in his trial whereas the maximum punishment provided for the offence under section 489-F, P.P.C. is imprisonment for three years and it does not fall within the prohibitory clause of section 497, Cr.P.C. grant of bail in such like cases is a rule and refusal is an exception.

6. In view of all above, I accept this petition and admit the petitioner to bail subject to his furnishing bail bond in the sum of Rs.1,00,000 (Rupees one hundred thousand only) with one surety in the like amount to the satisfaction of the learned trial Court/Area Magistrate.

7. It is, however, clarified that observations made herein are just tentative in nature and strictly confined to the disposal of this bail petition.

MWA/M-52/L Bail granted.

2013 Y L R 536
[Lahore]
Before Muhammad Anwaarul Haq, J
SHAHADAT ALI alias CHHADI---Petitioner
Versus
The STATE and another---Respondents

Criminal Miscellaneous No.17663-B of 2011, decided on 18th January, 2012.

Criminal Procedure Code (V of 1898)---

----S. 497(2)---Penal Code (XLV of 1860), Ss. 302/ 365/ 211/ 148/ 149---Qatl-e-amd, kidnapping or abducting with intent secretly and wrongfully to confine person, false charge of offence made with intent to injure, rioting armed with deadly weapons---Bail, grant of---Further inquiry---Alleged fake police encounter---F.I.R. for the occurrence had been registered which was cancelled by the Area Magistrate after which complainant filed a private complaint, resulting in the present F.I.R.---Co-accused (police official) , who had been attributed the main role, had been acquitted after regular trial was conducted on basis of the private complaint---Trial Court while acquitting the co-accused had found that the police encounter was genuine---Role attributed to the accused (police official) was only to the extent of calling the deceased at the place of occurrence with connivance of his co-accused (police officials) and aerial firing after the occurrence---Accused had not been found convicted in any criminal case in the past and his mere abscondence was not a sufficient ground to refuse him bail when otherwise a good case for bail was made out in his favour---Case against accused called for further inquiry into his guilt---Bail application of accused was allowed and he was admitted to bail.

Mitho Pitafi v. The State 2009 SCMR 299 ref.
Muhammad Ahsan Nizami for Petitioner.
Ch. Muhammad Akram Tahir, D.D.P.P. for the State with Niaz Ahmad, A.S.-I.
Sarfraz Khan Gondal for the Complainant.

ORDER

MUHAMMAD ANWAARUL HAQ, J.---Petitioner Shahadat Ali alias Chhadi seeks post-arrest bail in the private complaint titled "Muhammad Arif v. Asad Muzaffar and others" under sections 302, 365, 211 and 148/149 P.P.C.

2. Learned counsel for the petitioner contends that earlier an F.I.R. No.70 dated 2-2-2007 under sections 302, 365 and 148/149, P.P.C. was registered at Police Station Chunian District Kasur against the petitioner and others regarding the same occurrence, which was

cancelled by the learned Area Magistrate and thereafter the complainant has filed a private complaint; that five co-accused of the petitioner were earlier tried and acquitted by the learned trial Court in the private complaint and the petitioner was declared a proclaimed offender. Further contends that the fatal injury on the person of the deceased was attributed to co-accused of the petitioner namely Asad Muzaffar who has already been acquitted by the learned trial Court vide judgment dated 27-10-2010; that the only allegation against the petitioner is that he abetted his co-accused for the murder of the deceased who had been killed in a police encounter and it has been so held in the judgment of the learned trial Court passed in the private complaint. Further adds that in this matter a judicial inquiry was conducted wherein it was held that the deceased was killed in a genuine police encounter; that mere abscondence of the petitioner is not a ground itself to refuse him bail if otherwise his case falls within the purview of subsection (2) of section 497, Cr.P.C. Places reliance on 2009 SCMR 299; that the petitioner has never been convicted in any criminal case, therefore, he is entitled for bail.

3. On the other hand learned Deputy District Public Prosecutor assisted by learned counsel for the complainant while vehemently opposing this bail application contends that as the allegations were against the police officials and the local police had refused to register the case, therefore, the complainant had to file a writ petition and the F.I.R. was lodged by the Orders of this court; that if there is any delay in lodging of the F.I.R. the same cannot be attributed to the complainant. Further contends that appeal against acquittal of the co-accused of the petitioner is pending before this Court at motion stage; that the petitioner actively participated in the occurrence, as he had pointed out the deceased to his co-accused/ police officials; that the petitioner also made aerial firing after the occurrence to deter the witnesses; that the petitioner remained absconder for a period of more than six years and six other criminal cases are pending against him. Learned counsel for the complainant has placed reliance on PLD 2009 SC 385.

4. Heard. Record perused.

5. Admittedly the F.I.R. earlier registered regarding the same occurrence was cancelled by the learned Area Magistrate and co-accused of the petitioner having attributed main role have already been acquitted after regular trial conducted in this private complaint. The learned trial Court while acquitting the co-accused of the petitioner has held the police encounter as genuine. Even otherwise the role attributed to the petitioner is only to the extent of calling the deceased at the place of occurrence with the alleged connivance of his co-accused/police officials and of aerial firing after the occurrence. The police encounter in which the deceased had been killed was declared to be genuine in the judicial inquiry. In view of the above, case against the petitioner, prima facie, falls within the purview of subsection (2) of section 497, Cr.P.C. and is one of further inquiry into his guilt. Learned Law Officer after consulting the record confirms that the petitioner has not been found convicted in any criminal case. Mere abscondence of the petitioner is not sufficient to refuse him bail when otherwise a good case for bail after arrest is made out in his favour. I respectfully rely upon the case of "Mitho Pitafi v. The State (2009 SCMR 299)" wherein the Hon'ble Supreme Court of Pakistan has held as under:--

"It is well-settled principle of law that bail can be granted if an accused has good case for bail on merits and mere his absconsion would not come in way while granting the bail."

Therefore, petitioner is admitted to bail subject to his furnishing bail bonds in the sum of Rs.2,00,000 (Rupees two hundred thousand only) with two sureties each in the like amount to the satisfaction of the learned trial Court.

6. It is, however, clarified that the observations given herein are just tentative in nature and strictly confined to the disposal of this bail petition.

MWA/S-32/L Bail granted.

2013 Y L R 701
[Lahore]
Before Muhammad Anwaarul Haq and Syed Iftikhar Hussain Shah, JJ
MUHAMMAD IMRAN alias MANI and another---Petitioners
Versus
The STATE and another---Respondents

Criminal Miscellaneous No.15673-B of 2011, decided on 30th January, 2012.

Criminal Procedure Code (V of 1898)---

----S. 497(2)---Penal Code (XLV of 1860), Ss. 302/ 109/ 379/ 427/ 148/ 149---Anti-Terrorism Act (XXVII of 1997), S. 7---Qatl-e-amd, abetment, theft, mischief causing damage to the amount of fifty rupees, rioting armed with deadly weapons, acts of terrorism---Bail, grant of---Further inquiry---Ten persons were alleged to have collectively fired at the deceased but no specific injury on the person of the deceased had been attributed to the accused---No weapon of offence had been recovered from the accused---Accused had taken plea of alibi at the time of occurrence by stating that they were present in a court in connection with a criminal case and in this regard, statements of two advocates and court reader were available on the record---Accused were found innocent in three consecutive investigations and their names were placed in column No.2 of the report prepared under S. 173 Cr.P.C.---Question of vicarious liability of accused and evidentiary value of the plea of alibi was to be determined by Trial Court after recording of evidence---Case against accused fell within the purview of S.497(2) Cr.P.C. and was one of further inquiry into their guilt---Bail petition of accused was accepted and they were admitted to bail.

M.A. Zafar and Shoaib Zafar for Petitioners.

Tariq Javed, Deputy District Public Prosecutor, Naveed Irshad, DSP Ferozewala Circle and Muhammad Younas, Inspector/S.H.O. Police Station Factory Area, Sheikhupura for the State

Sher Afghan Asadi for the Complainant.

ORDER

Through this petition, petitioners Muhammad Imran alias Mani and Tanveer Hussain alias Chammi seek post-arrest bail in Case No.529 of 2011 dated 19-5-2011, offence under sections 302/109/379/427/ 148/149, P.P.C. and section 7 of ATA, 1997, registered at Police Station Factory Area District Sheikhupura.

2. Learned counsel for the petitioners contends that there is collective allegation against ten accused persons of making firing at the deceased and no specific role has been attributed to the petitioners; that no recovery of any weapon of offence was effected from the petitioners; that in three consecutive investigations conducted by three different police officers both the petitioners were found innocent and the police has placed their names in Column No.2 of the report prepared under section 173, Cr.P.C., that the police after thorough investigation has declared that only two nominated accused namely Khizar Hussain and Akmal Shehzad participated in this occurrence; that motive is also not directly attributed to the petitioners and during the course of investigation they have successfully proved their plea of alibi; that in the circumstances, case against the petitioners is one of further inquiry into their guilt and they are entitled for the bail.

3. On the other hand, learned Deputy District Public Prosecutor assisted by learned counsel for the complainant vehemently opposing this bail petition contends that in this broad-daylight occurrence four persons have lost their lives; that the petitioners arc nominated in a promptly lodged F.I.R; that specification of injuries in this occurrence was impossible and the F.I.R. has been registered on the basis of natural statement of the complainant; that it is a case of vicarious liability and every accused is responsible for every act of his other co-accused; that declaration of innocence of the petitioners is a mala fide on the part of the police; that initially both the petitioners were challaned showing their names in Column No.3 of the report under section 173 Cr.P.C. but that report is not available on the record and the petitioners with connivance of the police managed disappearance of the same; that deeper appreciation of evidence especially the plea of alibi taken by the petitioners is not permissible at bail stage; that challan in this case has already been submitted and all the accused including the petitioners have been summoned by the learned trial Court.

4. Heard. Record perused.

5. Be that as it may, admittedly the collective allegation of making firing at the deceased has been levelled against ten accused persons and no specific injury on the persons of the deceased has been attributed to the petitioners. No weapon of offence was recovered from the petitioners. During the investigation the petitioners have taken the plea of alibi that at the time of occurrence they were present in the court of learned Additional Sessions Judge, Ferozewala in connection with the case F.I.R. No.1299 of 2007 and in this regard, statements of two Advocates and Reader of the Court are available on the record and on the basis of the same, petitioners were found innocent in three consecutive investigations and their names were placed in Column No.2 of the report prepared under section 173, Cr.P.C. In view of all above, question of vicarious liability of the petitioners and evidentiary value or the plea of alibi taken by them can validly be determined by the learned trial Court after recording of some evidence. However, case against the petitionrs, in our view, prima facie falls within the purview of subsection (2) of section 497, Cr.P.C. and is one of further inquiry into their guilt. We, therefore, accept this petition and admit the

petitioners to post-arrest bail subject to their furnishing bail bonds in the sum of Rs.300,000 (Rupees three hundred thousand only) each with two sureties each in the like amount to the satisfaction of the learned trial Court.

6. It is, however, clarified that observations made hereinabove are just tentative in nature and strictly confined to the disposal of this bail petition.

MWA/M-53/L Bail granted.

2013 Y L R 1393
[Lahore]
Before Muhammad Anwaarul Haq, J
GHULAM JILLANI---Petitioner
Versus
The STATE and another---Respondents

Criminal Miscellaneous No.3006-B of 2013, decided on 14th March, 2013.

Criminal Procedure Code (V of 1898)---

----S. 497---Bail, grant of---Scope----Bail granted to accused cancelled due to his absence on one date of hearing---Propriety---Plea that accused was regularly appearing before Trial Court but due to his absence on only one date, his bail was cancelled; that his non-appearance was not intentional as public transport was not available due to a long march in the country---Validity---Accused was on bail earlier and his absence was for one date only---Accused was granted bail in circumstances.

Ali Akhtar Shabbir for Petitioner.

Tahir Zia Mahar, Special Prosecutor for Customs with Muhammad Afzal Awan, I.O. Customs House, Faisalabad for Respondents.

ORDER

MUHAMMAD ANWAARUL HAQ, J.---Petitioner Ghulam Jillani seeks post arrest bail in a case F.I.R. No.4 dated 9-9-2012 under sections 2(s), 15, 16, 18, 156(1) & 89 Customs Act, 1969 registered at Police Station Investigation and Prosecution Branch, Model Custom Collectorate, Faisalabad.

2. Learned counsel for the petitioner contends that the petitioner was earlier granted bail in this case and he was appearing before the learned trial Court but due to his absence on only one date i.e. 15-1-2013 his bail was cancelled. Further contends that non-appearance of the petitioner was not at all intentional rather due to long march of Dr. Tahir-ul-Qadri, the public transport was not available, therefore, he could not appear before the learned trial Court and that the petitioner shall regularly appear before the learned trial Court in future if he is granted bail.

3. Learned Special Prosecutor for Customs does not seriously oppose the request of bail of the petitioner.

4. Heard. Record perused.

5. Without commenting upon the reasons for non-appearance of the petitioner before the learned trial Court on the date fixed, only keeping in view the fact that earlier he was on bail and his absence was only for one date, he is granted bail subject to his furnishing bail bond in the sum of Rs.50,000 (Rupees fifty thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

MWA/G-11/L Bail granted.

2013 Y L R 2009
[Lahore]
Before Muhammad Anwaarul Haq and Abdus Sattar Asghar, JJ
ABDUL MAJEED alias MITHU---Petitioner
Versus
The STATE and others---Respondents

Criminal Miscellaneous Nos.3284-B and 1212-B of 2013, decided on 20th March, 2013.

Criminal Procedure Code (V of 1898)---

----S. 497(2)---Control of Narcotic Substances Act (XXV of 1997), S. 9(c)---Qanun-e-Shahadat (10 of 1984), Art. 22---Possession of narcotics---Bail, grant of---Further inquiry---Non-conducting of identification parade---Effect---Allegation against accused was that he was carrying a sack of charas weighing 50 kilograms on his motorcycle, and on seeing the police, he threw it away and made good his escape---No identification parade was conducted--Investigating officer had opined that charas was found unattended and there was no police official who saw the accused throwing away the sack of charas---Accused was no more required for further investigation---Case was one of further inquiry into guilt of accused, who was admitted to bail accordingly.

Ch. Tariq Javaid for Petitioner.
Ch. Muhammad Mustafa, Deputy Prosecutor-General for the State.
Safdar Ali S.I. with record.

ORDER

This is the 2nd post-arrest bail petition on behalf of the petitioner before this Court. Earlier petition i.e. Criminal Miscellaneous No.1212-B of 2013 was dismissed having been withdrawn on 13-2-2013.

2. Through this petition, petitioner Abdul Majeed alias Mithu seeks post-arrest hail in case F.I.R. No.260/2009 dated 4-6-2009, offence under section 9(c) of the Control of Narcotic Substances Act, 1997, registered at Police Station Saddar Muridkey District Sheikhupura. Allegation against the petitioner is that he along with his co-accused namely Waheed alias Chhatu was coming on motorcycle with a sack of charas and on seeing the

police party they accelerated the motorcycle; they were chased by the police, but both of them made good their escape while throwing the sack of charas weighing 50 kilograms.

3. Learned counsel for the petitioner contends that the petitioner has falsely been involved in this case by the police with mala fide intention just to harass and humiliate him; that nothing was recovered from the possession of the petitioner and the alleged recovery is planted one; that there is no evidence whatsoever collected by the Investigating Officer even after the arrest of the petitioner that he is connected with the allegedly thrown sack of charas; that there is no legal evidence available against the petitioner as no identification parade was held in this case during the whole investigation; that petitioner is behind the bars since 24-11-2012 and no more required for further investigation; that case against the petitioner is one of further inquiry.

4. On the other hand, learned Deputy Prosecutor-General opposing this petition contends that a huge quantity of charas weighing 50 kilograms was recovered from the sack thrown by the petitioner; that the offence committed by the petitioner comes within the prohibition of section 51(2) of C.N.S.A., 1997, therefore, he is not entitled for the bail.

5. Heard. Record perused.

6. Be that as it may, the allegation against the petitioner is that on chasing the police party he threw the sack of contraband charas weighing 50 kilograms and fled away from the scene of occurrence. Learned Law Officer, after consulting the record, states that no identification parade was conducted in this case and that vide Zimni No.29 dated 21-12-2010 Muhammad Anwar, S.I/I.O has opined that the charas was found unattended and there was no police official who saw the petitioner and his co-accused while throwing the sack of charas. Petitioner is behind the bars since 24-12-2012 and is no more required for the purpose of investigation.

7. In view of the above, case against the petitioner is one of further inquiry into his guilt as contemplated under sub-section (2) of section 497, Cr.P.C., therefore, we accept this petition and admit the petitioner to 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 learned trial Court.

8. It is, therefore, clarified that the observations made herein above are just tentative in nature and strictly confined to the disposal of this bail petition.

MWA/A-50/L Bail granted.

PLJ 2013 Cr.C. (Lahore) 3 (DB)
[Bahawalpur Bench Bahawalpur]
Present: Muhammad Anwaarul Haq and Altaf Ibrahim Qureshi, JJ.
GHAUS BAKHSH alias GHAUSU--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 1426-B of 2012, decided on 20.9.2012.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), S. 365-A--Bail, grant of--Role against accused was that he facilitated co-accused--Statement of abductee was totally negating story of FIR--A star witness of the occurrence, made his statement negating the story of his abduction as narrated in the FIR--Prosecution remained unable to cover-up the period of 14 months from the date of occurrence--Case of the petitioner requires further probe into his guilt--Accused had succeeded to make-out a case of further inquiry--Bail was allowed. [P. 5] A & B

Mr. Zafar Iqbal Awan, Advocate for Petitioner.
Mr. Muhammad Ali Shahab, DPG for State.
Mr. Muhammad Aslam Khan Dhukkar, Advocate for Complainant.
Date of hearing: 20.9.2012.

Order

The petitioner has been arrested in this case on 06.02.2012 in a FIR Bearing No. 301, dated 23.10.2011, registered under Section 365-A, P.P.C. at Police Station Bhong, Tehsil Sadiqabad, District Rahim Yar Khan, for abduction of Ghulam Qadir, brother of the complainant, for the purpose of ransom of Rs. 500,000/-. Allegedly, after receiving the amount of Rs. 300,000/-, the accused persons released the abductee-Ghulam Qadir.

2. Learned counsel for the petitioner contends that as per contents of the FIR, role against the petitioner is that he facilitated his principal co-accused Badla Lathani, who allegedly contacted the complainant party for payment of ransom and the present petitioner never contacted the complainant party for ransom. Further contends that there is a delay of more than 14 months in lodging of the FIR. It is contended that statement of the alleged abductee-victim is totally negating the story narrated in the FIR, as according to his statement, he was released by the accused after 1« months of the occurrence whereas in the FIR it is categorically stated that the alleged abductee was released after payment of ransom amount on 22.10.2011, after 14 months of the occurrence.

3. Learned Deputy Prosecutor General assisted by the learned counsel for the complainant opposed this bail petition on the grounds that there are three other cases of similar nature, which are pending against the present petitioner, hence, he is not entitled for the grant of bail; that the complainant and the witnesses have no enmity with the petitioner to falsely involve him in this heinous offence; that the petitioner is nominated in the FIR; that delay perse is no ground to enlarge the petitioner on bail in an offence falling within the prohibitory clause and; that at time of receipt of ransom amount, petitioner was present there.

5. Arguments heard. Record perused.

6. The occurrence in this case took place on 10.08.2010 whereas the matter was reported to the police on 23.10.2011 i.e. after one year, two months & 13 days. The prosecution case, according to the complainant, is that a few days ago, the accused persons including the present petitioner received the amount of Rs. 300,000/-, which was shared by them there and then and after receiving the ransom money, Ghulam Qadir was released i.e. on the same day 22.10.2011. Ghulam Qadir, a star witness of the occurrence, made his statement on 23.10.2011 negating the story of his abduction as narrated in the FIR, which happens to be registered long ago on 10.08.2010. On a Court question, learned counsel for the complainant as well as the learned Deputy Prosecutor General remained unable to satisfy us to cover-up the period of 14 months from the date of occurrence. On this score alone, case of the petitioner requires further probe into his guilt.

7. So far as the argument raised by the learned DPG as well as learned counsel for the complainant that the petitioner is involved in three case of alike nature, on a Court question, learned counsel for the petitioner has stated at bar that in two out of three cases, the petitioner had been acquitted whereas the third one is pending trial, which fact remained un-rebutted by the other side; meaning thereby, in none of the case, the petitioner has suffered conviction. In Jamal-ud-Din alias Zubair Khan vs. The State (2012 SCMR 573), it has been held as under:

"The argument that the petitioner has been involved in two other cases of similar nature would not come in the way of grant of petition so along as there is nothing on the record to show that he has been convicted in any one of them".

8. For what has been stated above, we find that the petitioner has succeeded to make-out a case of further inquiry. Resultantly, we allow this application and admit the petitioner 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 each in the like amount to the satisfaction of the learned trial Court.

(R.A.) Bail allowed.

PLJ 2013 Cr.C. (Lahore) 12
[Bahawalpur Bench Bahawalpur]
Present: Muhammad Anwaar-ul-Haq, J.
MUNIR AHMED and another--Petitioners
versus
STATE and another--Respondents

Crl. Misc. No. 1709-B of 2012, decided on 18.9.2012.

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

----S. 498--Pakistan Penal Code, (XLV of 1860), Ss. 337-L(2) & 337-F(v)--Bail before arrest, confirmed--Question of vicarious liability--Cross-version--Collective role was assigned--During the investigation, two nominated co-accused of the petitioners were found innocent--During the investigation, Investigating Officer remained fail to ascertain the question of aggression--Only Court can validly determine which party was actually

aggressor and originator of that occurrence--Therefore, keeping in view the peculiar circumstances of that case, without further commenting upon the merits of the case, to avoid any prejudice to either side, ad-interim pre-arrest bail already allowed to the petitioners by High Court was confirmed subject to their furnishing fresh bail bonds. [Pp. 13 & 14] A & B

Mr. Zafar Iqbal Awan, Advocate for Petitioners.

Mr. Asghar Ali Gill, Deputy Prosecutor-General for State.

Syed Asim Ali Bukhari, Advocate for Complainant.

Date of hearing: 18.9.2012.

Order

Through this petition, Munir Ahmed and Hakim Ali petitioners seek pre-arrest bail in case F.I.R. No. 87/12, dated 15.05.2012, registered at Police Station Marrot, District Bahawalnagar, in respect of offences under Sections 337-L(2) and 337-F(v)/34, PPC.

2. Learned counsel for the petitioners contends that the petitioners are innocent and have falsely been roped in this case on the basis of mala fide of the complainant; that in fact it is a case of cross-version and complainant party lodged an attack upon the petitioner's side, wherein both the petitioners also received injuries during the occurrence, and in this regard a Rapt No. 18 was got recorded on 09.05.2012 at 06:15 p.m. by petitioner Munir Ahmad but the complainant did not mention the same in the F.I.R. that itself is sufficient to create doubt about the whole F.I.R.; that allegation mentioned in the F.I.R. against two nominated co-accused of the petitioners Muhammad Bashir and Haji Ameer Ahmad, has already been falsified because during the investigation, they have been found innocent as such story of the prosecution has become highly doubtful; that as per averments of the F.I.R. no specific injury on the person of any injured is attributed to any of the petitioners; that question of vicarious liability of the petitioners is a matter of further inquiry into their guilt. Further contends that exaggerations made in the F.I.R. by the complainant is sufficient to hold that case against the petitioners is based upon mala fide of the complainant and that in the circumstances case against the petitioners is a matter of further inquiry into their guilt.

3. Conversely, learned Law Officer assisted by learned counsel for the complainant opposing this bail application contends that the petitioners are specifically nominated in the F.I.R. with specific role of causing injuries to the complainant Muhammad Hussain and his brother Muhammad Yaqoob injured/PWs; that the petitioners have actively participated in the occurrence, they are vicariously liable for every act of their co-accused; that pre-arrest bail is an extra-ordinary relief and deeper appreciation of the merits of the case at this stage is not proper; that prior condition of pre-arrest bail is to prove mala fide on the part of the complainant or the police that is missing in this case. Learned Law Officer adds that during the occurrence petitioners were armed with Sotas and those are yet to be recovered from them; that cross-version got lodged by the petitioner's side is an attempt to save their skin from the consequences of this F.I.R.

4. Heard. Record perused.

5. Be that as it may, I have noticed that it is a case of cross-version, which was promptly recorded through Rapt No. 18, on 09.05.2012 at 06:15 p.m. by petitioner MunirAhmad,

according to which, both the petitioners also received injuries during the occurrence and Medico-Legal. Reports issued in this regard are available on the record. Bare perusal of the record reflects that both the sides have concealed injuries of each other. As per averments of the F.I.R., collective role has been assigned to the petitioners. During the investigation, two nominated co-accused of the petitioners namely Muhammad Bashir and Haji Ameer Ahmad, have been found innocent. Furthermore, during the investigation, Investigating Officer remained fail to ascertain the question of aggression. In this view of the matter, only the learned trial Court can validly determine which party was actually aggressor and originator of this occurrence.

Therefore, keeping in view the peculiar circumstances of this case, without further commenting upon the merits of the case, to avoid any prejudice to either side, ad-interim pre-arrest bail already allowed to the petitioners by this Court vide order dated 17.08.2012, is confirmed subject to their furnishing fresh bail bonds in the sum of Rs. 50,000/- (Rupees fifty thousand only) each with one surety each in the like amount to the satisfaction of the learned trial Court/Area Magistrate within a period of fifteen days from today.

6. It is, however, clarified that observations made herein are just tentative in nature and strictly confined to the disposal of this bail petition.

(R.A.) Bail confirmed.

PLJ 2013 Cr.C. (Lahore) 24
[Bahawalpur Bench Bahawalpur]
Present: Muhammad Anwaar-ul-Haq, J.
HAMID ABBAS--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 1925-B of 2012, decided on 2.10.2012.

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

----S. 498--Bail before arrest, confirmed--After refusal of pre-arrest bail of accused on merits, he cannot be granted after arrest bail on same grounds--Birth certificate of accused was never produced before trial Court when pre-arrest bail was dismissed on merits he cannot be granted post arrest bail on same grounds--Held: It is established principle of law that considerations for grant of pre-arrest bail and that of after arrest bail were altogether different--Bail was confirmed. [P. 25] A

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

----S. 498--Pakistan Penal Code, (XLV of 1860)--S. 337-F(v)--Bail before arrest, confirmed--No previous criminal record--Offence did not fall within prohibitory clause--Injury attributed to accused had been declared attracting offence u/S. 337-F(v), PPC which did not fall within prohibitory clause of S. 497, Cr.P.C.--I.O after consulting record confirmed that accused had no previous criminal record--High Court did not find any justifiable reason to send accused behind bars who was earlier granted bail after arrest by trial Court--Bail was confirmed. [P. 25] B

Mr. Zafar Iqbal Awan, Advocate with Petitioner.

Mr. Asghar Ali Gill, Deputy Prosecutor General for State.

Mr. Tariq Mehmood Chaudhry, Advocate for Complainant.

Date of hearing: 2.10.2012.

Order

Petitioner Hamid Abbas seeks pre-arrest bail in case FIR No. 146 dated 14.05.2012 under Section 337A(iv), PPC registered at Police Station City Yazman DistrictBahawalpur.

2. Learned counsel for the petitioner contends that earlier the petitioner was arrested in this case on 11.07.2012 and was granted bail by the learned trial Court on 09.07.2012, however, upon filing of application under Section 497(5), Cr.P.C. by the complainant, his bail was cancelled by the learned Additional Sessions Judge, Yazmanon 10.09.2012. Further contends that the injury attributed to the petitioner has already been declared falling under Section 337F(v), PPC and punishment provided for the same is five years that does not fall within the prohibitory clause of Section 497 Cr.P.C; that while canceling the bail of the petitioner the learned Additional Sessions Judge has observed that after refusal of pre-arrest bail of an accused on merits he cannot be granted after arrest bail on the same grounds, however, the considerations for the grant of bail before arrest and after arrest bail are all together different.

3. On the other hand learned law officer assisted by learned counsel for the complainant while opposing this bail application contends that the petitioner is nominated in the FIR with the specific role of causing an injury on the fingers of right hand of female injured with "Sota". Further contends that the petitioner was arrested on 11.07.2012 and just after seven days he was granted bail by the learned trial Court and that during the investigation the petitioner has been found fully involved in the occurrence.

4. Heard. Record perused.

5. Admittedly the petitioner was earlier granted bail after arrest by the learned trial Court on 18.07.2012 and the same was cancelled by the learned Additional Sessions Judge on 10.09.2012 by observing that birth certificate of the petitioner was never produced before the learned trial Court and that when pre-arrest bail of an accused is dismissed on merits he cannot be granted post arrest bail on the same grounds. It is established principle of law that considerations for the grant of pre-arrest bail and that of after arrest bail are altogether different. The injury attributed to the petitioner has already been declared attracting the offence under Section 337F(v), PPC, which does not fall within the prohibitory clause of Section 497, Cr.P.C. The investigating officer, present in Court, after consulting the record confirms that the petitioner has no previous criminal record. Therefore, I do not find any justifiable reason to send the petitioner behind the bars who was earlier granted bail after arrest by the learned trial Court.

In view of the above, ad-interim pre-arrest bail already granted to petitioner by this Court on 18.09.2012 is hereby confirmed subject to his furnishing fresh bail bond in the sum of Rs. 50,000/- (Rupees fifty thousand only) with one surety in the like amount to the satisfaction of the learned trial Court/Area Magistrate within a period of fifteen days.

6. It is, however, clarified that observations made herein are just tentative in nature and strictly confined to the disposal of this bail petition.

(R.A.) Bail allowed.

PLJ 2013 Cr.C. (Lahore) 42
[Bahawalpur Bench Bahawalpur]
Present: Muhammad Anwaar-ul-Haq, J.
RASHEED AHMED--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 1958-B of 2012, decided on 4.10.2012.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 337-F(v) & 337-L(2)--Bail, grant of--Case of cross version--Delay of more one and half month in FIR--Aggression of either side can only be determined by trial Court after recording of some evidence--Case against the petitioner is one of further inquiry into his guilt, as contemplated u/S. 497(2), Cr.P.C.--Even otherwise the injury attributed to accused has been declared attracting the offence u/S. 337F(v), PPC, which does not fall within the prohibitory clause of S. 497, Cr.P.C.--Bail was admitted. [P. 43] A

Mr. Shabbir Ahmed Awan, Advocate for Petitioner.

Mr. Asghar Ali Gill, Deputy Prosecutor General for State.

Ch. Muhammad Munir, Advocate for Complainant.

Date of hearing: 4.10.2012.

Order

Petitioner Rasheed Ahmed seeks post arrest bail in a case FIR No.63 dated 22.02.2012 registered under Sections 337F(v) & 337L(2), PPC at Police Station Pacca Larran District Rahim Yar Khan.

2. Learned counsel for the petitioner contends that there is an inordinate delay of more than one and half month in lodging of the FIR; that it is a case of cross-version, as a case FIR No.02 dated 03.01.2012 under Section 337A(ii), PPC has already been registered against the complainant and others for causing injuries to the petitioner and his co-accused. Further contends that allegation against the petitioner is that he has caused a fracture on the left arm of injured Mst. Majeedan with "Soti", which has already been declared attracting the offence under Section 337F(v), PPC and the same does not fall within the prohibitory clause of Section 497, Cr.P.C. and that the petitioner is behind the bars since 23.08.2012 without any substantive progress in his trial.

3. On the other hand learned law officer assisted by learned counsel for the complainant while opposing this bail application contends that the petitioner is nominated in the FIR with a specific role of causing a fracture on the left arm of injured Mst. Majeedan; that the injured was medically examined on the same day, therefore, the delay, if any, in lodging of the FIR cannot be attributed to the complainant. Further contends that the medical evidence fully corroborates the version of the complainant; that during the investigation the petitioner has been found fully involved in the occurrence; that weapon of offence i.e. "Soti" has already been recovered from the petitioner and that mere non-falling of an offence within the

prohibitory clause of Section 497, Cr.P.C. is not sufficient to enlarge the petitioner on bail. Places reliance on PLJ 2007 Cr.C. Lahore 655.

4. Heard. Record perused.

5. Admittedly, it is a case of cross-version and a case FIR No.02 dated 03.01.2012 has already been registered against the complainant and others for causing injuries to the petitioner and his co-accused. The aggression of either side can only be determined by the learned trial Court after recording of some evidence. In this view of the matter, case against the petitioner is one of further inquiry into his guilt, as contemplated under sub-section (2) of Section 497, Cr.P.C. Even otherwise the injury attributed to the petitioner has been declared attracting the offence under Section 337F(v), PPC, which does not fall within the prohibitory clause of Section 497, Cr.P.C. I, therefore, admit the petitioner to bail subject to his furnishing bail bond in the sum of Rs.50,000/- (Rupees fifty thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

6. It is, however, clarified that observations made herein are just tentative in nature and strictly confined to the disposal of this bail petition.

(R.A.) Bail granted.

PLJ 2013 Cr.C. (Lahore) 87
Present: Muhammad Anwaar-ul-Haq, J.
MUHAMMAD AKBAR ALI--Appellant
versus
STATE, etc.--Respondents

Crl. Appeal No. 71-J of 2010, and Crl. Misc. No. 1 of 2012, decided on 22.11.2012.

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

----S. 426--Pakistan Penal Code, (XLV of 1860), Ss. 302(b) & 149--Suspension of sentence--Behind the bars for the last about seven years--No reason attributable to the petitioner or any person acting on his behalf, for delay in disposal of this appeal, that relates to the year 2010 and there is no scope of early fixation of the same in the near future--Court while dealing with the petition for suspension of sentence, can refuse to exercise its discretion if the convict is previously convicted or in the opinion of the Court is a hardened, desperate or dangerous criminal or is an accused of an act of terrorism punishable with death or imprisonment for life--Counsel for the complainant remained unable to provide any material against the petitioner to establish that the petitioner is previously convicted or a hardened dangerous criminal--Petitioner is not responsible for the delay in decision of his appeal in any manner whatsoever and further that case of the petitioner does not fall within the proviso of subsection (1-A) referred above--Petition allowed and suspend the sentence of the petitioner till the final disposal of his criminal appeal. [P.] A, B & C

Syed Afzal Shah Bukhari, Advocate for Appellant-Petitioner.

Mirza Abid Majeed, Deputy Prosecutor-General for State.

Rana Muhammad Saeed Akhtar, Advocate for Complainant.

Date of hearing: 22.11.2012.

Order

Through this 1st petition, petitioner/appellant Muhammad Akbar Ali seeks suspension of sentence on the statutory ground i.e. non-disposal of his appeal within the stipulated period mentioned in the amendment in Section 426, Cr.P.C. Petitioner/appellant alongwith his two co-accused namely Siraj Din and Muhammad Anwar, has been convicted and sentenced by the learned trial Court as under:--

Under Sections 302(b)/149, PPC

Imprisonment for Life each as Ta'zir for the murder of each deceased namely Muhammad Akbar, Ghulam Haider and Shabbir Ahmad with a compensation of Rs, 1,00,000/- each to the legal heirs of each deceased and in default thereof to further undergo one year S.I. each.

Under Sections 427/149, PPC

Rigorous imprisonment for two years each with fine of Rs.20,000/- each or in default thereof to undergo two months S.I. each.

Under Sections 148/149, PPC

Rigorous imprisonment for three years each with fine of Rs.20,000/- each or in default thereof to undergo six months S.I. each.

Benefit of Section 382-B, Cr.P.C. was also extended to the petitioner and his co-accused and it was ordered that all the sentences shall run concurrently.

2. Learned counsel for the petitioner contends that during four investigations, petitioner was declared innocent and he has been convicted and sentenced in a private complaint filed by Muhammad Sharif complainant; that as per contents of the private complaint, no specific injury is attributed to the present petitioner rather there is general allegation against him that he also fired at the deceased, who had already received firearm injuries from his other co-accused; that petitioner-appellant has no previous criminal record; that in this case, he was arrested on 28.11.2005 and has been convicted and sentenced by the learned trial Court on 21.01.2010, he has preferred appeal before this Court on 19.03.2010, but even after the lapse of more than two and half years his appeal has not been decided; that the instant appeal relates to the year 2010 and there is no likelihood of early fixation of the same, therefore, in view of the amendment in Section 426 (1-A)(c), Cr.P.C., he deserves suspension of his sentence.

3. Learned Law Officer as well as learned counsel for the complainant remained unable to point out any fault of the petitioner or any person acting on his behalf in any manner whatsoever for delay in disposal of this appeal. However, learned counsel for the complainant placing reliance on the case law PLJ 1986 Crl. Cases (Karachi) 475 and PLJ 1986 Crl. Cases (Karachi) 482, contends that petitioner even after lapse of statutory period is not entitled for the relief prayed for because he is a hardened desperate criminal, case against him has already been proved beyond any shadow of doubt and he has been convicted and sentenced after a regular trial by the learned trial Court that the learned trial Court has already taken a lenient view by awarding lesser punishment to the petitioner; that deeper appreciation of evidence at this stage is not desirable and after the conviction presumption of innocence is also not available to the petitioner and that there are serious allegation against

the petitioner that he had fired at the deceased, hence, he is not entitled for the relief prayed for.

4. Heard. Record perused.

5. Admittedly, petitioner was arrested in this case on 28.11.2005 and he is continuously behind the bars for the last about seven years. Admittedly, there is no reason attributable to the petitioner or any person acting on his behalf, for delay in disposal of this appeal, that relates to the year 2010 and there is no scope of early fixation of the same in the near future.

6. As far as proviso to the newly added sub-section (1-A) of Section 426, Cr.P.Code, is concerned, it is mentioned in the proviso that Court while dealing with the petition for suspension of sentence, can refuse to exercise its discretion if the convict is previously convicted or in the opinion of the Court is a hardened, desperate or dangerous criminal or is an accused of an act of terrorism punishable with death or imprisonment for life. The learned counsel for the complainant remained unable to provide any material against the petitioner to establish that the petitioner is previously convicted or a hardened dangerous criminal.

Keeping in view the facts and circumstances of this case, I am of the view that petitioner is not responsible for the delay in decision of his appeal in any manner whatsoever and further that case of the petitioner does not fall within the proviso of sub-section (1-A) referred above, therefore, without touching the merits of the case, I allow this petition and suspend the sentence of the petitioner till the final disposal of his criminal appeal, 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. However, petitioner shall remain present before this Court on each and every date of hearing fixed in the main appeal.

(A.S.) Petition allowed.

PLJ 2013 Cr.C. (Lahore) 102
Present: Muhammad Anwaar-ul-Haq, J.
MUHAMMAD RIAZ--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 6643-B of 2012, decided on 31.5.2012.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), S. 489-F--Bail, grant of--Further inquiry--Dishonored Cheque--Details of the transaction between the parties, even there was no documentary evidence whatsoever regarding the transaction mentioned in the F.I.R--Alleged dishonest intention of the petitioner can validly be determined by the trial Court after recording of some evidence and case against the petitioner, prima facie, falls within sub-section (2) of Section 497, Cr.P.C. and was one of further inquiry into his guilt--Petitioner was behind the bars whereas the maximum punishment provided for the offence u/S. 489-F, PPC is imprisonment for three years and it does not fall within the prohibitory

clause of Section 497, Cr.P.C., grant of bail in such like cases is a rule and refusal is an exception--Bail admitted. [P. 104] A

Malik Ghulam Abbas Nissoana, Advocate for Petitioner.

Mirza Abid Majeed, Deputy Prosecutor-General for State.

Ch. Muhammad Zubair Rafique Warraich, Advocate for Complainant.

Date of hearing: 31.5.2012.

Order

Through this petition Muhammad Riaz petitioner seeks post-arrest bail in case F.I.R No. 146/12, dated 22.03.2012, for an offence under Section 489-F, PPC registered at Police Station Sahiwal, District Sargodha.

2. Learned counsel for the petitioner contends that case against the petitioner is totally fabricated and is an outcome of an application moved by the brother of the petitioner against the complainant containing serious allegation of corruption against him; that no date and time of occurrence has been mentioned in the F.I.R; that there is no documentary evidence whatsoever regarding the transaction mentioned in the F.I.R.; that the offence against the petitioner does not fall within the prohibitory clause of Section 497, Cr.P.Code; that in the circumstances case against the petitioner is one of further inquiry into his guilt. Further contends that petitioner has no previous criminal record and is behind the bars since 07.04.2012 without any progress in his trial.

3. Conversely, learned Law Officer assisted by learned counsel for the complainant opposing this bail application contends that the petitioner has deprived the innocent complainant from a huge amount of Rs. 50,00,000/-; that the petitioner issued the disputed cheque to the complainant knowing the fact that he has insufficient funds in his account, which cheque has been dishonored and that is sufficient to prove his dishonest intention to constitute an offence under Section 489-F, PPC; that contentions raised by the learned counsel for the petitioner need deeper appreciation of the evidence of the case and that is not permissible at bail stage mere non-falling of an offence within prohibitory clause does not entitle any accused to be released on bail as a matter of right.

4. Heard. Record perused.

5. Mumtaz Ahmad A.S.I./Investigating Officer after consulting the record confirms that petitioner has no previous criminal record.

Be that as it may, F.I.R. does not speak about the details of the transaction between the parties, even there is no documentary evidence whatsoever regarding the transaction mentioned in the F.I.R. The alleged dishonest intention of the petitioner can validly be determined by the learned trial Court after recording of some evidence and case against the petitioner, prima facie, falls within sub-section (2) of Section 497, Cr.P.C. and is one of further inquiry into his guilt. Petitioner is behind the bars since 07.04.2012 whereas the maximum punishment provided for the offence under Section 489-F, PPC is imprisonment for three years and it does not fall within the prohibitory clause of Section 497, Cr. P.C, grant of bail in such like cases is a rule and refusal is an exception.

6. In view of all above, I accept this petition and admit the petitioner to bail subject to his furnishing bail bond in the sum of Rs. 2,00,000/- (Rupees two hundred thousand only) with one surety in the like amount to the satisfaction of the learned trial Court/Area Magistrate.

7. It is, however, clarified that observations made herein are just tentative in nature and strictly confined to the disposal of this bail petition.

(A.S.) Bail admitted.

PLJ 2013 Cr.C. (Lahore) 285
Present: Muhammad Anwaar-ul-Haq, J.
ABDUL RAZAQ and 3 others--Petitioners
versus
STATE and another--Respondents

Crl. Misc. No. 14585-B of 2011, decided on 14.11.2011.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 337-A2, 337-A1, 148 & 149--Bail before arrest--Confirmed--There was delay of six days in lodging of the F.I.R without any plausible explanation--Complainant was not the eyewitness of the occurrence as he heard about the occurrence on phone and thereafter he came to the place of occurrence--According to the police opinion, petitioners were although present at the place of occurrence but they were empty handed, therefore, question of recovery from both these petitioners was inconsequential--Injuries attributed to petitioners had been declared falling u/S. 337-L(i), PPC, whereas injury falling u/S. 337-F(ii), PPC had not been assigned to any of the petitioners--No justifiable reason to send the petitioners behind the bars--Ad-interim pre-arrest bail already allowed to the petitioners by High Court was confirmed. [P. 286] A

Mian Shahid Ali Shakir, Advocate along with Petitioners in person.

Mr. Zia Shahid Waseer, Advocate for Complainant.

Ch. Muhammad Akram Tahir, D.D.P.P. for State.

Date of hearing: 14.11.2011.

Order

Through this petition, petitioners Abdul Razaq, Khalid Mehmood, Muhammad Saeed alias Saidu and Muzammal Sohail seek pre-arrest bail in case F.I.R No. 372, dated 27.09.2011, offences under Sections 337-A2, 337-A1, 148, 149, PPC, registered at Police Station Blochni, District Faisalabad.

2. At the very outset, the Investigating Officer present with record states that Muhammad Saeed alias Saidu Petitioner No. 3 has been declared innocent and is not required in this case. In this view of the matter, learned counsel for the petitioners does not press this petition to the extent of Muhammad Saeed alias Saidu petitioner, this petition to his extent is dismissed having been withdrawn.

3. Learned counsel for the petitioner contends that petitioner, Abdul Razzaq during the investigation has successfully proved that he was not armed with any weapon; even

otherwise injury attributed to him falls under Section 337-A(i), PPC whereas injury declared by the doctor falling under Section 337-A(ii), PPC has not been assigned to any of the petitioners; that injuries attributed to Khalid Mehmood and Muzammal Sohail, petitioners have been declared falling under Section 337-L(i), PPC and to their extent police has opined that though they were present at the place of occurrence but they were empty handed; that case against the petitioners is based upon mala fide of the complainant; that no specific injury is attributed to any of the petitioners on the person of Muhammad Khan, injured.

4. On the other hand, learned Deputy District Public Prosecutor assisted by learned counsel for the complainant while opposing this bail application contends that pre-arrest bail is an extraordinary relief which cannot be granted in routine without proving the mala fide of the police or the complainant; that petitioners are nominated in the F.I.R with their specific roles of causing injuries to the injured Aadil and general beating to Muhammad Khan, injured; that Muhammad Khalid, petitioner was armed with pistol, therefore, they are not entitled for grant of bail.

5. Heard. Record perused.

6. Admittedly there is delay of six days in lodging of the F.I.R without any plausible explanation. Even otherwise, the complainant is not the eye-witness of the occurrence as he heard about the occurrence on phone and thereafter he came to the place of occurrence. Learned Deputy District Public Prosecutor after consulting the record states that according to the police opinion, Abdul Razaq and Khalid Mehmood, petitioners were although present at the place of occurrence but they were empty handed, therefore, question of recovery from both these petitioners is inconsequential. The injuries attributed to petitioners Khalid Mehmood and Muzammal Sohail have been declared falling under Section 337-L(i), PPC, whereas injury falling under Section 337-F(ii), PPC has not been assigned to any of the petitioners. In view of all above, I do not find any justifiable reason to send the petitioners behind the bars, therefore, ad-interim pre-arrest bail already allowed to the petitioners by this Court vide order dated 28.10.2011, is hereby confirmed subject to their furnishing fresh bail bonds in the sum of Rs.50,000/- (Rupees fifty thousand only) each with one surely each in the like amount to the satisfaction of the learned trial Court/Area Magistrate within a period of 10 days from today.

7. It is, however, clarified that observations made herein above are just tentative in nature and strictly confined to the disposal of this bail petition.

(A.S.) Bail confirmed.

PLJ 2013 Cr.C. (Lahore) 485
Present: Muhammad Anwaar-ul-Haq, J.
SHAMAS-UD-DIN--Petitioner
versus
STATE, etc.--Respondents

Crl. Misc. No. 10926-B of 2012, decided on 29.8.2012.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 324, 337-F(v), 337-F(iv), 337-F(iii) & 34--Bail after arrest, accepted--Statutory ground of delay in trial--Incarceration period--Certified copy of order sheet of trial Court was produced by petitioner reflected that only three adjournments were sought on behalf of petitioner and if the period was excluded from consideration even then his incarceration period exceeded one year--As delay in conclusion of trial of petitioner cannot be attributed to him or any other person acting on his behalf in any manner, therefore, without commenting upon merits of case, keeping in view 6th proviso to S. 497, Cr.P.C.--Bail was admitted. [P. 487] A & B

Mr. Mushtaq Ahmed Dhoon, Advocate for Petitioner.

Mirza Abid Majeed, DPG for State.

Mr. Muhammad Qasim, Advocate for Complainant.

Date of hearing: 29.8.2012.

Order

Through this 3rd petition, petitioner Shamas-ud-Din seeks post arrest bail in case FIR No. 17 dated 1.03.2010 under Sections 324, 337F(v), 337F(iv) & 337F(iii)/34, PPC registered at Police Station Chikrala District Mianwali. His 1st bail application i.e. Crl. Misc. No. 7752-B of 2011 was dismissed having been withdrawn whereas his 2nd bail petition i.e. Crl.Misc.No. 14549-B of 2012 was dismissed on merits on 21.11.2011.

2. Learned counsel for the petitioner contends that he urges only the statutory ground of delay in the trial of the petitioner; that the petitioner was arrested in this case on 05.04.2011 and he is continuously behind the bars since then but his trial has yet not been concluded without any fault on his part or any other person acting on his behalf. Further contends that if the adjournments sought on behalf of the petitioner are excluded from the consideration even then the period of his incarceration exceeds one year and that the petitioner has no previous criminal record.

3. On the other hand learned Deputy Prosecutor General assisted by learned counsel for the complainant while opposing this bail application contends that the prosecution witnesses have regularly been appearing before the learned trial Court, however, for the reasons beyond the control of the prosecution, evidence could not be recorded, therefore, delay in conclusion of trial cannot be attributed to the complainant; that on some of the dates of hearing, witnesses were present but adjournments were sought on behalf of the petitioner, hence, he is not entitled for bail even on the ground of statutory delay in his trial.

4. Heard. Record perused.

5. The petitioner was arrested in this case on 05.04.2011 and since then he is continuously behind the bars without any substantive progress in his trial. Even not a single prosecution witness has so far been recorded. The certified copy of the order sheet of the learned trial Court produced by the learned counsel for the petitioner, reflects that only three adjournments were sought on behalf of the petitioner and if the said period is excluded from the consideration even then his incarceration period exceeds one year. There is nothing on record to suggest that case of the petitioner falls within the ambit of 7th proviso to Section 497, Cr.P.C. Learned law officer after consulting the record confirms that the petitioner has no previous criminal record. As the delay in conclusion of the trial of the petitioner cannot be attributed to him or any other person acting on his behalf in any manner whatsoever, therefore, without commenting upon the merits the case, keeping in view the 6th proviso to Section 497, Cr.P.C., I admit him to bail subject to his furnishing bail bond in the sum of Rs. 2,00,000/- (Rupees two hundred thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

(R.A.) Bail admitted.

PLJ 2013 Cr.C. (Lahore) 833 (DB)
Present: Muhammad Anwaarul Haq and Syed Iftikhar Hussain Shah, JJ.
BEHZAD RASHEED and 3 others--Petitioners
versus
STATE and 2 others--Respondents

Crl. Misc. No. 7499-B of 2013, decided on 16.7.2013.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 406/409--Pre-arrest bail--Confirmed--Allegation of--Misappropriated the pledged articles--A loan facility provided by the bank of Khyber was availed by Sidra Rice Mills owned by the father and brother of the present complainant--Bank instituted a suit for recovery of loan against the aforesaid mills--Court passed an order regarding the auction of stock--Complainant approached the bank purchasing the stock and paid the price of the stock to the bank and the bank directed to hand over the stock to the complainant--Allegedly when the complainant went to take the possession of the stock it was found short but the petitioners have placed on record a copy of undertaking regarding the handing over of the physical possession of the pledged stock consisting of 13845 paddy bags of Karnal Basmati rice lying in the godown at M/s Sidra Rice Mills wherein it is categorically mentioned that before taking physical possession of the pledged stock the complainant has physically checked and counted the pledged paddy bags which were 13825 and were in tact in all respects--The said undertaking bears a thumb impression as well as signatures of the complainant--During the course of arguments the execution of the said document has not been denied--Furthermore, there is no denial of this fact that the pledged bags were 13845 and the same had been received by the complainant--Therefore, prima facie the question of embezzlement or misappropriation of a part of the pledged stock does not arise in view of the aforesaid undertaking--Furthermore the bank had already got registered a case under Section 406, PPC at Police Station against father and brother of the complainant--Possibility of false implication of the present petitioners to counter the aforesaid FIR cannot be ruled out. [P. 835] A & B

Mr. Akhtar Javed, Advocate for Petitioners.

Ch. Pervaiz Iqbal Gondal, Standing counsel for State.

Ch. Shahzad Ahmed and Mr. Amjad Farooq Bismell Rajput, Advocates for Complainant.

Date of hearing: 16.7.2013.

Order

The petitioners have claimed pre-arrest bail in case F.I.R. No. 21 dated 20.7.2012 registered under Sections 406/409, P.P.C. at Police Station, FIA Gujranwala.

2. The allegation against the petitioners is that they have misappropriated the paddy bags belonging to M/s. Sidra rice Mills which were pledged against the loan taken by the owners of the rice mills namely Javed Dar, Waqas Dar and Abbas Dar father and brother of the complainant and were kept in custody of Imtiaz Ahmed and Sajjad Ali, the employees of Muqaddam Company.

3. Learned counsel for the petitioners has stated that case against the petitioners is false and concocted one; petitioners have not committed any breach of trust and have not misappropriated the pledged articles. The complainant had taken away the physical possession of the pledged stock after its due verification and the case has been got registered against the petitioners with mala fide intention and ulterior motives just to disgrace them in the public. The officials of the bank had got registered a case FIR No. 86/12 against the father and brother of the complainant. Therefore, the present case has been got registered just to black-mail them and as such they are entitled to the confirmation of their pre-arrest bail.

4. The application is opposed from the complainant side and it is contended that after purchasing the stock and paying its price to the bank the complainant checked the pledged stock it was found short. The petitioners have misappropriated the stock which is required to be recovered from them. Therefore, they are not entitled to the confirmation of pre-arrest bail.

5. We have heard the learned counsel for the parties and have also perused the record.

6. A loan facility provided by the bank of Khyber was availed by Sidra Rice Mills owned by the father and brother of the present complainant. The bank instituted a suit for recovery of loan against the aforesaid mills. The Court passed an order regarding the auction of stock on 7.6.2012. The complainant approached the bank purchasing the stock and paid the price of the stock to the bank and the bank directed to hand over the stock to the complainant. Allegedly when the complainant went to take the possession of the stock it was found short but the petitioners have placed on record a copy of undertaking dated 23.5.2012 (annexure-E.I) regarding the handing over of the physical possession of the pledged stock consisting of 13845 paddy bags of Karnal Basmati rice lying in the godown at M/s. Sidra Rice Mills Sialkot wherein it is categorically mentioned that before taking physical possession of the pledged stock the complainant has physically checked and counted the pledged paddy bags which were 13825 and were in tact in all respects. The said undertaking bears a thumb impression as well as signatures of the complainant Mst. Kalsoom Javed.

7. During the course of arguments the execution of the said document has not been denied. Furthermore, there is no denial of this fact that the pledged bags were 13845 and the same had been received by the complainant. Therefore, prima facie the question of embezzlement or misappropriation of a part of the pledged stock does not arise in view of the aforesaid

undertaking. Furthermore the bank had already got registered a case FIR No. 86/12 dated 7.2.2012 under Section 406, PPC at Police Station SaddarSialkot against Javed Dar, Abbas Dar and Waqas Dar father and brother of the complainant. Therefore, possibility of false implication of the present petitioners to counter the aforesaid FIR cannot be ruled out.

8. In these circumstances, pre-arrest bail already granted to the petitioners is hereby confirmed subject to furnishing fresh bail bonds in the sum of rupee Rs. 2,00,000/- each with one surety each in the like amount to the satisfaction of the trial Court.

(A.S.) Bail confirmed.

PLJ 2013 Cr.C. (Lahore) 969
Present: Muhammad Anwaar-ul-Haq, J.
ATTEQ-UR-REHMAN--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 6632-B of 2013, decided on 13.6.2013.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), S. 302 & 34--Bail, allowed--No specific injury was attributed--Collective allegation--Indiscriminating firing upon deceased--Further inquiry--Held: No specific injury on the person of deceased was attributed to accused and only collective allegation of indiscriminating firing by him--Although recovery of alleged weapon of offence had been shown against accused yet no crime empty of such weapon had been recovered from spot--Vicarious liability of the accused, in backdrop of non-recovery of any empty of .30 bore pistol from spot can validly be determined by trial Court after recording of evidence--Case against accused, prima facie, falls within purview of S. 497 (2), Cr.P.C. and was one further inquiry into his guilty--Accused was behind bars without any substantive progress in his trial--Bail was allowed. [P. 971] A & B

Ms. Naila Riaz Chaudhry, Advocate for Petitioner.

Mr. Humayon Aslam, DPG for State.

Malik Allah Bakhsh Shakeel, Advocate for Complainant.

Date of hearing: 13.6.2013.

Order

Petitioner Atteq-Ur-Rehman seeks post arrest bail in a case FIR No. 245 dated 19.09.2012 under Sections 302/34, PPC registered at Police Station Kundian District Mianwali.

2. Learned counsel for the petitioner contends that no specific injury has been attributed to the petitioner on the person of the deceased and there is only collective allegation against him that he along with his co-accused Gull Rehman and Hafeez-Ur-Rehman made indiscriminating firing upon the deceased due to which he sustained injuries on different parts of his body; that recovery of .30-bore pistol shown against the petitioner is insignificant because no empty of .30-bore pistol was taken into possession from the spot. Further contends that the principal accused namely Matti-ur-Rehman, to whom the fatal injury on the chest of the deceased has

been attributed, has already been declared innocent during the investigation and has been allowed bail by the learned trial Court; that co-accused Hafeez-ur-Rehman, having been assigned the similar role, has also been granted bail by the learned trial Court; that the complainant has also filed a private complaint after declaration of innocence of two co-accused of the petitioner wherein he has attributed same joint role to the petitioner and his co-accused; that in the circumstances mentioned above case against the petitioner is one of further inquiry into his guilt and that the petitioner is behind the bars since 05.11.2012 without any substantive progress in his trial, therefore, he is entitled for bail.

3. On the other hand learned Deputy District Public Prosecutor assisted by learned counsel for the complainant while opposing this bail application contends that the petitioner is nominated in the promptly lodged FIR with the role of firing at the deceased along with his co-accused; that the weapon of offence has been recovered from the petitioner; that the occurrence took place in the open Bazar, therefore, empties could not be found there and even otherwise non-recovery of empties does not adversely affect the recovery of weapon of offence, Further contends that there are eight entry wounds on the person of the deceased that supports the version of the complainant that the petitioner along with his two co-accused made indiscriminating firing at the deceased; that deeper appreciation of evidence is not desirable at this stage; that the petitioner is also vicariously liable for the every act of his co- accused; that there is no reason for false implication of the petitioner in this case and that case of the petitioner is quite distinguishable than the case of his co-accused Mati-ur-Rehman and Hafeez-ur-Rehman, as Mati-ur-Rehman has been declared innocent during the investigation and there is an opinion of the investigating officer in favour of co-accused Hafeez-ur-Rehman.

4. Heard. Record perused.

5. Admittedly, no specific injury on the person of the deceased has been attributed to the petitioner and there is only collective allegation of indiscriminating firing by him and his two co-accused on the person of deceased, in the FIR. Although recovery of the alleged weapon of offence has been shown against the petitioner yet no crime empty of such weapon has been recovered from the spot. Co-accused Mati-ur-Rehman, to whom the fatal injury with a .12 bore repeater gun on the chest of the deceased has been attributed, has been declared innocent during the investigation. The complainant has also filed a private complaint against the accused with the similar version as mentioned in the FIR. The vicarious liability of the petitioner, in the backdrop of non-attribution of any specific injury, medical evidence and non-recovery of any empty of .30 bore pistol from the spot, can validly be determined by the learned trial Court after recording of some evidence. In view of the above, case against the petitioner, prima facie, falls within the purview of sub-section (2) of Section 497, Cr.P.C and is one of further inquiry into his guilt. The petitioner is behind the bars since 05.11.2012 without any substantive progress in his trial. I, therefore, admit the petitioner to bail subject to his furnishing bail bonds in the sum of Rs.2,00,000/- (Rupees two hundred thousand only) with two sureties each in the like amount to the satisfaction of the learned trial Court.

6. It is, however, clarified that the observations made herein are just tentative in nature and strictly confined to the disposal of this bail petition.

(R.A.) Bail allowed.

K.L.R. 2013 Cr.C. 7

[Lahore]

Present: **MUHAMMAD ANWAARUL HAQ and SYED MUHAMMAD KAZIM RAZA SHAMSI, JJ.**

Muhammad Naeem

Versus

The State, etc.

Criminal Revision No. 16057-B of 2012, decided on 20th November, 2012.

BAIL (NARCOTICS) --- (Borderline case)

Criminal Procedure Code (V of 1898)---

---S. 497(2)---Control of Narcotic Substances Act, 1997, S. 9(c)---Charas weighing 1120 grams allegedly was recovered from possession of petitioner---Bail concession---Borderline case---**Held:** Quantity of narcotics substance alleged to have been recovered from petitioner was marginally higher from one thousand, as such, it was a borderline case---Furthermore, petitioner was not previously involved in such- like cases---Matter called for further inquiry---Bail after arrest granted. (Paras 3,4)

[Allegation about recovery of 1120 grams of charas. Petitioner was not a previous record-holder. Bail was allowed].

For the Petitioner: **Malik Muhammad Jamil Awan, Advocate.**

Humayyun Aslam, D.P.G. with Nasir, S.I.

Date of hearing: **20th November, 2012.**

ORDER

Through the instant criminal miscellaneous petition, the petitioner Muhammad Naeem seeks his post-arrest bail in a case arising out of F.I.R. No. 348/2012, dated 12.8.2012, registered with Police Station Ferozwala, District Gujranwala, under Section 9(c) of Control of Narcotic Substances Act, 1997.

2. Precisely, the prosecution story as narrated in the F.I.R. is that Charas weighing 1120 grams was recovered from the possession of the petitioner at the time of raid.

3. After hearing the arguments of the learned counsel for the parties and perusing the record, we find that Charas weighing 1120 grams allegedly was recovered from the possession of the petitioner. Only a meager quantity of narcotic substance *i.e.* 120 grams has brought the case of the present petitioner within the mischief of Section 9(c) of Control of Narcotic Substances Act, 1997. Possibility, therefore, cannot be ruled out that the police might have exceeded the quantity of recovered substance in order to bring the case of the present petitioner within the ambit of Section 9(c) of Control of Narcotic Substances Act, 1997. Even otherwise, the quantity of narcotic substance, alleged to have been recovered from the present petitioner, is marginally higher from one thousand grams, as such, it is a borderline case between clauses (b) and (c) of Section 9 of Control of Narcotic Substances Act, 1997. There are sufficient grounds to enquire further as to whether the case of the petitioner actually falls within the mischief of Section 9(c) of Control of Narcotic Substances Act, 1997. Furthermore, the petitioner is not previously involved in such-like case. He is behind the bars since 12.8.2012 and his further detention in jail would not advance the case of the prosecution. Therefore, we consider it a fit case for grant of bail.

4. In view of above, the instant post-arrest bail petition, filed on behalf of Muhammad Naeem is accepted and he is admitted to bail subject to furnishing of bail bonds

in the sum of Rs. 1,00,000/- with one surety, in the like amount to the satisfaction of the learned Trial Court.

Bail after arrest granted.

2014 P Cr. L J 591
[Lahore]
Before Muhammad Anwaarul Haq and Shahid Bilal Hassan, JJ
PUNNAL KHAN---Petitioner
Versus
The STATE and others---Respondents

Criminal Miscellaneous No.510-B of 2013, decided on 21st May, 2013.

Criminal Procedure Code (V of 1898)---

----S. 497(2)---Penal Code (XLV of 1860), Ss.365-A & 34---Kidnapping or abducting for ransom, common intention---Bail, grant of---Further inquiry---Originally case was registered against six accused person and specific role was assigned to said accused persons, but name of accused was not nominated in the F.I.R.---Accused was involved in the case on the supplementary statement of the alleged abductee, who alleged that accused was guarding the place, where accused party had kept the said abductee---No allegation was levelled against accused with regard to kidnapping the abductee---Accused was not alleged to have either demanded ransom or received the same---Specific role had been assigned to six accused persons nominated in the F.I.R. and not to the accused---Involving a person during supplementary statement would create doubt in the case of prosecution to the extent of newly-added facts and accused---Trial of case was likely to consume reasonable period for its final verdict---Question of evidentiary value of the supplementary statement of the complainant, and that of authenticity of allegation against accused, would be determined by the Trial Court after recording the evidence of the parties; and till then case of accused was covered within subsection (2) of S.497, Cr.P.C. being one of further inquiry---Accused who was behind the bars was no more required by the prosecution for any further investigation---Detention of accused for an indefinite period would not serve any useful purpose---Accused was admitted to bail, in circumstances.

Syed Muhammad Jameel Awan for Petitioner.
Asghar Ali Gill, DPG with Abdul Majeed ASI for the State.
Nasir-u-Din for the Complainant.

ORDER

Petitioner Punnal Khan through the instant petition has sought for post-arrest bail in case F.I.R. No.42/2011 dated 4/5-12-2010 registered at Police Station Uch Sharif, District Bahawalpur under section 365-A read with section 34 of the Pakistan Penal Code 1860.

2. Briefly the prosecution story, as narrated in the crime report by the complainant of this case is that his son namely Waqas Jameel was found missing during the intervening night of 4/5-12-2010. During search of Waqas Jameel the complainant received a telephonic call from the abductee, who asked the complainant to arrange ransom as the accused party had kidnapped him and in this regard abductee asked the complainant to contact co-accused namely Mehboob Ahmed Bhatti. The needful was done and ultimately an amount of

Rs.5,00,000 (Rupees five hundred thousand) according to the prosecution was settled which amount was paid by the complainant in the presence of witnesses to Mehboob Ahmed Bhatti and Rasool Bukhsh, who promised that the abductee would reach home but the needful was not done as promised even after having received ransom amount, hence this case against the petitioner and others.

3. The learned counsel for the petitioner contends that the petitioner is not nominated in the F.I.R.; that there is delay of two months in lodging the F.I.R.; subsequently the petitioner was involved on the statement of the abductee; that there is no allegation against the present petitioner regarding the abduction and demanding of ransom; the allegation against the petitioner is that he was guarding the place where the alleged abductee Waqas Jamil was placed.

4. The learned Deputy Prosecutor-General assisted by the learned counsel for the complainant strongly opposed the bail petition and contends that the petitioner was nominated in the F.I.R.; that the petitioner remained absconder for a period of one year and eight months and challan has been submitted before the learned trial Court under section 512, Cr.P.C.; that there is no reason to falsely implicate in the present case.

5. Both the parties have been heard at length and record of the case has been perused carefully by us.

6. It is an admitted position that originally the case was registered under the provisions of section 365-A, read with section 34, P.P.C. against six accused namely Rasool Bukhsh son of Kabir Khan, Bashir Ahmed son of Kabir Khan, Liaquat Ali son of Rasool Bukhsh, Muhammad Hussain alias Hasni son of Hazoor Bukhsh, Abdul Razzaq son of Faiz Bukhsh and Mehboob Ahmed son of Hussain Bukhsh. According to the prosecution story specific role has been assigned to the said accused of the case and the name of the petitioner is not nominated in the F.I.R. The petitioner was involved in this case on the Supplementary Statement of the abductee, who alleged that the petitioner was guarding the place where the accused party had kept the said abductee. There is no allegation levelled against the petitioner with regard to kidnapping the abductee, there is no allegation against the petitioner to the effect that either he demanded ransom or received the same, which is evident from the record that the complainant has himself paid the ransom amount of Rs.5,00,000 (Rupees five hundred thousand only) to Mehboob Ahmed and Rasool Bukhsh the other co-accused of this case. Specific role has been assigned to the six accused nominated in the F.I.R. even otherwise involving a person during supplementary statement creates doubt in the case of prosecution to the extent of newly added facts and newly-added accused.

7. In the light of what has been discussed above, we find that the case of the petitioner is that of further probe. The trial of this case is likely to consume reasonable period for its final verdict. So, in such circumstances, the question of evidentiary value of the supplementary statement of the complainant and that of authenticity of allegation against the petitioner will be determined by the learned trial Court after recording the evidence of the

parties and till then, the case of the petitioner is covered within subsection (2) of section 497, Cr.P.C. being one of further inquiry.

8. The petitioner is behind the bars since his arrest and is no more required by the prosecution for any further investigation and the detention of the petitioner for an indefinite period will not serve any useful purpose.

9. In this view of the matter, we accept this petition and allow bail to the petitioner subject to his furnishing bail bonds in the sum of Rs.2,00,000 (Rupees two hundred thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

10. Before parting with this order, it is clarified that the observations given in this order are tentative in nature and it will have no effect upon the merits of the case in any manner whatsoever.

HBT/P-19/L Bail granted.

2014 P Cr. L J 807
[Lahore]
Before Muhammad Anwaarul Haq, J
HAMZA BASIT---Petitioner
Versus
The STATE and another---Respondents

Criminal Miscellaneous No.7267-B of 2013, decided on 27th June, 2013.

Criminal Procedure Code (V of 1898)---

----S. 498--- Penal Code (XLV of 1860), Ss. 452, 354, 337-F(i), 337-L(2), 337-A(i) & 34--- House-trespass after preparation for hurt, assault or wrongful restraint, assault or criminal force to woman with intent to outrage her modesty causing damiyah, hurt, causing Shajjah-i-Khafifah, common intention---Pre-arrest bail, refusal of---Accused was nominated in the F.I.R. with a specific role of not only committing house-trespass, but also outraging the modesty of the complainant and giving her beating---Complainant was medically examined just within two to three hours of the alleged occurrence, and the medical evidence fully corroborated the version given in the F.I.R.---Besides the complainant herself, one of the alleged eye-witness, also supported the prosecution version---Accused, during the investigation, had been found fully involved in commission of alleged occurrence---No mala fide on the part of the complainant, or the Police for false implication of accused had been established---In absence of any justifiable reason to confirm the pre-arrest bail of accused, ad interim pre-arrest bail granted to accused, was recalled.

NLR 1999 Criminal 527 (sic.) and 1988 PCr.LJ 270 ref.

Ch. Liaquat Ali Sandhu for Petitioner.

Muhammad Nawaz Shahid, DDPP with Sher Muhammad A.S.-I. for the State.

Sardar Muhammad Khalil for the Complainant.

ORDER

MUHAMMAD ANWAARUL HAQ, J.---Petitioner Hamza Basit seeks pre-arrest bail in a case F.I.R. No.343 dated 23-3-2013 registered under sections 452, 354, 337-F(i), 337-L(2) and 337A(i)/34, P.P.C. at Police Station Civil Line Gujranwala.

2. Learned counsel for the petitioner contends that there is an inordinate delay of four days in lodging of the F.I.R.; that no such occurrence, as narrated by the complainant in the F.I.R. ever took place, however, only hot words were exchanged between them, and the complainant with mala fide intention in connivance with the police has falsely involved him in this case. Further contends that the petitioner did not enter the house of the complainant and section 452, P.P.C. has been included just to make it a case of non-bailable offence; that as per prosecution story itself the petitioner was not armed with any weapon, therefore, nothing is required to be recovered from him; that two eye-witnesses namely Muhammad Arshad and Muhammad Qaisar are not supporting the prosecution version and that false implication of the petitioner in the circumstances cannot be ruled out. Places reliance on N.L.R 1999 Criminal 527(sic.) and 1988 PCr.LJ 270.

3. On the other hand learned Deputy District Public Prosecutor assisted by learned counsel for the complainant while opposing this bail petition contends that pre-arrest bail is an extraordinary relief and cannot be granted without the proof of mala fide or malice on the part of the complainant or the police; that the petitioner is nominated in the F.I.R. with a specific role of entering the house of the complainant, causing injuries on her person and also outraging her modesty. Further contends that during the investigation the petitioner has been found fully involved in the occurrence, therefore, he is not entitled for the confirmation of his pre-arrest bail.

4. Heard. Record perused.

5. The petitioner is nominated in the F.I.R. with a specific role of not only committing house trespass but also outraging the modesty of the complainant and giving her beating. The complainant was medically examined just within two to three hours of the alleged occurrence and the medical evidence fully corroborates the version given in the F.I.R. Besides the complainant herself, one of the alleged eye-witness namely Adil Shabbir is also supporting the prosecution version. During the investigation the petitioner has been found fully involved in commission of the alleged occurrence. Most importantly, learned counsel for the petitioner has not been able to establish any mala fide on the part of the complainant or the police for false implication of the petitioner in this case. In view of the above, I do not find any justifiable reason to confirm the pre-arrest bail of the petitioner, therefore, the same is dismissed and the ad-interim pre-arrest bail granted to him on 14-6-2013 is hereby recalled. The case-law relied upon by the learned counsel for the petitioner is quite distinguishable from the facts and circumstances of this case.

6. It is, however, clarified that the observations made herein are just tentative in nature and strictly confined to the disposal of this bail petition.

HBT/H-9/L Bail refused.

2014 P Cr. L J 1252
[Lahore]
Before Abdus Sattar Asghar and Muhammad Anwaarul Haq, JJ
SHEHRIYAR ALAM---Petitioner
Versus
JUDGE, SPECIAL COURT (OFFENCES IN RESPECT OF BANKS) PUNJAB, LAHORE and 2 others---Respondents

Criminal Miscellaneous No.307-CB of 2013, decided on 6th May, 2014.

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

----S. 497(5)---Penal Code (XLV of 1860), Ss. 409, 420, 468, 471 & 109---Prevention of Corruption Act (II of 1947), S. 5(2)---Criminal breach of trust by public servant, cheating and dishonestly inducing delivery of property, forgery for purpose of cheating, using as genuine a forged document, abetment, criminal misconduct---Petition for cancellation of pre-arrest bail, dismissal of---Co-accused allegedly opened a bank account, wherein he deposited stolen cheques and encashed the same---Allegation against accused was that he received the amounts from the said cheques on behalf of the co-accused---Banking Court granted pre-arrest bail to the accused---Validity---Account from which amounts were withdrawn was a sole proprietorship account maintained by the co-accused---No incriminating material was available with the prosecution to establish any nexus of accused with regard to opening and maintenance of the said account---Allegedly stolen cheques were issued by the co-accused in his own favour---Investigating officer had declared accused as innocent being not beneficiary of the allegedly withdrawn amounts---Bail granting order was not perverse in such circumstances--- Petition for cancellation of pre-arrest bail awarded to accused was dismissed accordingly.

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

----S. 497(5)---Cancellation of bail, petition for---Grounds taken into consideration by the court.

Following are the grounds which are taken into consideration by the court for cancellation of bail:--

(i) That accused had misused the concession of bail and was causing fear and alarm to the complainant and the prosecution witnesses;

(ii) That there was likelihood of witnesses being won-over and their evidence being tampered with;

(iii) That there was likelihood of repetition of the commission of the crime which the accused had allegedly committed;

(iv) That accused was likely to abscond; and

(v) That order granting bail was arbitrary, capricious and against the evidence available with the prosecution.

Once bail had been granted on merits by the court of competent jurisdiction, very strong and exceptional circumstances were required to cancel the same.

Abdul Rasheed Khan v. Zahoor Ahmed Malik and others PLD 2011 SC 210 rel.

Muhammad Ahmad Pansota for Petitioner.

Muhammad Sohail Standing Counsel for Pakistan.

Muhammad Aftab Butt, Assistant Director FIA and Irshad Ahmad Inspector, FIA for Respondents.

ORDER

Shafqat Ali respondent No.2/accused in case F.I.R. No.4/2012 dated 18-1-2012 under sections 409, 420, 468, 471, 109, P.P.C. read with section 5(2) Prevention of Corruption Act 1947 Police Station FIA Lahore was allowed pre-arrest bail by the learned Special Judge Special Court (Offences in Banks) Lahore vide order dated 11-10-2012. Through this petition under section 497(5) of Criminal Procedure Code 1898 Shehriyar Alam on behalf of the complainant seeks cancellation of pre-arrest bail allowed to the respondent No.2.

2. Prosecution case is that one Nasir Bashir Malik and Shafqat Ali (respondent No.2) along with their co-accused namely Muhammad Rafique Khan and Tanvir Hussain opened separate sole proprietorship accounts in UBL Abid Market Branch Lahore; that co-accused Nasir Bashir Malik fraudulently got encashed and deposited seven stolen foreign currency cheques total amounting Rs.162.7 Million by different entities in favour of CIBC Work Market and CIBC Capital Market Inc. in his account and the amount Rs.162.7 Million was credited in the said account. Attribution against Shafqat Ali (respondent No.2) is that he received a sum of Rs. 9.3 Million through cheques issued by principal accused Nasir Bashir Malik from his fraudulent Account No.371-0111-0.

3. Arguments heard. Record perused.

4. During the course of investigation Shafqat Ali respondent No.2 was declared innocent for want of incriminating material. The learned Special Judge Special Court (Offences in Banks) Lahore vide order dated 11-10-2012 allowed pre-arrest bail in his favour in the following manner:--

"----It is fact to this extent that he was given cheque and he withdrew the amount but not for himself. And this has been thoroughly investigated by the Investigating Agency that the main beneficiary was Nasir Bashir Malik and the other accused. And the present petitioner is not the beneficiary of the any alleged amount. He has surrendered him before the Investigating Agency. Nothing is required to be recovered from him as I.O. has concluded that he has gained nothing from that alleged amount. The record is already in the possession of the police. The present petitioner has no access to that record. There is no apprehension of tampering of the same. Therefore, I do not think it proper to hand over the custody of both the petitioners to the police. The ad-interim pre-arrest bail of the petitioners is confirmed and their custody is handed over to the sureties in the sum of Rs.10,00,000 each or bank guarantee of the equal amount each with one surety each in the like amount to the satisfaction of the Registrar of this court within a week's time."

5. Petitioner's plea is that signatures of respondent No.2 on the back of four cheques were sent to the Forensic Science Laboratory Islamabad wherefrom it is reported that signatures on the backside of the said cheques were similar with his signatures and that prosecution has sufficient incriminating material to connect respondent No.2 with the withdrawals from the fraudulent account maintained by co-accused Nasir Bashir Malik therefore order passed by learned Special Judge is perverse and respondent No.2 being beneficiary and guilty of fraudulent withdrawals of heavy amounts does not deserve concession of bail.

6. It is evident on the record that Account No.371-0111-0 from which allegedly the amounts were withdrawn was a sole proprietorship account in the name of CIBC Work Markets Inc. And CIBC Capital Markets Inc. maintained by Nasir Bashir Malik co-accused. It is also available on the record that Cheques No.7076501, 7076503, 7076508 and 7076509 were issued by Nasir Bashir Malik in his own favour. The allegation against respondent No.2 is that he had received the amounts of said cheques on behalf of Nasir Bashir Malik co-accused. There is no incriminating material with the prosecution to establish any nexus of respondent No.2 with regard to opening and maintenance of the above said account. Admittedly reports of Forensic Science Laboratory Islamabad were not available with the prosecution at the relevant time i.e. on 11-10-2012 when respondent No.2 was allowed pre-arrest bail by the learned Special Judge. The Investigating Officer has declared respondent No.2 innocent being not beneficiary of the allegedly withdrawn amounts. We do not find any perversity in the impugned bail granting order.

7. Needless to say that consideration for grant of bail and those for its cancellation are entirely different. Ordinarily the ground which are taken into consideration for cancellation of bail are:--

(i) that the applicant has misused the concession of bail and is causing fear and alarm to the complainant and the prosecution witnesses;

(ii) that there is likelihood of witnesses being won over and their evidence being tampered with;

(iii) that there is likelihood of repetition of the commission of the crime which the accused had allegedly committed;

(iv) that the accused was likely to abscond; and

(v) that the order granting the bail was arbitrary, capricious and against the evidence available with the prosecution.

None of the above mentioned grounds is available to the complainant/petitioner calling for cancellation of bail granted to the respondent No.2. Learned counsel for the petitioner did not allege any misuse of concession of bail by the respondent. Once the bail has been granted on merits by the court of competent jurisdiction, very strong and exceptional circumstances are required to cancel the same which are not available to the petitioner in this case. Reliance be made upon Abdul Rasheed Khan v. Zahoor Ahmed Malik and others (PLD 2011 SC 210).

8. Since the petitioner has not been able to point out any solid reason for cancellation of bail therefore this petition having no merit is dismissed in limine.

MWA/S-80/L Petition dismissed.

2014 P Cr. L J 1305
[Lahore]
Before Muhammad Anwaarul Haq, J
UMAIR ASLAM---Petitioner
Versus
STATION HOUSE OFFICER and 7 others---Respondents

Writ Petition No.19131 of 2013, decided on 28th February, 2014.

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

----S. 154---Penal Code (XLV of 1860), S. 406---Constitution of Pakistan, Art. 199---Constitutional petition---Quashing of F.I.R.---Civil dispute---General allegation---Dishonest misappropriation of property---F.I.R. did not disclose commission of offence under S. 406, P.P.C. as there was no specific entrustment of property to any of the accused and there was a general allegation that all the accused had received the money from the complainant---Even otherwise, if at all disputed amount mentioned in the F.I.R. was given in the backdrop of a property deal and the accused were not ready for execution of sale deed, it was only a matter to be resolved by the civil court---Complainant had not filed any suit for specific performance against the accused for such purpose---Pendency of criminal proceedings on the basis of impugned F.I.R. was sheer abuse of the process of law---Constitutional petition was allowed in circumstances and proceedings under the impugned F.I.R. were quashed.

Hafiz Muhammad Iqbal v. The State and another 2009 PCr.LJ 934 and Dr. Nasir Ali v. S.H.O. Police Station Ghulam Muhammadabad Faisalabad and others 2006 PCr.LJ 1636 rel.

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

----Ss. 154 & 173---Constitution of Pakistan, Art. 199---Constitutional petition---Quashing of F.I.R.---Challan already submitted before Trial Court---Framing of charge in a case by the Trial Court did not debar burying of the proceedings by way of quashment (of F.I.R.)---No invariable rule of law existed in such regard and it depended on the facts of each case whether to allow the proceedings to continue or nip the same in the bud.

Muhammad Aslam (Amir Aslam) and others v. District Police Officer, Rawalpindi and others 2009 SCMR 141 rel.

Muhammad Anas Ghazi for Petitioner.

Raza-ul-Karim Butt, Assistant Advocate-General along with Ijaz Ahmad, S.-I. with record.

Rasheed Ahmad Sulehria for Respondent No.2/Complainant.

ORDER

MUHAMMAD ANWAARUL HAQ, J.---Through this writ petition, the petitioner seeks the quashing of case F.I.R. No.322/2013 dated 13-7-2013 under section 406, P.P.C., registered at Police Station Civil Lines, Sialkot.

2. Learned counsel for the petitioner contends that there is delay of more than two years in lodging of the impugned F.I.R.; that a false case has been registered against the petitioner; that from the contents of the F.I.R., offence under section 406, P.P.C. has not been made out and registration of the present case against the petitioner is abuse of process of law; that dispute between the parties at the most is of civil nature and converting the same into a criminal case is not/permissible under the law; that there is no chance of conviction of the petitioner in this case, therefore, continuation of proceedings on the basis of the impugned F.I.R. would be a futile exercise.

3. On the other hand, learned counsel for respondent No.2/complainant contents that challan in this case has already been submitted before the court of competent jurisdiction declaring the petitioner guilty; that F.I.R. reflects commission of a cognizable offence. Further contends that bare perusal of the F.I.R. reveals that petitioner and his co-accused have deprived the complainant of a huge amount of Rs.16,00,000 and that it is a clear case of criminal breach of trust and cheating, and that mere delay of more than two years is not a ground to disbelieve the prosecution case.

4. Heard. Record perused.

5. The crux of the allegation has been summarized by the complainant in the F.I.R. itself in the following words:--

Learned Law Officer has frankly conceded that offence under section 406, P.P.C. does not attract from the contents of the F.I.R. against the accused. He, however, contends that as challan in the case has already been submitted, therefore, the accused may be directed to approach the learned trial court for their desired relief I am of the considered view that the impugned F.I.R. does not disclose commission of offence under section 406, P.P.C. as there is no specific entrustment of money to any of the accused and there is a general allegation that all the accused had received the money from the complainant. Even otherwise, the disputed amount of Rs.16,00,000 mentioned in the F.I.R. if at all was given in the backdrop of a property deal and the accused are not ready for execution of the sale-deed, that is only a matter to be resolved by the civil court and the learned counsel for the complainant has frankly conceded that the complainant has not filed any such suit for specific performance against the accused in the F.I.R.

6. In view of all above, pendency of criminal proceedings on the basis of the impugned F.I.R. is sheer abuse of process of law that cannot be allowed. Argument of the learned Law Officer that after submission of challan the petitioner can only approach the learned trial

Court for redressal of his grievance is misconceived. The Hon'ble Supreme Court of Pakistan in the case of Muhammad Aslam (Amin Aslam) and others v. District Police Officer, Rawalpindi and others (2009 SCMR 141) has observed as under:--

"Framing of charge in the case by trial court does not debar burying of the proceedings by way of quashment. No invariable rule of law existed in this regard and it depended on the facts of each case whether to allow the proceedings to continue or to nip the same in the bud."

Same principle has been followed by this Court in the case of Hafiz Muhanunad Iqbal v. The State and another (2009 PCr.LJ 934) wherein while converting a constitutional petition into application under section 561-A, Cr.P.C., criminal proceedings pending before the trial Court were quashed. In another case of Dr. Nasir Ali v. S.H.O. Police Station Ghulam Muhammadabad Faisalabad and others (2006 PCr.LJ 1636), this Court has held as under:--

"For what has been discussed above it is quite clear that the contents of the impugned F.I.R. do not disclose commission of the alleged offences by the petitioner. In these circumstances allowing the impugned F.I.R. to continue to hold the field is to amount to an abuse of the process of law which cannot be allowed by this Court to be perpetuated. The writ petition is, therefore, allowed with no order as to costs and the impugned F.I.R. is hereby quashed."

Therefore, by allowing this petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 read with section 561-A, Cr.P.C., the impugned proceedings in case F.I.R. No.322/2013 dated 13-7-2013 under section 406, P.P.C., registered at Police Station Civil Lines, Sialkot are quashed. Needless to add that quashing of F.I.R. shall not affect the civil dispute, if any, between the parties in any manner whatsoever.

MWA/U-6/L Petition allowed.

P L D 2014 Lahore 541
Before Muhammad Anwaarul Haq, J
ALI IMRAN---Petitioner
Versus
THE STATE and others---Respondents

Criminal Miscellaneous No.7014-B of 2014, decided on 12th June, 2014.

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

----Ss. 345(2A) & 497---Penal Code (XLV of 1860), Ss.302, 338-E(2), Second Proviso, 148 & 149---Qatl-e-amd, roting armed with deadly weapons, unlawful assembly---Bail, refusal of---Murder committed in the name of honour---Compounding of offence---Scope---Consent of legal heirs not sufficient---Compounding of offence only with permission of Trial Court---Sister of accused ran away and contracted marriage---Accused along with his co-accused allegedly killed his sister, brother-in-law and other family members---Plea of

accused that injury attributed to him was on the person of his sister, and her legal heirs i.e. their father and mother had pardoned him; that in such circumstances he should be released on bail---Validity---Present case was a triple murder case, with a strong motive---Mere consent of legal heirs of deceased was not sufficient by itself for compromise in cases of honour crimes and compounding of such an offence could take place only with the permission of Trial Court---Even otherwise F.I.R. was promptly lodged and accused was assigned a specific role of causing firearm injury on the head of his sister---Prima facie, accused was vicariously liable for the acts of his co-accused, who had allegedly killed two people---Legal heirs of both said deceased were contesting the present case---Evidence of prosecution witnesses had already been recorded and trial of accused was at the verge of his conclusion---Accused was denied bail in circumstances.

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

----Ss. 345(2A) & 497---Penal Code (XLV of 1860), Ss.302 & 338-E(2), Second Proviso---Murder committed in the name of honour---Compounding of offence---Requirement---Mere consent of legal heirs not sufficient---Compounding of such offence could take place only with permission of Trial Court.

Muhammad Arshad Bhatti for Petitioner.

Mirza Abid Majeed, Dy. Prosecutor-General for the State with Muhammad Saleem A.S.I. with record.

Iftikhar Ahmad Ranjha for the Complainant.

ORDER

MUHAMMAD ANWAARUL HAQ, J.---Through this petition, Ali Imran petitioner seeks post-arrest bail in case P.I.R. No. 73, dated 16-2-2013, registered at Police Station Civil Lines, District Mandi Bahauddin, in respect of offences under sections 302, and 148/149, P.P.C.

2. Heard. Record perused.

3. The allegation against the petitioner in a promptly lodged F.I.R. is that being annoyed on the runaway marriage of his sister Mst. Iqra Bibi, he along with his two real brothers, armed with .30 bore pistols and a machete (Toka) had murdered their sister, her husband Liaqat Ali and Mst. Safia I3egum, mother of said Liaqat Ali.

4. Learned counsel for the petitioner has raised only one ground in favour of the petitioner to release him on bail that injury attributed to him is on the person of his own sister Mst. Iqra and surviving legal heirs of the deceased i.e. her father Muhammad Anar and mother Rasulan Bibi have pardoned him and they have no objection for his release on bail. 1 am afraid the sole ground raised in favour of the petitioner, in the peculiar circumstances of this case, is not of any help to him as it is a triple murder case wherein direct allegation

against the petitioner is that he along with his two real brothers, in the backdrop of a strong motive against their sister, had murdered three innocent persons.
An amendment has been introduced in section 338-E, P.P.C. through Criminal Law (Amendment) Act, 2004 that provides a special procedure for compounding of an offence of murder in such like cases, last proviso of Section 338-E, P.P.C. reads as follows:--

"Provided further that where qatl-i-amd or any other offence under this Chapter has been committed as an honour crime, such offence shall not be waived or compounded without permission of the Court and subject to such conditions as the Court may deem fit having regard to the facts and circumstances of the case."

A corresponding amendment has also been made in section 345, Cr.P.C. while inserting subsection 2 (A) in the following words:--

"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 compounded 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."

In view of the foregoing provisions of law it is thus clear that mere consent of the legal heirs of the deceased is not sufficient by itself for a compromise in cases of honour crimes and compounding of such an offence can take place only with the permission of trial court concerned.

5. Even otherwise, in this case, petitioner is nominated in the promptly lodged F.I.R. with a specific role of causing firearm injury on the head of deceased Mst. Iqra Bibi. Petitioner prima facie, is vicariously liable for every act of his two co-accused, who have allegedly taken lives of Liaqat Ali and his mother Mst. Safia Begum. Legal heirs of both the deceased are seriously contesting this case. Evidence of eight prosecution witnesses has already been recorded and trial of the petitioner is at the verge of its conclusion.

In view of all above, this petition being devoid of any force is dismissed.

6. It is, however, clarified that observations made herein are just tentative in nature and strictly confined to the disposal of this bail petition.

MWA/A-112/L Bail refused.

P L D 2014 Lahore 555
Before Muhammad Anwaarul Haq, J
MUHAMMAD QASIM and another---Petitioners
Versus
The STATE and others---Respondents

Criminal Miscellaneous No.7107-B of 2014, decided on 16th June, 2014.

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

----Ss. 337-A(i) & 337-A(ii)---"Shajjah-i-Khafifah"---"Shajjah-i-mudihah"---Distinction---"Shajjah-i-Khafifah" was an injury caused to the victim without exposing his bone whereas "Shajjah-i-Mudihah" was an injury where bone of victim was exposed without causing fracture---Injuries not resulting into exposure of bone, could not be considered "shajjah-i-mudihah" falling under S.337-A(ii), P.P.C.---All injuries described as bone deep, prima facie, fell within the purview of "shajjah-i-khafifah" under S.337-A(i), P.P.C.

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

----S. 498---Penal Code (XLV of 1860), Ss.337-A(i), 337-A(ii), 337-F(i), 148, 149 & 354---Shajjah-i-Khafifah, shajjah-i-mudihah ghayr-jaifah (damiyah), rioting armed with deadly weapons, unlawful assembly, assault or criminal force to woman with intent to outrage her modesty---Ad interim pre-arrest bail, confirmation of---"Bone deep injury", fell within purview of S.337-A(i)---Accused persons allegedly hit the complainant causing her a bone deep lacerated wound at the back of her head---Such bone deep injury could not be said to fall under S.337-A(ii), P.P.C. and clearly fell within the purview of S.337-A(i), P.P.C. which was a bailable and non-cogniszable offence---Ad interm pre arrest bail already granted to accused persons was confirmed in circumstances.

Malik Azhar Abbas Waseer along with Petitioners.

Mirza Abid Majeed, Dy. Prosecutor-General for the State with Muhammad Nawaz A.S.I. with record.

Malik Khalid Akmal for the Complainant.

ORDER

MUHAMMAD ANWAARUL HAQ, J.---Through this petition, Muhammad Qasim and Muhammad Asif seek pre-arrest bail in case F.I.R. No.134, dated 8-3-2014, registered' under sections 354, 452, 337A(ii), 337A(i), 337(i) and 148/149, P.P.C. at Police Station Sharaqpur District Sheikhupura.

2. Heard. Record perused.

3. Allegation against the petitioners Muhammad Qasim alias Kashif and Muhammad Asif is that they armed with pistol and "Sota" respectively entered into the house of complainant Mst. Shahnaz Bibi where petitioner Muhammad Asif inflicted a blow with

"Sota" on the head of Mst. Shahnaz Bibi whereas petitioner Muhammad Qasim alias Kashif had snatched her gold ear-ring.

4. At the outset, learned law officer while referring case Diary No.23, dated 13-6-2014 states that section 452, P.P.C. has been deleted during the investigation and snatching of ear-ring of Mst. Shahnaz Bibi has not been proved, therefore, no such offence has been added in this case. The only non-bailable offence as per police record against the petitioners is section 337-A(ii), P.P.C., that is a bone deep lacerated wound at the back of head of Mst. Shahnaz Bibi.

5. It has been noticed that after promulgation of Criminal Law 2nd Amendment Ordinance, 1990, the concept of simple or grievous injury has been changed and a new definition of hurt has been introduced in section 332, P.P.C. in the following words:--

"332. Hurt

(1) Whoever causes pain, harm, disease, infirmity or injury to any person or impairs, disables or dismembers any organ of the body or part thereof of any person without causing his death, is said to cause hurt.

(2) The following are the kinds of hurt: -

a) Itlaf-i-udw;
b) Itlaf-i-salahiyyat-i-udw;
c) Shajjah;
d) Jurh; and
e) All kinds of other hurts.

Explanation.--Disfigure means disfigurement of face or disfigurement or dismemberment of any organ or any part of the organ of the human body which impairs or injures or corrodes or deforms the symmetry or appearance of a person."

Shajjah mentioned in section 332(2)(c), P.P.C. has further been defined in section 337, P.P.C. in the following words:--

"337. Shajjah (i) Whoever causes, on the head or face of any person, any hurt which does not amount to Itlaf-i-udw or Itlaf-i-salahiyyat-i-udw, is said to cause Shajjah.

(2) The following are the kinds of Shajjah, namely: -

a) Shajjah-i-Khafifah;
b) Shajjah-i-mudihah;
c) Shajjah-i-hashimah;
d) Shajjah-i-munaqillah;
e) Shajjah-i-ammah; and
f) Shajjah-i- damighah.

(3) Whoever causes Shajjah-

(i) without exposing bone of the victim, is said to cause Shajjah-i-khafifah;

(ii) by exposing any bone of the victim without dislocating it, is said to cause Shaiiah-i-mudihah:

(iii) by fracturing the bone of the victim and without dislocating it, is said to cause Shajjah-i-hashimah;

(iv) by causing fracture of the bone of the victim and thereby the bone is dislocated, is said to cause Shajjah-i-munaqillah;

(v) by causing fracture of the skull of the victim so that the wound touches the membrance of the brain, is said to cause Shajjah-i-ammah; and

(vi) by causing fracture of the skull of the victim and the wound ruptures the membrane of the brain is said to cause Shajjah-i-damighah.

Shajjah-i-Khafifah as per definition in section 337, P.P.C., is an injury caused to the victim without exposing his bone whereas Shajjah-i-mudihah is an injury where bone of the victim is exposed without causing fracture, therefore, these are two distinct kinds of Shujjah under section 337, P.P.C. and its punishment is provided under sections 337-A(i) and 337-A(ii), P.P.C. respectively. A very significant difference in two clauses under section 337-A (i) and section 337-A(ii), P.P.C. is that offence "Shajjah-i-Khafifah" under section 337-A(i) P.P.C. as per Schedule 2 of the Cr.P.C. is bailable and non-cognizable whereas offence "Shajjah-i-mudihah" under section 337-A(ii), P.P.C. is non-bailable and cognizable offence.

6. The Medical Officers while examining the victims, have themselves introduced a new term i.e. "bone deep" injury, that term does not figure in Pakistan Penal Code and police in routine in all the injuries declared by the doctors bone deep, stamps the same an injury under section 337-A(ii), P.P.C. and the offence against the accused becomes non-bailable and cognizable just because of heedlessness of the doctor concerned.

Keeping in view numerous cases of mis-description of injury under section 337, P.P.C., in another case I felt it appropriate to call Surgeon Medico-Legal, Punjab, Lahore to assist this Court. On Court's call, Surgeon Medico-Legal Punjab, keeping in view the importance of the query has rightly opted to call a meeting of Leading Consultants of the Punjab to discuss this matter in depth. The Surgeon Medico-Legal Punjab through Letter No.3343/SML, dated 4-7-2013, addressed to Rai Muhammad Khan, Research Officer of this Court, responded the query in the following words:-

"Every bone deep injury where bone is not exposed, does not attract. Shajjah-i-mudihah and only bone exposed injury attracts Shajjah-i-mudihah."

The Surgeon Medico-Legal, Punjab, Lahore for issuance of a proper Notification in this regard has also forwarded a request to the competent authority vide Office letter No.3324-26/SML, dated 1-7-2013 in the following words:--

"The Secretary,

Government of the Punjab,

Health Department, Lahore.

Subject:--RECTIFICATION OF OLD TERMINOLOGIES OF QISAS AND DIYAT ORDINANCE.

In the light of directions given by Mr. Justice Anwaarul Haq, honourable Judge, Lahore High Court, Lahore, in a meeting with the under-signed and Dr. Tajammal Hussain, Head of Forensic Department, Allama Iqbal Medical College, Lahore, in his Chamber on 27-6-2013 at 4-00 P.M. the meeting of Heads of Forensic Department of the Medical Colleges in the Punjab (list attached) was held in this office on 1-7-2013 at 10-00 A.M. vide this office letter No. 3284-97/SM., dated 28-6-2013.

The recommendations made thereby are being attached herewith for immediate notification by your good office.

(Sd.)

SURGEON MEDICOLEGAL

PUNJAB, LAIIORE."

No. 3324-26 /SML, Dated Lahore, the 1/7/2013

(Office to annex all the correspondence referred above with the file of this criminal miscellaneous for ready reference for all.)

The recommendations attached to the above referred letter of Dr. Umar Farooq Khan, Surgeon Medico Legal Punjab, read as follows: -

1. While writing the description of the injury, it should be mentioned whether bone is exposed or bone is not exposed. The term "Bone Deep" must not be used.

2. Manner of infliction in cases of fracture of nasal bone, carpal and metacarpal bone, tarsal and metatarsal bone and ulna bone, should be carefully commented in the light of history, circumstantial evidence and through examination of associated injuries.

3. All the injuries in MLC must be marked in skiagram and properly labelled. Any MLC in which skiagram is left blank, will be considered as incomplete.

4. Nature of injuries should be given in accordance with Qisas and Diyat Ordinance, stating the name of the injury as described in the Qisas and Diyat Ordinance, e.g. Shajjah, Jurh, Jaifa etc. Number of the section should not be written except section 337-L(i) and section 337-L(ii). No terminology in the MLC must be used which alien to the Qisas and Diyat Ordinance and manual for instructions for conduction of medico-legal and postmortem work.

5. In case of any complaint about MLC, the parties should contact Medical Superintendent of the concerned Hospital and in case of Rural Health Centers, the EDO (Health) of the respective district, The phone number and E-Mail of Medical Superintendent or EDO (Health), as the case may be, must be displayed at a prominent place in the office of the Medical Officer. Failure to do so, the EDO (Health) or M.S. will be held responsible.

6. No time frame can be given for not performing the medico-legal examination of a sexual offence case.

7. It is unanimously decided that as already notified, and it is again emphasized that no column of Medico-legal Report should be left blank. If not applicable, the particular column should be crossed.

8. a) As already notified, opinion should be given in simple language clearly stating the legal nature of the offence, the duration, causative agent and the manner of the causation.

b) The notified pro forma of the MLC also contains a column about possibility of fabrication. (Yes/No), as already mentioned in Point No.7 supra, no column should be left blank. This applies to this column also.

In view of all above, I am of the considered view that injuries not resulting into exposure of bone, cannot be considered Shajjah-i-mudihah falling under Section 337-A(ii), P.P.C. and all the injuries described as bone deep, prima facie, fall within the purview of Shajjah-i-Khafifah under section 337-A(i), P.P.C. The Surgeon Medico-Legal Punjab, has already issued a direction to all concerned not to describe any injury as bone deep and describe the injury stricto sensu within the meaning of Shajjah-i-Khafifah under Section 337-A(i), P.P.C. or Shajjah-i-mudihah under section 337-A(ii), P.P.C., as the case may be.

7. Now adverting to the case in hand, bone deep injury attributed to the petitioner on the person of injured Mst. Shehnaz Bibi cannot be termed falling under section 337- A(ii), P.P.C. and that clearly falls within the purview of section 337-A(i), P.P.C., bailable and non-cognizable offence. Section 452, P.P.C. has already been deleted during the investigation. In the circumstances. mentioned above, I do not find any justifiable reason to send the petitioners behind the bars, therefore, ad interim pre-arrest bail already granted to them on 23-5-2014 is hereby confirmed subject to their furnishing fresh bail bonds in the sum of Rs.50,000/- (Rupees fifty thousand only) each with one surety each in the like amount to the satisfaction of the learned trial court/Area Magistrate within 15 days.

8. Before parting with this order, I feel it necessary to appreciate efforts of Research Center of this Court and of the Surgeon Medico Legal, Punjab, Lahore, who have organized a meeting of 14 senior most Forensic Experts from all medical colleges of the Punjab to clarify confusion in description of injuries by the Medical Officers and has issued valuable instructions in public interest.

MWA/M-240/L Bail granted.

P L D 2014 Lahore 567
Before Muhammad Anwaarul Haq, J
BASHIR AHMAD---Petitioner
Versus
THE STATE and others---Respondents

Criminal Miscellaneous No.8761-B of 2014, decided on 3rd July, 2014.

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

----S. 497(2)---Penal Code (XLV of 1860), S.295-A---West Pakistan Maintenance of Public Order Ordinance (XXXI of 1960), S.16---Deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs, dissemination of rumours, etc.---Bail, grant of---Further inquiry---Pamphlets containing opinion on religious beliefs--- Whether such opinion was derogatory required academic consideration and recording of evidence---Pamphlets allegedly containing derogatory remarks regarding religious beliefs of Muslims were recovered from a car being driven by the accused---Said pamphlets, written by someone else, reflected expression of an opinion---Question as to whether such opinion was derogatory or otherwise required very serious consideration by the Trial Court, and that was only possible after recording of evidence from both the sides, who claimed themselves to be Muslims---Alleged recovery of pamphlets from the car of the accused or his involvement in distribution thereof with intent to outrage religious feeling of another group were acts that required further inquiry into the guilt of the accused---Accused was a previous non-convict---Offences alleged did not fall within the prohibitory clause of S.497(1), Cr.P.C.---Accused was granted bail in circumstances.
Nasir Ahmed v. The State 1993 SCMR 153 rel.

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

----S. 497(1)---Prohibitory clause of S.497(1), Cr.P.C.---Scope--Offence providing alternative sentence of fine---Effect---Where alternate sentence of fine was provided, the offence would not fall within the prohibitory clause of S.497(1), Cr.P.C. stricto sensu.
Ch. Mushtaq Ahmad Khan for Petitioner.
Mirza Abid Majeed, Deputy Prosecutor-General for the State with Sher Ali, S.I., with record.
ORDER

MUHAMMAD ANWAARUL HAQ, J.---Through this petition, Bashir Ahmad petitioner seeks post-arrest bail in case F.I.R.. No.60, dated 4-6-2014, registered at Police Station Haider Abad, District Bhakkar, in respect of offences under Sections 295-A, P.P.C. and Section 16 of the West Pakistan Maintenance of Public Order Ordinance. 1960.

2. Heard. Record perused.

3. According to the contents of the F.I.R., one Mazhar along with four other co-accused all sitting in a car were distributing some pamphlets containingderogatory remarks regarding the religious beliefs of the Muslims on 4-6-2014 in the area of village Mahni. The second part of the F.I.R. reflects that on interception of the police some objectionable - pamphlets were recovered from the same car driven by the petitioner bearing registration No. LRC-6081.

4. Investigating Officer/Sher Ali, S.I. present in Court states that he has registered this case on the basis of only two pamphlets out of one hundred, allegedly recovered from the car driven by the petitioner; one titled "Wafat-e-Khatam-ur Rusul (p.b.u.h.)" and other "Allah Ka Ghar our Yeh Dargahain". Both the pamphlets available on the police file I written by Dr. Masood-ud Din Usmani, M.B.B.S. Lakhnau, prima facie, reflect expression of an opinion and question regarding such opinion being derogatory or otherwise requires very serious academic consideration by the learned trial court that is only possible after recording of evidence from both the sides who both claim themselves Muslims. I respectfully place reliance on the case of Nasir Ahmed v. The State (1993 SCMR 153) wherein the Hon'ble Supreme Court of Pakistan, in a case under the similar offence, has held as under: -

> "In this context, in view of the serious question requiring examination in depth, and the offences being punishable with ten years' imprisonment or death, an authoritative pronouncement is called for which is to take place at the trial."

5. I am of the considered view that alleged recovery of such pamphlets from the car of the petitioner or his involvement in distribution thereof with the intent to outrage religious feelings of an other group is an act that keeping in view its nature requires further inquiry into the guilt of the petitioner, if any, within the purview of subsection (2) of section 497, Cr.P.C. Admittedly, the petitioner has no previous criminal record. Offence under section 16 of the West Pakistan Maintenance of Public Order Ordinance, 1960 does not fall within the prohibitory clause of section 497, Cr.P.C. whereas offence under section 295-A, P.P.C. entails punishment for a term which may extend to ten years or with fine or with both. It is well settled that where (alternate sentence of fine is provided offence would not fall within the prohibitory clause of section 497, Cr.P.C. stricto sensu.

Learned Law Officer after consulting the record confirms that no sanction for taking cognizance for offence under section 295-A, P.P.C., has yet been received as required under section 196, Cr.P.C., however, police has sent a request to the concerned authority for the required sanction. Therefore, without commenting upon

the merits of the case, I accept this petition and admit the petitioner to post-arrest bail subject to his furnishing bail bond in the sum of Rs.100,000/-- (Rupees one hundred thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

It is, however, clarified that observations made herein above are just tentative in nature and strictly confined to the disposal of this bail petition.

MWA/B-20/L Bail granted

2014 Y L R 401
[Lahore]
Before Muhammad Anwaarul Haq and Shahid Bilal Hassan, JJ
MUHAMMAD SAJID---Petitioner
Versus
The STATE and others---Respondents

Criminal Miscellaneous No.335-B of 2013, decided on 21st May, 2013.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), S.365-A--- Abduction/kidnapping for ransom---Bail, refusal of---Accused, though was not named in the F.I.R., but when alleged abductee was recovered, he made a statement under S.161, Cr.P.C. before the Police in which he nominated the accused specifically by name---Accused was arrested from the place where accused and co-accused had detained the abductee; and during said process 12-bore gun, was also recovered from the possession of accused---Car which was got from "Rent-A-Car" company in the name of accused, was used for commission of offence---Prosecution witnesses in their statements before the Police, while supporting the prosecution story, involved accused with the commission of offence levelled against him, which offence fell within the ambit of prohibitory clause of S.497, Cr.P.C.---Trial of the case was in progress, in which charge had been framed and case was fixed for evidence of prosecution---Reasons were available to believe that accused had committed offence levelled against him, as the whole prosecution evidence, oral as well as documentary was against the accused---Accused being not entitled to grant of bail, his bail application was dismissed.

Zafar Iqbal Awan for Petitioner.
Asghar Ali Gill, D.P.G. with Mansoor S.I. for the State.
Malik Saeed Ejaz for the Complainant.

ORDER

This is second bail application filed by the petitioner as the earlier was dismissed having been withdrawn vide order dated 11-9-2012.

2. Petitioner Muhammad Sajid son of Muhammad Hashim seeks post-arrest bail in case F.I.R. No. 359 of 2012 dated 30-5-2012 registered at Police Station Cantt., District Bahawalpur under section 365-A, P.P.C.

3. Briefly the prosecution story, as narrated in the F.I.R. by the complainant of this case is that the petitioner and other co-accused of this case had abducted/ kidnapped Muhammad Naveed the grandson of the complainant for ransom and after having kidnapped the said abductee initially demanded an amount of Rs.50,00,000 (rupees fifty lac only) and thereafter, certain negotiations took place and the said amount was reduced to Rs.32,00,000 (rupees thirty-two lac only) which amount was paid by the complainant of this case in the presence of witnesses to the accused party.

4. The learned counsel for the petitioner contends that the petitioner has no nexuses with any telephone allegedly used for the offence; that the petitioner remained fifteen days in physical remand and nothing has been recovered from the petitioner; that the petitioner is behind the bars since 1-6-2012. Lastly adds that it is the case where the petitioner has been falsely implicated as the prosecution has no evidence against him, therefore, the case of the petitioner falls within the ambit of further probe.

5. On the other hand the learned Deputy Prosecutor General assisted by the learned counsel for the complainant who have strongly opposed the bail petition. Contends that although the petitioner is not nominated in the F.I.R. but he has specifically been nominated at the time of recovery. Further adds that the petitioner was present at the time and place of recovery of abductee where the abductee was kept. Further adds that the offence falls within the prohibitory clause of section 497, Cr.P.C; that there is ample evidence available against the petitioner which connect him in the commission of crime alleged against him; that the abductee has no reason whatsoever to falsely involve the petitioner in this F.I.R.; that the statements of Jaffar and Sabir have been recorded under section 161, Cr.P.C. which fully implicate the petitioner and the case is fixed for prosecution evidence and next date of hearing is 1-6-2013.

6. Both the parties have been heard at length and record of the case has been perused carefully by us.

7. Though the petitioner was not named in the F.I.R. but on 1-6-2012, when the abductee namely Muhammad Naveed was recovered, he made a statement under section 161 Cr.P.C. before the police in which he nominated the petitioner specifically by name. In support of the prosecution story the petitioner was arrested from the place where the other co-accused and the petitioner had detained the abductee and during the said process 12-bore gun was also recovered from the possession of the petitioner. It is also an admitted fact that a car used for the commission of the said offence, which was got from Rent. A.Car company in the name of the petitioner. Apart from the said P.Ws. namely Hafiz Ghulam Qadir, Ch. Muhammad Jaffar and Muhammad Saddiq in their statements before the police while supporting the prosecution story involved the petitioner with the commission of the offence levelled against him. The offence of abduction/kidnapping falls within the ambit of prohibitory clause. Moreover, it has been brought to our notice that the trial of this case is in

progress and in which charge has been framed and is fixed for evidence of the prosecution side.

8. In the light of what has been discussed above there are reasons to believe that the petitioner has committed the offence levelled against him as the whole prosecution evidence oral as well as documentary is against the petitioner, therefore, we find that the petitioner is not entitled to the grant of post-arrest bail in this case at this stage and is hereby dismissed accordingly.

9. Before parting with this order, it is clarified that the reasons given in this order are tentative in nature and it will have no effect upon the merits of the case in accordance with law.

HBT/M-243/L Bail refused.

2014 Y L R 646
[Lahore]
Before Muhammad Anwaarul Haq and Shahid Bilal Hassan, JJ
LIAQAT ALI---Petitioner
Versus
The STATE and others---Respondents

Criminal Miscellaneous No.974-B of 2013, decided on 28th May, 2013.

Criminal Procedure Code (V of 1898)---
----S. 498---Control of Narcotic Substances Act (XXV of 1997), S.9(c)---Possessing and trafficking narcotics---Pre-arrest bail, confirmation of---F.I.R., in the case was lodged against accused after unexplained delay of approximately 24-days---Prosecution had put forward two stances, firstly, 1240 grams of charas was recovered from the secret cavity of the van, secondly, 1100 grams charas was recovered---Contraband was not recovered from the possession of accused---Complainant was real brother of a Police Officer, with whom accused had strained relations---Mala fide on the part of complainant, in circumstances, could not be ruled out---Accused was no more required by prosecution side for any further investigation and recovery---Ordinarily accused under S.9(c) of the Control of Narcotic Substances Act, 1997, did not deserve the right for the grant of pre-arrest bail, but facts of each and every case were to be seen independently---case of accused being fit one for grant of pre-arrest bail, bail granted to accused, was confirmed, in circumstances.

Muhammad Umair Mohsin for Petitioner.
Khalid Pervaiz Opel, D.P.G. with Raees S.I. for the State.
Ch. Ahmad Mehmood Goraya for the Complainant.

ORDER

Petitioner Liaquat Ali son of Mukhtar Ahmed seeks pre-arrest bail in case F.I.R. No.60/2013 dated 22-3-2013 for offence under sections 9(c) of the Control of Narcotic Substances Act, 1997 registered at Police Station Saddar Yazman.

2. According to the prosecution story as narrated in the Crime Report is that on 26-2-2013 Liqat Ali and Muhammad Akhtar alias Rola hired Suzuki Pick Up at the rate of Rs.1300 for the purpose of transportation of passengers; that both the accused kept a gift pack in front of Wagon; that when they reached Talewal bridge, Police Patrolling Party checked the vehicle; that the police party found gift pack which was lying in the Wagon; that "Charas" was found in that packet; that both the accused fled away from the scene. Hence this F.I.R.

3. Learned counsel for the petitioner referred Rapat No.5 of Police Patrolling Party of Talewala bridge dated 26-2-2013; that the van of the complainant was checked by the raiding party and recovered 1240 grams "Charas"; that Rapat No.7 further corroborates the stance taken by the petitioner; that during investigation in fact contraband was recovered from the van of Muhammad Irfan complainant and shifted his liability towards the petitioner and a false case has been registered against the present petitioner with mala fide intention and to safe his skin, as his real brother is an A.S.-I. in Police at Bahawalpur. He further contends that nothing has been recovered from the possession of the petitioner and that even the weight of the contraband mentioned in the F.I.R. is 1100-grams "Charas" and Rapat Nos.5 and 7 shows that 1240-grams. Adds that the case against the petitioner is false and there is delay of twenty four days in lodging the F.I.R. without any explanation. Further adds that the registration of case on the statement of Muhammad Irfan complainant by itself is not permissible if any raid was conducted.

4. On the other hand, the learned Deputy Prosecutor General assisted by the learned counsel for the complainant have strongly opposed the bail petition by stating that the petitioner is specifically nominated in the F.I.R.; that specific role has been attributed to the petitioner and a heavy quantity of narcotic belonging to him has been recovered.

5. We have heard the arguments and perused the record.

6. Interestingly, the alleged occurrence took place on 26-2-2013 when the police party searched the van of the complainant in his presence and during the said search, recovered Charas from the possession of the complainant after which the police was legally bound to register a criminal case against the complainant but the needful was not done but rather on 22-3-2013 F.I.R. was lodged against the petitioner after a delay of approximately 24-days which is altogether unexplained and another co-accused on the application of the complainant which act on the part of the police cannot be digested by a sane mind. The prosecution as per record has put forward two stances, firstly, 1240 grams of Charas was recovered from the secret cavity of the van, secondly, 1100 grams Charas was recovered. Admittedly the contraband was not recovered from the possession of the petitioner. Complainant is the real brother of one Muhammad Aslam A.S.-I. with whom the petitioner has strained relations, in this backdrop mala fides on the part of the complainant cannot be ruled out. The petitioner is no more required by the prosecution side for any further investigation and recovery. In the given circumstances, the case of the petitioner is a fit one for the grant of pre-arrest bail in this case. We are conscious of the fact that in ordinary cases accused persons under section 9(c) of the Control of Narcotic Substances Act, 1997 do not deserve the right for the grant of pre-arrest bail but the facts of each and every case are to be

seen independently. Therefore, pre-arrest bail granted to the petitioner in this case vide order dated 20-5-2013 is hereby confirmed, subject to his furnishing fresh bail bonds in the sum of Rs.1,00,000 (rupees one hundred thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

7. Before parting with this order, it is clarified that the reasons given in this order are tentative in nature and it will have no effect upon the merits of the case in accordance with law.

HBT/L-13/L Bail confirmed.

2014 Y L R 1159
[Lahore]
Before Muhammad Anwaarul Haq, J
MUNIR MASIH and 3 others---Petitioners
Versus
The STATE and others---Respondents

Criminal Miscellaneous No.12948 of 2013, decided on 27th November, 2013.

Criminal Procedure Code (V of 1898)---

----Ss. 498 & 497(2)---Penal Code (XLV of 1860), Ss.337-F(v), 337-A(i), 337-L(2), 148 & 149---Causing Mudihah, Shajjah-i-Khafifah, causing hurt, rioting, common object---Pre-arrest bail, grant of---Further inquiry---Delay of eight days in lodging of the F.I.R.---Injuries attributed to accused persons had been declared as simple in nature by the Doctor falling under Ss.337-A(i) & 337-L(2), P.P.C.---Five co-accused including one against whom, there was allegation of causing an injury with a Sota on the left arm of injured falling under S.337-F(v), P.P.C., had already been declared innocent---Question regarding vicarious liability of accused persons, could validly be determined by the Trial Court after recording of some evidence---Prima facie, matter was of further inquiry qua the guilt of accused persons---Recovery of unspecified Sotas being inconsequential in the peculiar circumstances of the case, sending accused persons behind the bars, only for a technical reason to enable them to apply for bail after arrest, was not justified---Ad interim pre-arrest bail already allowed to accused persons, was confirmed, in circumstances.

Muhammad Aslam v. The State 2000 YLR 1341 ref.

Naseeb Masih for Petitioners.

Muhammad Nawaz Shahid, Deputy District Public Prosecutor for the State with Muhammad Afzal A.S.-I. with record.

M. Tanveer Chaudhary for the Complainant.

ORDER

MUHAMMAD ANWAARUL HAQ, J.---Through this petition, Munir Masih, Jameel Masih, Saleem Masih and Azeem Masih petitioners seek pre-arrest bail in case

F.I.R. No. 192, dated 16-7-2013, registered at Police Station Saddar Samundri, District Faisalabad, in respect of offences under sections 337-F(v), 337-A(i), 337-L(2), and 148/149 P.P.C.

2. Learned counsel for the petitioners contends that the petitioners are innocent and have falsely been roped in this case with mala fide of the complainant in the backdrop of a dispute of plot, only to humiliate and pressurize them; that there is a delay of eight days in lodging of the F.I.R. without any explanation; that as per contents of the F.I.R. the injuries attributed to the petitioners maximum fall within the purview of sections 337-A(i) and section 337-L(2), P.P.C.; that out of twelve, five accused including main accused Shakeel Masih against whom, there is allegation of causing an injury with a Sota on the left arm of the injured Cornelious falling under section 337-F(v), P.P.C., have already been declared innocent; that in view of declaration of innocence of the co-accused of the petitioners, question of vicarious liability of the petitioners in the circumstances of the case, is a matter of further inquiry into their guilt.

3. Conversely, learned Law Officer opposing this bail petition contends that all the petitioners are nominated in the F.I.R. with specific role of causing injuries to two injured namely Ishaq Peter and Brain Peter, who were medically examined on the same day through police and if there is delay of some days in lodging of the formal F.I.R., that cannot be attributed to the complainant; that deeper appreciation of merits of this case at this stage is not desirable; that version of the complainant is supported by medical evidence; that petitioners have actively participated in the occurrence as such, they are vicariously liable for every act of their co-accused; that pre-arrest bail is an extraordinary relief and prior condition of pre-arrest bail is to prove mala fide on the part of the complainant or the police that is even not alleged in this case and that at the time of occurrence, petitioners were armed with their respective weapons, those are yet to be recovered from them.

4. Heard. Record perused.

5. Be that as it may, there is delay of eight days in lodging of the F.I.R. despite of the fact that both the injured Ishaq Peter and Brain Peter were medically examined on the same day. As per averments of the F.I.R. allegation against the petitioners is that petitioner Munir Masih inflicted an injury with a Sota on the right side of the head of the injured Ishaq Peter, petitioner Jamil Masih inflicted an injury with a Sota at the head of the injured Brian Peter, petitioner Saleem Masih inflicted an injury with a Sota on the right leg of the injured Ishaq Peter whereas petitioner Azeem Masih inflicted an injury on the right shoulder of injured Brain Peter. The injuries attributed to the petitioners have been declared by the doctor simple in nature falling under sections 337-A(i) and 337-L(2), P.P.C. Admittedly, five co-accused of the petitioners including Shakeel Masih against whom, there is allegation of causing an injury with a Sota on the left arm of the injured cornelious falling under section 337-F(v), P.P.C., have already been declared innocent. Question regarding vicarious liability of the petitioners, can validly be determined by the learned trial Court after recording of some evidence. It is prima facie a matter of further inquiry qua the guilt of petitioners. The intended recovery of unspecified Sotas is inconsequential in the peculiar circumstances of this case, therefore, sending the petitioners behind the bars only for a technical reason to

enable them to apply for bail after arrest is not justified. Reference in this regard is placed on the case of Muhammad Aslam v. The State 2000 YLR 1341.

Resultantly, this petition is accepted and ad-interim pre-arrest bail already allowed to the petitioners by this Court vide order dated 27-9-2013, is confirmed subject to their furnishing fresh bail bonds in the sum of Rs.50,000 (Rupees fifty thousand only) each with one surety each in the like amount to the satisfaction of the learned trial Court/Area Magistrate within a period of fifteen days from today.

6. It is, however, clarified that observations made herein are just tentative in nature and strictly confined to the disposal of this bail petition.

HBT/M-16/L Bail confirmed.

2014 Y L R 1493
[Lahore]
Before Muhammad Anwaarul Haq, J
BABAR HUSSAIN---Petitioner
Versus
The STATE and another---Respondents

Criminal Miscellaneous No.7652-B of 2013, decided on 19th July, 2013.

Criminal Procedure Code (V of 1898)---

----S.497---Penal Code (XLV of 1860), S.489-F---Dishonestly issuing a cheque---Bail, grant of---Business deal---Disputed cheque was given in the backdrop of a business deal between the parties---Validity---Question that disputed cheque was issued dishonestly was a matter to be determined by Trial Court after recording of some evidence---Accused had been behind the bars since, 10-2-2013, without any substantive progress in his trial---Maximum punishment provided for the offence under S. 489-F, P.P.C. was imprisonment for three years and the same did not fall within the prohibitory clause of S. 497, Cr.P.C.---Grant of bail in such like cases was a rule and refusal an exception---Bail was allowed in circumstances.

Mitho Pitafi v. The State 2009 SCMR 299; Qamar alias Mitho v. The State and others PLD 2012 SC 222 and Ikram-ul-Haq v. Raja Naveed Sabir and others 2012 SCMR 1273 rel.

Mian Muhammad Rashid for Petitioner.

Muhammad Nawaz Shahid, Deputy District Public Prosecutor for the State.

Fazal-ur-Rehman Khilji for the Complainant.

Muhammad Imran, A.S.I, with record.

ORDER

MUHAMMAD ANWAARUL HAQ, J.---Through this petition, petitioner Babar Hussain seeks post-arrest bail in the case F.I.R. No. 1205/2011 dated 30-11-2011, under section 489-F, P.P.C., Police Station Model Town District Gujranwala.

2. Learned counsel for the petitioner contends that the F.I.R itself reflects that the cheque in question was given to the complainant in the backdrop of a business deal between the parties; that the offence does not fall within the prohibitory clause of section 497, Cr.P.C.; that petitioner has no previous criminal record and is behind the bars since 10-2-2013 without any substantive progress in his trial; that case against the petitioner in the circumstances is one of further inquiry into his guilt.

3. On the other hand, learned Deputy District Public Prosecutor assisted by learned counsel for the complainant vehemently opposing this petition contends that petitioner has deprived the complainant of a huge amount of Rs.15,00,000; that mere non-falling of the offence within the prohibitory clause of section 497 Cr.P.C. does not entitle the petitioner to bail; that there is sufficient evidence on the record to connect the petitioner with the crime as issuance of cheque and dishonouring thereof are enough to constitute the offence under section 489-F P.P.C.; that petitioner remained absconder for about 1-1/2 year, therefore, he is not entitled for the bail.

4. Heard. Record perused.

5. Be that as it may, according to the contents of the F.I.R. the disputed cheque was given in the backdrop of a business deal between the parties. Whether the disputed cheque was issued dishonestly, is a matter to be determined by the learned trial Court after recording of some evidence. Petitioner is behind the bars since 10-2-2013 without any substantive progress in his trial. Maximum punishment provided for the offence under section 489-F, P.P.C. is imprisonment for three years. Offence does not fall within the prohibitory clause of section 497, Cr.P.C. and grant of bail in such like cases is a rule and refusal is an exception. Investigating Officer, present before the Court, confirms that the petitioner has no previous criminal record. As far as abscondence of the petitioner is concerned, suffice it to say that it is well-settled by now that if case of an accused falls within the purview of further inquiry as contemplated under subsection (2) of section 497, Cr.P.C. then he shall be entitled for bail and mere abscondence would not be an impediment for the grant of bail to the accused. In his context, I respectfully refer the cases of Mitho Pitafi v. The State (2009 SCMR 299), Qamar alias Mitho v. The State and others (PLD 2012 SC 222) and of Ikram-ul-Haq v. Raja Naveed Sabir and others (2012 SCMR 1273). Therefore, without going into further details of the controversy between the parties, I allow this petition and admit the petitioner to bail subject to his furnishing 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 the learned trial Court.

6. It is, however, clarified that the observations made herein above are just tentative in nature and strictly confined to the disposal of this bail petition.

MH/B-24/L Bail allowed.

2014 Y L R 2146
[Lahore]
Before Muhammad Anwaarul Haq, J
NASEER AHMED---Petitioner
Versus
The STATE and others---Respondents

Criminal Miscellaneous No.3923-B of 2014, decided on 21st May, 2014.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), Ss.302, 324 & 34---Qanun-e-Shahadat (10 of 1984), Art.46---Qatl-e-amd, attempt to commit qatl-e-amd, common intention---Bail, grant of---Implication on basis of statement of deceased---Such statement not implicating the accused---Accused was not named in the F.I.R. and was subsequently involved on the basis of statement of deceased made 15 days after the occurrence---Initially accused was shown as an eye-witness of the occurrence, and he voluntarily appeared before the investigating officer to record his statement under S. 161, Cr.P.C.---Before dying, deceased made a statement to the effect that he took a lift from the accused on his motorcycle, whereafter some unknown person fired at him---Accused was implicated for the offence due to such statement---Such statement of deceased was yet to be scrutinized as to whether the same was recorded by the deceased himself and whether it could be used as a dying declaration---Even otherwise, prima facie such statement did not incriminate the accused for the occurrence in any manner whatsoever because some unknown person had fired at the deceased---Additionally deceased was brought to hospital in a very serious condition and according to the doctor he was unfit to make any statement at that time---Accused was a previous non-convict---Accused was granted bail in circumstances.

Imran Asmat Chaudhry for Petitioner.

Mr. Muhammad Nawaz Shahid, Deputy District Public-Prosecutor for the State with Nawazish Ali S.I. for the State.

M. Tanveer Chaudhry, for the Complainant.

ORDER

MUHAMMAD ANWAARUL HAQ, J.---Through this petition, Naseer Ahmed petitioner seeks post-arrest bail in case F.I.R. 41, dated 21-2-2013, registered at Police Station Wahndo, District Gujranwala, in respect of offences under sections 302, 324 and 34, P.P.C.

2. Arguments heard. Record perused.

3. Petitioner is not named in the F.I.R. and was subsequently involved in this case on the basis of statement of the injured/deceased Abdul Jabbar dated 8-3-2013. I have noticed that initially, F.I.R. in this case was registered under section 324, P.P.C. and petitioner Naseer Ahmed was shown as an eyewitness of the occurrence, even his statement under

section 161, Cr.P.C. was also recorded by the police. The only evidence referred by the learned counsel for the complainant against the petitioner is the statement of the deceased allegedly made in his life time on 8-3-2013 after about 15 days of the occurrence, wherein he has not attributed any fire to the petitioner and has stated that he took lift from the petitioner on his motorcycle, in the meantime, one unknown accused had fired at him. I have noticed that the deceased Abdul Jabbar was brought to the hospital on 21-2-2013 in a very serious condition and as per endorsement of Dr. Waheed, dated 21-2-2013, he was unfit to make any statement at that time. Learned counsel for the complainant points out that the injured Abdul Jabbar initially remained in very dangerous condition but on 21-3-2013, he was discharged from the hospital and later on was expired after about two months and ten days of the alleged occurrence.

In the peculiar circumstances of the case, statement of the injured/deceased, the only evidence relied upon by the prosecution against the petitioner, is yet to be scrutinized whether the same was got recorded by the injured himself and whether that can be used as dying declaration but fact remains that statement of Abdul Jabbar even otherwise, prima facie, does not incriminate the petitioner in this occurrence in any manner whatsoever because the injured took lift from the petitioner on motorcycle, some unknown accused had fired at the deceased and petitioner as per his statement ran away from the place of occurrence. I have noticed with concern that statement of the petitioner recorded under section 161, Cr.P.C. also reflects the same narration of the occurrence wherein he has categorically stated that after firing at the deceased by some unknown accused he ran away from the spot to save his life. However, he voluntarily did appear before the Investigating Officer on the same day and got recorded his statement under section 161, Cr.P.C.

In view of all above, I am of the considered view that question of culpability of the petitioner, can validly be determined by the learned trial Court after recording of some evidence in trial. Learned counsel for the petitioner states at bar that petitioner is previously non-convict and is behind the bars since 22-12-2013. Therefore, without further commenting upon the merits of the case, I accept this petition and admit the petitioner to post-arrest bail subject to his furnishing bail bonds in the sum of Rs.2,00,000 (Rupees two hundred thousand only) with two sureties each in the like amount to the satisfaction of the learned trial Court.

4. It is, however, clarified that observations made herein above are just tentative in nature and strictly confined to the disposal of this bail petition.

MWA/N-35/L Bail granted.

PLJ 2014 Cr.C. (Lahore) 101 (DB)
[Bahawalpur Bench Bahawalpur]
Present: Muhammad Anwaar-ul-Haq and Shahid Bilal Hassan, JJ.
LIAQAT ALI--Petitioner
versus
STATE etc.--Respondents.

Crl. Misc. No. 974-B of 2013, decided on 28.5.2013.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 498--Control of Narcotic Substances Act, (XXV of 1997), S. 9(c)--Pre-arrest bail--Confirmed--Allegation of--Recovery of charas--Prosecution as per record has put forward two stances, firstly, 1240 grams of Charas was recovered from the secret cavity of the van, secondly, 1100 grams Charas was recovered--Admittedly the contraband was not recovered from the possession of the petitioner--Complainant was the real brother of ASI with whom the petitioner has strained relations, in this backdrop mala fides on the part of the complainant cannot be ruled out--Petitioner was no more required by the prosecution side for any further investigation and recovery--Case of the petitioner was a fit one for the grant of pre-arrest bail--In ordinary cases accused persons u/S. 9-C of the Control of Narcotic Substances Act, 1997 do not deserve the right for the grant of pre-arrest bail but the facts of each and every case are to be seen independently--In this case there were mala fides surfacing on the face of the record on the part of the complainant and the prosecution who have joined hands just in order to unlawfully drag the petitioner and punishing him for a crime he has not committed as apparent on the face of the record, therefore, pre-arrest bail granted to the petitioner--Bail confirmed. [Pp. 102 & 103] A

Mr. Muhammad Umair Mohsin, Advocate alongwith Petitioner.
Mr. Khalid Pervaiz OPel, D.P.G. for State.
Ch. Ahmad Mehmood Goraya, Advocate for Complainant.
Date of hearing: 28.5.2013.

Order
Petitioner Liaquat Ali son of Mukhtar Ahmed seeks pre-arrest bail in case FIR No. 60/2013 dated 22.03.2013 for offence under Sections 9(c) of the Control of Narcotic Substances Act, 1997 registered at Police Station Saddar Yazman.

2. According to the prosecution story as narrated in the Crime Report is that on 26.02.2013 Liaqat Ali and Muhammad Akhtar alias Rola hired Suzuki Pick Up at the rate of Rs. 1300/- for the purpose of transportation of passengers; that both the accused kept a gift pack in front of Wagon; that when they reached Talewal bridge, Police Patrolling Party checked the vehicle; that the police party found gift pack which was lying in the Wagon; that "Charas" was found in that packet; that both the accused fled away from the scene. Hence this FIR.

3. Learned counsel for the petitioner referred Rapat No. 5 of Police Patrolling Party of Talewala bridge dated 26.02.2013; that the van of the complainant was checked by the raiding party and recovered 1240 grams "Charas"; that Rapat No. 7 further corroborates the

stance taken by the petitioner; that during investigation in fact contraband was recovered from the van of Muhammad Irfan complainant and shifted his liability towards the petitioner and a false case has been registered against the present petitioner with mala fide intention and to safe his skin, as his real brother is an ASI in Police at Bahawalpur. He further contends that nothing has been recovered from the possession of the petitioner and that even the weight of the contraband mentioned in the FIR is 1100-grams "Charas" and Rapat Nos. 5 and 7 shows that 1240- grams. Adds that the case against the petitioner is false and there is delay of twenty-four days in lodging the FIR without any explanation. Further adds that the registration of case on the statement of Muhammad Irfan complainant by itself is not permissible if any raid was conducted.

4. On the other hand, the learned Deputy Prosecutor General assisted by the learned counsel for the complainant have strongly opposed the bail petition by stating that the petitioner is specifically nominated in the FIR; that Specific role has been attributed to the petitioner and a heavy quantity of narcotic belonging to him has been recovered.

5. We have heard the arguments and perused the record.

6. Interestingly, the alleged occurrence took place on 26.2.2013 when the police party searched the van of the complainant in his presence and during the said search, recovered Charas from the possession of the complainant after which the police was legally bound to register a criminal case against the complainant but the needful was not done but rather on 22.3.2013 FIR was lodged against the petitioner after a delay of approximately 24-days which is altogether un-explained and another co-accused on the application of the complainant which act on the part of the police cannot be digested by a sane mind. The prosecution as per record has put forward two stances, firstly, 1240 grams of Charas was recovered from the secret cavity of the van, secondly, 1100 grams Charas was recovered. Admittedly the contraband was not recovered from the possession of the petitioner. Complainant is the real brother of one Muhammad Aslam ASI with whom the petitioner has strained relations, in this backdrop mala fides on the part of the complainant cannot be ruled out. The petitioner is no more required by the prosecution side for any further investigation and recovery. In the given circumstances, the case of the petitioner is a fit one for the grant of pre-arrest bail in this case. We are conscious of the fact that in ordinary cases accused persons under Section 9-C of the Control of Narcotic Substances Act, 1997 do not deserve the right for the grant of pre-arrest bail but the facts of each and every case are to be seen independently. In this case there are mala fides surfacing on the face of the record on the part of the complainant and the prosecution who have joined hands just in order to unlawfully drag the petitioner and punishing him for a crime he has not committed as apparent on the face of the record, therefore, pre-arrest bail granted to the petitioner in this case vide order dated 20.05.2013 is hereby confirmed, subject to his furnishing fresh bail bonds in the sum of Rs. 1,00,000/- (rupees one hundred thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

7. Before parting with this order, it is clarified that the reasons given in this order are tentative in nature and it will have no effect upon the merits of the case in accordance with law.

(A.S.) Bail confirmed.

PLJ 2014 Cr.C. (Lahore) 120 (DB)
[Bahawalpur Bench Bahawalpur]
Present: Muhammad Anwaar-ul-Haq and Shahid Bilal Hassan, JJ.
Mst. NASIM--Petitioner
versus
STATE, etc.--Respondents

Crl. Misc. No. 739-B of 2013, decided on 28.5.2013.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 497--Control of Narcotic Substances Act, (XXV of 1997), S. 9(c)--Bail, grant of--Allegation of--Recovery of charas--Petitioner was arrested in this case at the spot and was behind the bar ever since i.e for a period of over one year--Order sheet produced by the petitioner's counsel revealed that delay in trial was being caused by the prosecution side and not the petitioner side, as she has sought no adjournment in this case--It was evident from the order sheet that PWs were not appearing despite repeated opportunities and subsequently non-bailable warrants have been issued to the concerned--Petitioner was behind the bar and was no more required by the prosecution for any further investigation--The trial in this case was yet to conclude and was likely to consume reasonable period--No useful purpose would be served by keeping the petitioner behind the bars for indefinite period--Bail allowed. [P. 121] A

Ch. Abdul Khaliq, Advocate for Petitioner.
Mr. Khalid Pervaiz Opel, D.P.G. for State.
Date of hearing: 28.5.2013.

Order
This is second bail application of the petitioner. First was dismissed on merits on 28.05.2012.

2. Petitioner Mst. Naseem widow of Nawaz seeks post arrest bail in case FIR No. 143/2012 dated 20.03.2012 under Sections 9(c) of the Control of Narcotic Substances Act, 1997 registered at Police Station City Khanpur, the allegation against the petitioner is that when the police raided she was arrested and 4000- gram charas was recovered from her possession.

3. Learned counsel for the petitioner contends that earlier the bail petition of the petitioner was dismissed on merits; that only statutory ground is available to the petitioner; that the petitioner has falsely been implicated in this case; that the trial has not commenced without fail of the petitioner; that attested copies of the interim orders of the learned trial Court have been produced which show that all the adjournments have been sought by the prosecution as PWs are not appearing before the Court even after issuance of their non-bailable warrants of arrest.

4. On the other hand, the learned Deputy Prosecutor General has strongly opposed the bail petition by stating that the petitioner is specifically nominated in the FIR. Specific role has

been attributed to the petitioner; that heavy quantity of narcotic has been recovered from the petitioner and that she is not entitled for bail even on the statutory ground.

5. We have heard the arguments and perused the record.

6. The perusal of record transpires that the petitioner was arrested in this case at the spot and is behind the bar ever since i.e for a period of over one year. The order sheet produced by the petitioner's counsel reveals that delay in trial is being caused by the prosecution side and not the petitioner side, as she has sought no adjournment in this case. It is evident from the order sheet that PWS are not appearing despite repeated opportunities and subsequently non-bailable warrants have been issued to the concerned. The petitioner is behind the bar and is no more required by the prosecution for any further investigation. The trial in this case is yet to conclude and is likely to consume reasonable period. No useful purpose would be served by keeping the petitioner behind the bars for indefinite period.

7. In the light of what has been discussed above, this petition is allowed and the petitioner is admitted to post-arrest bail in this case subject to her furnishing bail bonds in the sum of Rs. 200,000/- (rupees two hundred thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

8. Before parting with this order, it is clarified that the reasons given in this order are tentative in nature and it will have no effect upon the merits of the case in accordance with law.
(A.S.) Bail allowed.

PLJ 2014 Cr.C. (Lahore) 124
Present: Muhammad Anwaar-ul-Haq, J.
NADEEM alias NAVEED--Petitioner
versus
STATE, etc.--Respondents
Crl. Misc. No. 12500-B of 2013, decided on 3.10.2013.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 498--Pakistan Penal Code, (XLV of 1860), Ss. 324/34--Pre-arrest bail--Confirmed--Rule of consistency--Mere abscondence of the petitioner was not sufficient to refuse him bail when otherwise he was entitled to the same on the rule of consistency--Ground of consistency can only be considered in an after arrest bail is totally misconceived--In the cases where an accused has a good case for his bail on the rule of consistency sending him behind the bars only to enable him to apply for after arrest bail is not justified--Considering the principle of consistency as a fresh ground, pre-arrest bail already granted to petitioner was confirmed. [Pp. 126 & 127] A & B
PLD 2012 SC 222, 2012 SCMR 1273, 1986 SCMR 1380 & PLJ 1999 Cr.C. 1504, ref.
Raja Nadeem Haider, Advocate with Petitioner.
Mr. Muhammad Nawaz Shahid, DDPP for State.
Ch. Tauseef Khalid Khatana, Advocate for Complainant.
Date of hearing: 3.10.2013.

Order

Through this 2nd petition, petitioner Nadeem alias Naveed seeks pre-arrest bail in a case FIR No. 236 dated 12.04.2011 registered under Sections 324/34 & 109, PPC at Police Station Old Anarkali, Lahore. His first pre-arrest bail petition i.e. Crl.Misc.No. 5615-B of 2011 was dismissed on merits on 27.05.2011.

2. The Order passed by this Court refusing pre-arrest bail to the petitioner was challenged by the co-accused of the petitioner namely Saeed Khan before the Hon'bleSupreme Court of Pakistan through Criminal Petition No. 387-L of 2013 and he was allowed pre-arrest bail.

3. Learned counsel for the petitioner contends that this petition has been moved on the ground of consistency, as co-accused of the petitioner namely Saeed Khan, whose pre-arrest bail was also dismissed on merits by this Court through the same Criminal Miscellaneous, has been allowed pre-arrest bail by the Hon'ble Supreme Court of Pakistan on 13.06.2011 vide Criminal Petition No. 387-L of 2011. Further contends that except the alleged abscondence of the petitioner, his case is not distinguishable than the case of his co-accused mentioned above. While explaining the abscondence, learned counsel for the petitioner contends that because of life threat to the petitioner he opted to hide himself at some safe place and even now his life is in jeopardy.

4. Learned law officer after consulting the record confirms that except the abscondence of the petitioner for about two years, case of the petitioner is at par with the case of his co-accused Saeed Khan already allowed bail by the Hon'ble Supreme Court of Pakistan. However, learned counsel for the complainant while opposing this petition contends that case of the petitioner is quite distinguishable than that of his co-accused Saeed Khan, as after the dismissal of his pre-arrest bail he remained absconder for about two years and did not approach the Hon'ble Supreme Court of Pakistan for his pre-arrest bail; that even otherwise principle of consistency is not a rule of universal application and each case has to be dealt with on its own merits, therefore, petitioner is not entitled for pre-arrest bail and all the arguments of the learned counsel for the petitioner can only be considered in the after arrest bail.

5. Heard. Record perused.

6. Admittedly, co-accused of the petitioner namely Saeed Khan, whose pre-arrest bail along with that of present petitioner was dismissed by this Court on merits, has already been allowed pre-arrest bail by the Order of Hon'ble Supreme Court of Pakistan dated 13.06.2011 in Criminal Petition No. 387-L of 2011 with the following observations:--

"3. Admittedly the petitioner had not been nominated in the FIR in any capacity whatsoever. The occurrence in this case had taken place on 10.4.2011 and the FIR had been lodged in that regard on 12.04.2011. It had been mentioned by the complainant in the FIR that two unknown persons had committed the alleged offence and that they had collectively fired three shots hitting the victim namely Ajmal Khan on his right lower leg. We have curiously noticed that on 12.4.2011 the complainant had also got recorded his supplementary statement wherein he had nominated the present petitioner and another as the culprits who had fired at and injured the victim and in that supplementary statement it had categorically

been stated by the complainant that till then he had not reported the incident to the police. We have remained unable to understand as to how that statement of the complainant could be termed as a supplementary statement if by then the complainant had not even lodged an FIR regarding the incident in issue.

"4. It has also been found by us to be intriguing that in the above mentioned supplementary statement the complainant had maintained that he and the petitioner had remained partners in business for some time in the past and if that were so then the complainant's failure to identify and nominate the petitioner in the FIR as one of the culprits who had fired at and injured the complainant's brother namely Ajmal Khan has been found by us to be prima facie irreconcilable. Such belated implication of the petitioner by the complainant in the criminal case in hand and the circumstances in which such implication had come about have tentatively been found by us to be smacking of mala fide on the part of the complainant.

"5. The record also highlights a glaring contradiction between the FIR/supplementary statement and the Medico-legal Certificate issued in respect of the injured victim in as much as according to the FIR/supplementary statement the alleged victim had received three fire-arm injuries on his right lower leg at the hands at the hands of the culprits but according to the Medico-legal Certificate issued in respect of the alleged victim there was only one fire shot received by him on his right lower leg. These factors have been found by us to be sufficient to put us to caution regarding veracity of the allegations levelled by the complainant party against the petitioner."

7. In view of the allegation levelled against the petitioner and the material collected during the investigation case of the petitioner is not distinguishable than the case of his co-accused Saeed Khan. Mere abscondence of the petitioner is not sufficient to refuse him bail when otherwise he is entitled to the same on the rule of consistency. I respectfully refer the case of Qamar alias Mitho versus The State and others (PLD 2012 Supreme Court 222) wherein the Hon'ble Supreme Court of Pakistan has held as under:

"It has vehemently been argued by the learned Additional Prosecutor-General, Punjab appearing for the State that the petitioner had remained a Proclaimed Offender for a period of about four years and, thus, he is not entitled to any indulgence in the matter of bail. We have, however, not felt persuaded to agree with the learned Additional Prosecutor-General in this regard. It has already been held by this Court in the cases of Ibrahim v. Hayat Gul and others (1985 SCMR 382) and Muhammad Sadiq v. Sadiqand others (PLD 1985 SC 182) that in a case calling for further inquiry into the guilt of an accused person bail is to be allowed to him as of right and such right cannot be refused to him merely on account of his alleged abscondance which is factor relevant only to propriety."

Similar view has been taken by the Hon'ble Supreme Court of Pakistan in the case of "Ikram-ul-Haq vs. Raja Naveed Sabir and others (2012 SCMR 1273)" wherein it has been held as under:--

"It has vehemently been argued by the learned counsel for the petitioner that Respondent No. 1 had remained a fugitive from law and had been declared a Proclaimed Offender and, thus, he was not entitled to be extended the concession of bail We have, however remained unable to subscribe to this submission of the learned counsel for the petitioner because the law is by now settled that in a case calling for further inquiry into the guilt of an accused person bail is to be allowed to him as a matter of right and not by way of grace or

concession. Bail is sometimes refused to an accused person on account of his absconsion but such refusal of bail proceeds primarily upon a question of propriety. It goes without saying that whenever a question of propriety is confronted with a question of right the latter must prevail. A reference in this respect may be made to the cases of Ibrahim v. Hayat Gul and others (1985 SCMR 382), Muhammad Sadiq v. Sadiq and others (PLD 1985 SC 182) and Qamar alias Mitho v. The State and others (PLD 2012 SC 222)."

The contention of the learned counsel for the complainant that the ground of consistency can only be considered in an after arrest bail is totally misconceived. In the cases where an accused has a good case for his bail on the rule of consistency sending him behind the bars only to enable him to apply for after arrest bail is not justified. I respectfully rely upon Muhammad Ramzan vs. Zafar Ullah and another (1986 SCMR 1380) where the Hon'ble Supreme Court has observed as under:--

"2. The case of murder was initially instituted against seven persons. The majority of them were not attributed any specific role in so far as the physical injuries to the victims are concerned Accordingly, in this category the respondent was allowed bail before arrest and some others were allowed bail after arrest. The petitioner has chosen not to challenge the grant of bail after arrest to the other persons falling in the same category to which the respondent belongs. The distinction made according to the learned counsel, is based on the fact that he has been allowed bail before arrest.

3. After hearing the learned counsel we feel that prima facie, at this stage, the case of the petitioner is not distinguishable from that of others to whom bail has been allowed. No useful purpose would be served if the bail of Zafar Ullah Khan respondent is cancelled on any technical ground because after arrest he would again be allowed bail on the ground that similarly placed other accused are already on bail. We, therefore, in the circumstances of this case, do not consider it a fit case for grant of leave to appeal. This petition accordingly, is dismissed."

Similar view has been taken by this Court in the case of Muhammad Aslam vs. The State (PLJ 1999 Cr. C. 1504) while observing as under:--

"The petitioner appears to have a reasonably good case for post-arrest bail on the basis of suddenness of the occurrence, lack of premeditation on the part of the accused party, divergent findings of different Investigating Officers of this case and admission of a co-accused to post-arrest bail. Thus, it shall have a colour of ludicrousness if he is sent behind the bars for a few days by dismissing his application for pre-arrest bail so as to enable him to come out of jail after a few days on post-arrest bail. I for one would not like to be a party to such a mockery of the system."

In view of all above, while considering the principle of consistency as a fresh ground, pre-arrest bail already granted to the petitioner on 20.09.2013 is hereby confirmed subject to his furnishing fresh bail bonds in the sum of Rs. 2,00,000/- (Rupees two hundred thousand) with two sureties each in the like amount to the satisfaction of the learned trial Court within 15 days.

(A.S.) Bail confirmed.

PLJ 2014 Cr.C. (Lahore) 279 (DB)
Present: Muhammad Anwar-ul-Haq and Abdus Sattar Asghar, JJ.
QAMAR ALI--Petitioner
Versus
STATE and another--Respondents

Crl. Misc. No. 11689-B of 2013, decided on 17.9.2013.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 497--Control of Narcotic Substances Act, (XXV of 1997), S. 9(c)--Bail, grant of--Allegation of--Recovery of charas--Alleged recovery of contraband Charas 1022 grams from the petitioner was a borderline case in between clauses (b) and (c) of Section 9 of CNSA, 1997--Petitioner was behind the bars without any material progress in the trial--He cannot be detained in jail for indefinite period as a matter of punishment--Incarceration of the petitioner was not likely to serve any cause of justice at this stage. [P. 280] A
Syed Muhammad Afzal Wasti, Advocate for Petitioner.
Mr. Hamayon Aslam, D.P.G. for State.
Date of hearing: 17.9.2013.

Order
Qamar Ali petitioner seeks post arrest bail in case FIR No. 356/2013 dated 8.7.2013 under Section 9(c) of the Control of Narcotic Substances Act, 1997 registered at Police Station Muradpur Sialkot.

2. As per FIR allegation against the petitioner is that he was found in possession of contraband Charas 1022 grams when arrested by the police.

3. Learned counsel for the petitioner argues that the petitioner has falsely been involved in this case by the police just to show their efficiency; that nothing was recovered from the petitioner and fake recovery of Charas has been planted upon him; that the petitioner has no previous criminal record; and that the case against the petitioner is one of further inquiry therefore he is entitled to the concession of bail.

4. On the other hand learned Deputy Prosecutor General opposing this bail petition contends that contraband Charas has been recovered from the petitioner attracting the offence u/S. 9(c) which falls within the prohibitory clause of Section 51 of CNSA 1997 therefore he is not entitled to the grant of bail.

5. Arguments heard. Record perused.

6. Alleged recovery of contraband Charas 1022 grams from the petitioner is a borderline case in between clauses (b) and (c) of Section 9 of CNSA, 1997. Petitioner is behind the bars since 8.7.2013 without any material progress in the trial. He cannot be detained in jail for indefinite period as a matter of punishment. Incarceration of the petitioner is not likely to serve any cause of justice at this stage.

7. For the above reasons, this petition is allowed and the petitioner is admitted to bail subject to his furnishing bail bond in the sum of Rs. 1,00,000/- with one surety in the like amount to the satisfaction of the learned trial Court.

8. Before parting with this order it is clarified that the observations made hereinabove are tentative in nature and will not prejudice the case of either party in the trial.
(A.S.) Bail granted.

PLJ 2014 Lahore 784 (DB)
Present: Muhammad Anwaar-ul-Haq and Abdus Sattar Asghar, JJ.
MUHAMMAD ADNAN--Appellant
versus
RETURNING OFFICER, PP-136, NAROWAL etc.--Respondents

Election Appeal No. 1-A/2014, decided on 30.4.2014.

Representation of the People Act, 1976 (LXXXV of 1976)--
----S. 99(1-A)(b,h,i)--Objection on nomination papers--Legal consequences of illegal and corrupt practice being beneficiary--Validity--Expression he was found guilty of a corrupt or illegal practice under any law for the time being in force" used S. 99(1-A)(i) of the ROPA 1976 bears significant importance and also manifests intent of the legislature--Since R.O. was not directly found guilty of corrupt or illegal practice under any law, therefore, his candidature did not suffer from disqualification under Section 99(1-A)(i) of ROPA 1976--Appellant's second objection, therefore, was unfounded and untenable--Appeal was dismissed. [P. 786] A

Rana Zia-ur-Rehman and Ms. Misbah Serwar, Advocates for Appellant.

Order
This appeal under Section 14(5) of the Representation of the People Act 1976 (hereinafter to be called as ROPA 1976) is directed against the order dated 25.04.2014 passed by the Returning Officer PP-136, Narowal-V whereby appellant's objections on the nomination papers of Lt. Col. (Rtd.) Shujjat Ahmed Khan/Respondent No. 2 (to be called hereinafter as respondent) for contest of by-elections were rejected.

2. Arguments heard. Record perused.

3. The appellant a rival candidate for by-elections PP-136 Narowal-V scheduled to be held on 22.05.2014 had raised following two objections on the nomination papers of the respondent:

(i) that the respondent is defaulter of the cost of election petition amounting to Rs.250323/- as per memo of cost dated 26.3.2014 passed by the Election Tribunal Lahore, and

(ii) that the respondent has been found guilty of illegal practice as per order dated 26.3.2014 passed by the Election Tribunal Lahore and thus does not qualify to conduct the election.

With the above objections the appellant sought for rejection of respondent's nomination papers in terms of Section 99 (1-A)(b,h,i) of ROPA, 1976.

4. At the out set when confronted that the costs of election petition being a personal financial obligation of the respondent does not fall within the ambit of "Government dues" or "public exchequer" learned counsel for the appellant concedes and does not press the first objection, however contends that the second objection raised by him before the learned Returning Officer in view of the finding of Election Tribunal Lahore vide order dated 26.3.2014 regarding respondent's illegal practice is sufficient to disqualify him to contest the election. In this regard learned counsel has referred Section 99(1-A)(i) of the ROPA 1976 which reads below:

"A person shall be disqualified from being elected as, and from being, a member of an Assembly, if--

(i) he is found guilty of a corrupt or illegal practice under any law for the time being in force, unless a period of five years has elapsed from the date on which that order takes effect;"

To fortify his argument learned counsel for the appellant has referred to Para-12 of the order dated 26.3.2014 passed by the Election Tribunal Lahore, which reads below:--

"12. Learned counsel for the returned candidate further contended that the returned candidate was not answerable for the illegalities/irregularities committed by the Returning Officers or the members of polling staff as provided by Section 68 (2)(a) of the Act, 1976. A perusal of the aforesaid provisions of law would show that satisfaction of the Tribunal that the corrupt and illegal practices had not been committed with the consent and connivance of the returned candidate is a condition precedent to invoke the protection of Section 68(2)(a) of the Act. In the case in hand it has been established conclusively that the two Returning Officers joined hands and hijacked the election from PP-136, Narowal. This is a matter of record that perverse sense of authority drove the Returning Officers to pervert the process of election at the cost of dignity and prestige of the office without realizing that the State functionaries mortgaging their functions to others for some unholy considerations have never been treated with respect in the society. The Returning Officers might have featured their performance sheet with the election in question without realizing enormity of the mode of working, which cannot be approved of. The Returning Officers posed themselves to be stickler for rule of law, but they slaughtered the sanctity of election process with the sword of their official authority. They misappropriated and tempered with the election record under the impression that the election being closed-door-affair, they would succeed to blindfold the system. It was inapt and detrimental thinking of the Returning Officers, which polluted the election process. Such a conduct calls for reform,otherwise the unholy tendency to exercise official authority over and above the law may erode the system. There was a time when the State functionaries holding important positions were known as saints, who could do no wrong. Unfortunately, the Returning Officers tarnished the public image as they stepped over the legal authority. The need of the hour is to nip the evil in the bud. This is high time to dispel the common perception that the high ranking officials are not amenable to law of the land. I am not ready to accept that the Returning Officers played havoc with the

system of their own. The returned candidate being beneficiary of the hijacked election is bound to face the legal consequences of the aforesaid illegal and corrupt practices."

5. Bare reading of the concluding lines of the above quoted Paragraph makes it crystal clear that the learned Election Tribunal Lahore has not found the respondent directly responsible for any illegal and corrupt practice rather being beneficiary declared him bound to face the legal consequences of illegal and corrupt practices of the State functionaries. The expression "he is found guilty of a corrupt or illegal practice under any law for the time being in force" used in clause (i) of sub-section (1-A) of Section 99 of the ROPA, 1976 bears significant importance and also manifests intent of the legislature. In this case since the respondent is not directly found guilty of corrupt or illegal practice under any law therefore his candidature does not suffer from disqualification under Section 99(1-A)(i) of ROPA 1976. Appellant's second objection therefore is unfounded and untenable. In this regard argument of the learned counsel for the appellant is devoid of any force and thus repelled.

6. Besides above learned counsel for the appellant has frankly admitted that the order dated 26.3.2014 passed by the Election Tribunal Lahore has been challenged by the respondent before the Hon'ble Supreme Court of Pakistan through an appeal which has been admitted for hearing and pending adjudication before the Hon'ble Apex Court.

7. For the above reasons, we do not find any legal infirmity or jurisdictional error in the impugned order dated 25.04.2014 passed by the Returning Officer. This appeal therefore having no merits is dismissed in limine.
(R.A.) Appeal dismissed.

PLJ 2014 Cr.C. (Lahore) 906 (DB)
[Bahawalpur Bench Bahawalpur]
Present: Muhammad Anwaar-ul-Haq and Abdus Sattar Asghar, JJ.
SAMI ULLAH alias PEEDO--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 1932-B of 2012, decided on 3.10.2012.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 497--Control of Narcotic Substances Act, (XXV of 1997), S. 9(c)--Bail, grant of--Allegation of--Recovery of charas--According to contents of F.I.R, alleged recovery was not effected from possession of petitioner and allegation against him was that he threw shopping bag from where charas was recovered by police party--Even otherwise, charas allegedly recovered from petitioner was 1040 grams, therefore, it was a borderline case in between clauses (b) and (c) of Section 9 of CNSA, 1997--Petitioner was behind bars he was previously non-convict and was no more required for purpose of further investigation--Further incarceration of petitioner was of no consequence to prosecution case--Petition was allowed and bail was admitted. [P. 907] A
Mr. Muhammad Saleem Faiz, Advocate for Petitioner.
Mr. Muhammad Ali Shahab, Deputy Prosecutor General for State.
Date of hearing: 3.10.2012.

Order

Through this petition, petitioner Sami Ullah alias Peedo seeks post-arrest bail in case F.I.R. No. 544/2012 dated 09.07.2012, offence under Section 9(c) of the Control of Narcotic Substances Act, 1997, registered at Police Station City Chishtian District Bahawalnagar. Allegation against the petitioner is that on seeing the police raiding party he threw the shopping bag and fled away and from that shopping bag 1040 grams charas was recovered.

2. Learned counsel for the petitioner contends that the petitioner has falsely been involved in this case by the police just to show their efficiency; that nothing was recovered from the petitioner and fake recovery has been planted upon him; that case against the petitioner is one of further inquiry and he is entitled for the bail.

3. On the other hand, learned Deputy Prosecutor General opposing this bail petition contends that a huge quantity of charas was recovered from the shopping bag thrown by the petitioner by seeing the police party; that the offence committed by the petitioner comes within the prohibition of Section 51(2) of CNSA, 1997; that petitioner is a habitual offender and he is also involved in another case of similar nature; therefore, he is not entitled for the bail.

4. Heard. Record perused.

5. Be that as it may, according to the contents of the F.I.R, the alleged recovery was not effected from the possession of the petitioner and the allegation against him is that he threw the shopping bag from where charas was recovered by the police party. Even otherwise, the charas allegedly recovered from the petitioner is 1040 grams, therefore, it is a borderline case in between clauses (b) and (c) of Section 9 of CNSA, 1997. Petitioner is behind the bars since 13.07.2012; he is previously non-convict and is no more required for the purpose of further investigation. Further incarceration of the petitioner is of no consequence to the prosecution case. Therefore, we allow this petition and admit the petitioner to bail subject to his furnishing bail bond in the sum of Rs. 100,000/(Rupees one hundred thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

6. It is, however, clarified that the observations made herein above are just tentative in nature and strictly confined to the disposal of this bail petition.

(A.S.) Bail admitted.

PLJ 2014 Lahore 1159
Present: Muhammad Anwaar-ul-Haq, J.
MUHAMMAD SAJJAD--Petitioner
versus
STATE etc.--Respondents

W.P. No. 9894 of 2014, decided on 27.6.2014.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 550--Constitution of Pakistan, 1973, Art. 199--Constitutional Petition--Superdari of vehicle--Duplicate registration book--Vehicle was seized by Anti-Vehicle Lifting Staff on suspicion u/S. 550,, Cr.P.C. and was sent to F.S.L. for verification of its chassis and engine numbers--Vehicle does not have original chassis number--Last possessor of vehicle was entitled for superdari--Validity--Any vehicle without specific identification cannot be allowed to play on roads as same cannot be stamped to be of a particular owner that is a serious security threat and such like vehicles are being used in criminal activities including smuggling of narcotics and bomb blasts--It is high time to discourage allowing such vehicles to put on superdari on basis of duplicate registration books of stolen or destroyed vehicles--It has come to notice of High Court in numerous cases that in official public auctions people bid and buy discarded/damaged vehicles at exorbitant high prices only to get registration books and then these books were being used with tampered vehicles after getting duplicate registration books of same and embossing identification marks with tampering techniques--Where Courts have to take exception to general rule of giving vehicles on superdari to their last possessor just in routine--In case of failure of an owner to establish his entitlement for superdari in cursory proceedings before Court, he has a right under law to establish his ownership before Civil Court and if any such suit is filed Civil Court can pass a decree in favour of actual owner of property notwithstanding any observation made in cursory proceedings of superdari of the vehicle by any Court--Vehicle with tampered chassis frame is liable to outright confiscation--Petitioner remained unable to demonstrate existence of any valid ground justifying interference of High Court in concurrent finding of Courts below in its extra-ordinary exercise of constitutional jurisdiction--Petition being devoid of any force was dismissed. [Pp. 1162 & 1163] A, B & C

PLD 1970 SC 343, 1980 SCMR 954, ref. 2005 SCMR 735 & 2009 SCMR 226, rel.
Mr. Humayoun Rashid, Advocate for Petitioner.
Mr. Razaul Karim Butt, Assistant Advocate-General for State with Respondent No. 4/Muhammad Jameel, Inspector/Incharge AVLS, Gulberg, Lahore.
Date of hearing: 27.6.2014.

Order
Through this writ petition, petitioner assails the order of learned Additional Sessions Judge, Lahore dated 9.4.2014, dismissing the revision petition filed by the petitioner against the order of learned Area Magistrate dated 15.03.2014, refusing application of the petitioner for grant of superdari of Car Toyota Corolla bearing Registration No. LC-584.

2. Learned counsel for the petitioner contends that the impugned-orders passed by both the learned Courts below are against the law and facts on record; that the petitioner is a bona fide purchaser of the disputed vehicle, that was taken into possession by the Anti Vehicle Lifting Staff (AVLS), Gulberg, Lahore, under Section 550,, Cr.P.C. from the petitioner and there is no rival claimant of the same, therefore, petitioner being last possessor, is entitled for superdari of the vehicle. Learned counsel has placed reliance on the case law 2005 SCMR 735 and 2002 YLR 699.

3. Arguments heard. Record perused.

4. Vehicle in question i.e. Toyota Corolla Car was seized by the Anti Vehicle Lifting Staff (AVLS), Gulberg, Lahore on suspicion under Section 550,, Cr.P.C. on 27.11.2013 and was sent to the Forensic Science Laboratory for verification of its chassis and engine numbers. The result of report of Forensic Science Agency dated 07.01.2014 (Annexure-B) reflects as under:--

"Result:

. Chassis number before examination NZE120-0038250.
. Chassis number after examination NZE 120-0038250.
. Chassis number has been cut & welded.
. Engine number before examination 2545325
. Engine number after examination 2545325

Conclusion:

. The chassis number of the above said vehicle has been tampered.
. The engine number of the above said vehicle has not been tampered."

5. It is worth mentioning that as per (duplicate) Registration Book (Annexure-A) engine number has been mentioned `2197191' whereas the report shows the same as `2545325'. The learned Area Magistrate, after summoning the relevant record from the concerned quarter, vide his order-dated 15.03.2014, dismissed the application of the petitioner while observing as under:--

"The report of police perused which shows that the vehicle was got examined through Forensic Science Agency and according to report of Forensic Science Agency, the Chassis No. cut and welded. The following are the Chassis No. as well as Engine No.

	On Registration Book	On Police Report
Chassis No.	NZE-120-0038250	NZE-120-0038250
Engine No.	2197191	2545325

The above mentioned table shows that Chassis No. is the same in the police report as well as in registration certificate with the report of Forensic Science Agency but it is cut and welded whereas Engine No. is different. It clearly means that the Engine No. present in the vehicle is not the same which was registered alongwith vehicle. There is no order for changing of Engine in registration certificate produced by the petitioner nor he has produced any other document whereas the question is that if the petitioner purchased a cleared vehicle then what was the necessity to temper his Chassis No. by way of cut and weld. The registration book produced is duplicate. Now one thing is clear that the vehicle which was took into custody from the petitioner is not same of which the petitioner has the document i.e. registration

book in his hand. So there is no nexus of this vehicle with the petitioner. The petitioner kept the tempered vehicle in his custody without any ground or justification....
Though petitioner has no nexus with this vehicle. He may have some documents but the same are of some other vehicle and not this particular vehicle. Upon asking of this Court the petitioner states that he has no other document neither of purchase nor any paper of original file."
Admittedly the disputed vehicle does not have its original chassis number, even engine number is different from the one mentioned in the registration book produced by the petitioner. It has been noticed with concern that car was taken into possession by the Anti Vehicle Lifting Staff, Gulberg. Lahore on 27.11.2013 and duplicate registration book reflects transfer of vehicle in the name of the petitioner on 06.02.2014 when the same was in the police custody awaiting report of Forensic Science Laboratory regarding its identity.
As far as argument of the learned counsel for the petitioner that under Section 517,, Cr.P.C. petitioner being last possessor of the vehicle is entitled for superdari of the same as of right, is misconceived. Under Section 516-A,, Cr.P.C. "the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial". The words "may make such order" is sufficient to reflect the intention of law that Court can pass any appropriate order regarding the seized property as it thinks proper and a last possessor cannot claim superdari of the property as of right. In the case of Central Co-operative Bank Ltd. Sargodha versus Ahmad Bakhsh (PLD 1970 Supreme Court 343) and Republic Motors Ltd. versus M. Anwar and others (1980 SCMR 954), it has been held that "Property though to be restored to the party from whom it was taken yet such rule of law is not absolute and can be departed from under special circumstances."
Keeping in view the above referred legal position, I am of the considered view that any vehicle without specific identification cannot be allowed to play on roads as the same cannot be stamped to be of a particular owner that is a serious security threat and such like vehicles are being used in criminal activities including smuggling of narcotics and bomb blasts. It is high time to discourage allowing such vehicles to put on superdari on the basis of duplicate registration books of the stolen or destroyed vehicles. It has come to the notice of this Court in numerous cases that in official public auctions people bid and buy the discarded/damaged vehicles at exorbitant high prices only to get registration books and then these books are being used with tampered vehicles after getting duplicate registration books of the same and embossing identification marks with tampering techniques. These are the cases where Courts have to take exception to the general rule of giving vehicles on superdari to their last possessor just in routine. Needless to add that in case of failure of an owner to establish his entitlement for superdari in cursory proceedings before the Court concerned, he has a right under the relevant law to establish his ownership before the Civil Court and if any such suit is filed the Civil Court concerned can pass a decree in favour of the actual owner of the property notwithstanding any observation made in the cursory proceedings of superdari of said vehicle by any Court.
6. Case law relied upon by the learned counsel for the petitioner 2005 SCMR 735, is of no help to the petitioner as in that case, car was having its proper identification i.e. engine number and chassis number. In the case 2002 YLR 699, the identity of chassis of disputed vehicle was intact (not cut and welded as in this case). Matter regarding the vehicles with doubtful identity has been dealt with in the case of Ch. Maqbool Ahmed versus Customs, Federal Excise and Sales Tax. Appellate Tribunal and 3 others (2009 SCMR 226). wherein

the Hon'ble Supreme Court of Pakistan has approved the view of Customs Department that a vehicle with tampered chassis frame is liable to outright confiscation. Learned counsel for the petitioner remained unable to demonstrate existence of any valid ground justifying interference of this Court in the concurrent finding of both the Courts below in its extra-ordinary exercise of constitutional jurisdiction. Resultantly, this writ petition being devoid of any force is dismissed.

(R.A.) Petition dismissed.

2015 P Cr. L J 1508
[Lahore]
Before Muhammad Anwaarul Haq and Mamoon Rashid Sheikh, JJ
MUHAMMAD IMRAN alias IMRANOO alias KALU SHAHPURIA---Petitioner
versus
The STATE and another---Respondents

Criminal Miscellaneous No.5375-B of 2015, decided on 7th May, 2015.

Criminal Procedure Code (V of 1898)---
----S. 497(2)---Control of Narcotic Substances Act (XXV of 1997), S.9(c)---Possession of narcotics drugs, import and export of narcotic drugs, trafficking or financing trafficking of narcotic drugs---Bail, grant of---Further inquiry---Petitioner was alleged to have thrown away pack of eleven hundred grams of heroin while fleeing away from the scene---Contention raised by petitioner was that present case was prima facie one of further inquiry as no identification parade had been conducted---Heroin had not been recovered from possession of petitioner---Quantity of heroin allegedly recovered was slightly higher than weight mentioned in S.9(b), of Control of Narcotic Substances Act, 1997---Petitioner was no longer required for purpose of investigation---Further incarceration of petitioner was not likely to further the prosecution case---Bail application was allowed accordingly.

Ch. Muhammad Ashraf Khan for Petitioner.
Ch. Muhammad Mustafa, Deputy Prosecutor-General for the State.
Muhammad Faiz, A.S.I. with record.

ORDER

The petitioner, Muhammad Imran alias Imranoo alias Kalu Shahpuria, seeks post-arrest bail in case bearing F.I.R. No.201/2015 dated 18-3-2015, offence under section 9(c) of the Control of Narcotic Substances Act, 1997, registered at Police Station Sattellite Town, District Sargodha.

2. The learned counsel for the petitioner submits that the allegation against the petitioner is that whilst throwing away the packet containing 1100 grams heroin he succeeded in fleeing the scene. Contends that in the absence of any identification parade conducted for proper identification of the petitioner as being involved in the offence prima facie case against the petitioner is one of further inquiry into his guilt.

3. The learned D.P-G. controverts the stance of the learned counsel for the petitioner and submits that a huge quantity of narcotic substance has been recovered from the packet thrown by the petitioner. The petitioner is also involved in other cases of similar nature. The learned D.P.-G., however, after consulting the record submits that the petitioner has no previous conviction in an offence of a similar nature.

4. Heard. Record perused.

5. The heroin in question has not been recovered from the possession of the petitioner. It is alleged that when cornered the petitioner threw the packet containing heroin weighing 1100 grams and then fled the scene. The FIR on the basis of the occurrence was registered on 18-3-2015 the petitioner was arrested on 31-3-2015 after dismissal of his pre-arrest bail petition. Even otherwise quantity of heroin allegedly shown to be thrown by the petitioner is 1100 grams in weight. The said weight is slightly higher than the weight mentioned in section 9(b) of the Act, ibid. The petitioner is behind the bars and is no longer required for the purposes of investigation. The further incarceration of the petitioner is not likely to further the prosecution's case.

6. We, therefore, allow this petition and admit the petitioner to bail subject to furnishing of a bail bond in the sum of Rs.100,000 (Rupees one hundred thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

7. It is, however, clarified that any observation having been made in this order is purely tentative in nature and is only for the purposes of deciding the instant petition.

SL/M-181/L Application allowed.

2015 P Cr. L J 1633
[Lahore]
Before Muhammad Anwaarul Haq, J
NADEEM MASOOD---Appellant
versus
The STATE---Respondent

Criminal Appeal No.2066 of 2012, heard on 1st June, 2015.

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

----S. 376---Qanun-e-Shahadat (10 of 1984), Arts. 117 & 120---Criminal Procedure Code (V of 1898), S.340(2)---Rape---Appreciation of evidence---Commission of offence---Onus to prove---Accused committed rape with complainant which resulted into birth of a minor girl---Trial Court convicted the accused and sentenced him to imprisonment for twenty years and fine---Plea raised by accused was that it was an offence of fornication as complainant was a consenting party---Validity---Accused during trial denied to have committed rape or illicit intercourse with complainant and there was only a suggestion while cross-examining victim of her evidence that "it was incorrect that I was consenting party"---Such denied suggestion alone was not enough to hold that victim was a consenting party especially when accused did not produce any evidence in his defence and even did not opt to make his statement on oath under S.340(2), Cr.P.C. to rebut prosecution case set up against them---Even consent of victim obtained by putting her in fear of death or hurt or where the man knew that he was doing sexual intercourse with a woman who was not married to him but the woman believed herself to be married to him constituted offence of rape under S.375(iii) and (iv), P.P.C.---Prosecution was duty bound to prove its case against accused beyond any shadow of doubt---Accused who had come forward with a specific plea must bring on record some material to

establish the same---Conviction and sentence awarded to accused under S.376, P.P.C. by Trial Court was based on well-stated principles of appreciation of evidence---High Court declined to interfere in conviction and sentence awarded to accused by Trial Court---Appeal was dismissed in circumstances.

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

----Ss. 544-A & 545---Penal Code (XLV of 1860), S. 376---Rape---Compensation to victim of rape---Maintenance of child born as a result of rape---Accused committed rape with complainant and as a result a minor girl was born---Trial Court convicted and sentenced the accused for imprisonment for twenty years and also awarded fine but no maintenance was awarded to the minor girl---Validity---Minor baby girl born as a result of crime committed by accused was "a person" suffering mental anguish and psychological damage for her whole life, thus she was entitled for compensation provided under the law---High Court directed the accused to pay compensation under S.544-A(5), Cr.P.C. to victim child--- If fine was realized the same would be paid to victim of rape under S.545, Cr.P.C.

The State v. Md. Moinul Haque and others (2001) 21 BLD 465; Dilip v. State of Madhya Pradesh AIR 2013 (SC) Cri) 1200; Delhi Domestic Working Women's Forum v. Union of India and others 1995 (1) R.C.R. (Criminal) 194 (1995) 1 SCC 14; Sahih Muslim (Vol.4) Hadith [4432], pp.471-472; Mst. Nusrat v. The State 1996 SCMR 973 and Mokha v. Zulfiqar and 9 others PLD 1978 SC 10 rel.

Ghulam Farid Sanotra for Appellant.
Ch. Muhammad Mustafa, Deputy Prosecutor-General for the State.
Ahsan Ullah Ranjha for the Complainant.
Date of hearing: 1st June, 2015.

JUDGMENT

MUHAMMAD ANWAARUL HAQ, J.---Appellant Muhammad Nadeem Masood was tried in case F.I.R No.214/2010 dated 23-8-2010, registered at Police Station Miani District Sargodha, in respect of an offence under section 376, P.P.C. and through the impugned judgment dated 4-12-2012 passed by the learned Additional Sessions Judge, Bhalwal, he has been convicted and sentenced as under:-

Under section 376, P.P.C:

Twenty Years R.I. with a fine of Rs.100,000 and in default of payment of fine to further undergo six months S.I.

Benefit of section 382-B, Cr.P.C. has been extended to the appellant.

2. Prosecution story in brief un-folded in the F.I.R (Exh.PC/2) recorded on the statement of Humaira Yasmeen, complainant/victim (PW-5) is that she is a young unmarried girl; about 6/7 days prior to registration of F.I.R her parents were out of the house in

connection with their work and she was alone in her house; at about 4/5.00 p.m., Muhammad Nadeem (appellant), who was on visiting terms with her family, armed with pistol entered into her house while climbing over the wall, extended threats to her, she remained silent due to fear and he had committed zina bil jabr with her; Muhammad Aslam and Mazhar Hayat witnesses reached there and also saw the accused going away; the accused had also earlier committed zina bil jabr with her number of times and she was pregnant for seven months.

It is further mentioned in the FIR that on the same day she lodged an application to the learned Area Magistrate for her medical examination whereupon her medical examination was conducted by the lady doctor.

3. After registration of case, Karamat Ali Shah S.I. (PW-8) conducted investigation in this case, he has recorded statements of the PWs under section 161, Cr.P.C. and arrested the accused on 14-10-2010. Investigating Officer also produced the complainant/victim Humaria Yasmeen for DNA test and the report was received on 21-10-2010. He also got medically examined the appellant Muhammad Nadeem Masood.

4. After completion of investigation, report under section 173 Cr.P.C. was finalized and submitted before the learned trial court; charge was framed against the appellant on 15-3-2011, to which he pleaded not guilty and claimed trial.

5. To substantiate the charge, prosecution produced as many as nine witnesses; complainant/victim tendered her evidence as PW-5. Lady Dr. Lubna Pervaiz, who conducted medical examination of the victim, deposed as PW-2 and observed as under:--

"In my opinion she was also pregnant about 32 weeks. Final opinion about pregnancy will be given after ultra sound report. As per Radiologist report, uterus contained single alive fetus of 30 weeks. E.D.D. 1-11-2010. No other pelvic pathology seen.

According to DNA report No.37829 dated 11-11-2010, sample 2 was sent from my side. Samples 1 and 3 were taken from some where else. However, conclusion was that victim Humera Yasmin daughter of Allah Yar (item No.1) and Muhammad Nadeem son of Muhammad Ashraf (item No.2) are biological parents of fetus (item 3). It was also my opinion. After receipt of the above said reports which is mentioned in my Medical examination Exh.PA which is in my hand and bears my signature, I referred the victim to DHQ Hospital, Sargodha vide reference Exh.PB which also contains the opinion of the Radiologist Exh.PB/1."

6. The appellant was examined under section 342, Cr.P.C; he denied the allegations and professed his innocence. While answering to question "Why this case against you and why the PWs deposed against you?" appellant replied as under:--

"A false case has been registered against me. I am innocent and allegations in FIR are false and baseless. I have no concern with the occurrence. All the evidence and reports are fabricated by the prosecution and complainant to black-mail me with ulterior motive. No other independent witness has deposed against me."

The appellant did not make statement under section 340(2), Cr.P.C. and also did not produce any evidence in his defence. The learned trial Judge vide impugned judgment dated 4-12-2012 has convicted and sentenced the appellant as mentioned earlier.

7. Learned counsel for the appellant contends that case against the appellant regarding the rape of the victim is concocted one and the conviction and sentence passed by the learned trial court under section 376, P.P.C. is against the law and facts; that occurrence as stated in the FIR remained unproved; that the prosecution has not produced any independent witness except the alleged victim to prove allegation of rape against the appellant. Further adds that contents of FIR clearly reflect that the alleged victim of the offence was a consenting party and at the most it is a case of Fornication; that section 376, P.P.C. does not attract against the appellant and the offence if any attracted against the appellant falls under section 496-B, P.P.C. and maximum sentence provided for the said offence is five years that has already been undergone by the appellant.

8. On the other hand, learned Deputy Prosecutor General assisted by learned counsel for the complainant contends that there is sufficient evidence available on record against the appellant to prove the offence under section 376, P.P.C. in the shape of statement of victim Humaira Yasmeen as PW-5, her Medico-Legal Report (Exh.PA) and the positive report of DNA test (Exh.PK); that delay in lodging of the F.I.R in this case where offence has been admitted by the accused through a suggestion to the victim that she was a consenting party in the offence, is not a ground to discard the prosecution case and that section 375(v), P.P.C. is clear on the point that even consent given by a woman under the age of sixteen years the offence falls within the definition of rape; that the prosecution has proved its case against the appellant beyond any shadow of doubt and the learned trial court has already taken a lenient view while not awarding him death sentence, therefore, he does not deserve any further leniency.

9. Heard. Record perused.

10. I have noted that while appearing before the court as PW-5 the complainant/victim Mst. Humera Yasmeen has reiterated her version as set forth in the FIR and despite lengthy cross- examination, nothing material elicited in favour of the defence. Lady Dr. Lubna Pervaiz (PW-2) examined the complainant/victim on 23-8-2010 and as per her opinion the complainant/victim was pregnant about 32 weeks. After obtaining the reports of DNA test, she recorded her final report that Humera Yasmeen complainant/victim and Nadeem Masood (appellant) are the biological parents of fetus. Dr. Fazal Rasool (PW-4) examined the appellant Nadeem Masood and found him physically capable of performing sexual act in his Medico-Legal report (Exh.PF). The above referred medical evidence produced by the prosecution (not challenged by the appellant) furnishes sufficient corroboration to the prosecution version.

11. As far as legal question raised by the learned counsel for the appellant regarding the application of offence of Fornication against the appellant is concerned, the same is misconceived, firstly for the reason that the appellant during the trial has denied to have committed rape or illicit intercourse with the victim; there is only a suggestion while cross-

examining the victim/PW-5 at Page-3 of her evidence that "It is incorrect that I was consenting party". The said denied suggestion alone is not enough to hold that victim was a consenting party especially when the appellant has not produced any evidence in his defence and even did not opt to make his statement on oath under section 340(2), Cr.P.C. to rebut the prosecution case set up against him. Secondly, clauses (iii) and (iv) of the definition of 'rape' in section 375, P.P.C. clearly reflect that even consent of the victim obtained by putting her in fear of death or hurt or where the man knows that he is doing sexual intercourse with a woman who is not married to him but the woman believes herself to be married to him constitutes an offence of rape. It is appropriate to reproduce here section 375, P.P.C. that defines the offence of rape:-

"Rape.---A man is said to commit rape who has sexual intercourse with a woman under circumstances falling under any of the five following descriptions,---

(i) against her will;
(ii) without her consent;
(iii) with her consent, when the consent has been obtained by putting her in fear of death or of hurt;
(iv) with her consent, when the man knows that he is not married to her and that the consent is given because she believes that the man is another person to whom she is or believes herself to be married; or
(v) with or without her consent when she is under sixteen years of age."

It is a case where even till today the appellant is not claiming to be married to the victim woman who in result of his intercourse has given birth to an innocent baby girl alive to bear lifelong pain of crime of her father. Thirdly, in this case lady doctor at the time of medical examination of the victim had observed her age as 16 years with pregnancy of 32 weeks and in her cross-examination she has clarified that age given by her in MLR is based upon her 'expert estimation' and information provided by the victim and her father on 21-8-2010 i.e. after eight months of the alleged occurrence. I have noticed that at the time of recording of evidence in the court the learned trial court has mentioned the age of the victim as 14/15 years, however, during cross-examination the victim has denied the suggestion that she was 18/19 years of age on 10-3-2012 i.e. date of recording of her evidence. The accused remained fail to bring on record any material to disprove that the victim was more than 16 years of age at the time of occurrence. However, it was an application of the victim herself before the learned trial court for exact determination of her age and on the basis of the same PW-9, Secretary Union Council, was summoned by the learned trial court to place on record birth entry record of the victim, but the record produced by him was found illegible being damaged because of flood. I am of the considered view that Medico Legal Certificate, Affidavit produced on record by the accused himself (Exh.DA), another statement of the victim brought on record by the accused (Exh.DC) and her age mentioned at the time of recording of her statement before the trial court are sufficient to prove that the victim was much less than 16 years of age at the time of the crime, thus the offence against the appellant on this score alone falls within the purview of section 376, P.P.C. It goes without saying that the prosecution is duty bound to prove its case against the accused beyond any shadow of doubt but at the same time it is equally recognized rule of criminal jurisprudence that the

accused who comes forward with a specific plea must bring on record some material to establish the same. In this case, the accused remained totally fail to bring his case within the scope of section 496-B, P.P.C. by any stretch of imagination.

12. For the above reasons, I am of the considered view that conviction and sentence awarded to the appellant Muhammad Nadeem Masood under section 376, P.P.C. by the learned trial court is based upon well-settled principles of appreciation of evidence, thus the same is accordingly upheld.

13. Before parting with this judgment, I have to observe with a serious concern that the learned trial court has not passed any order under section 544-A or section 545, Cr.P.C. regarding the compensation to the victim of the offence and at the same time he has also ignored to award any compensation to the innocent girl born in result of the offence committed by the appellant.

14. The Supreme Court of Bangladesh in The State v. Md. Moinul Haque and others (2001) 21 BLD 465 has boldly observed that "victims of rape should be compensated by giving them half of the property of the rapist(s) as compensation in order to rehabilitate them in the society." Indian Supreme Court in the case of Dilip v. State of Madhya Pradesh (2013 AIR (SC) (Cri) 1200) reaffirmed the view already taken in Delhi Domestic Working Women's Forum v. Union of India and others 1995 (1) R.C.R. (Criminal) 194: (1995) 1 SCC 14, wherein it was found that in the cases of rape, the investigating agency as well as the subordinate Courts sometimes adopt totally an indifferent attitude towards the prosecutrix and therefore, various directions in order to render assistance to the victims of rape were issued including an instruction regarding compensation in the following words:--

"Compensation for victims shall be awarded by the court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction has taken place. The Board will take into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth if this occurred as a result of the rape."

Needless to add that under the Islamic Law a child born out of the wedlock/outcome of rape has no legal relationship with his biological father as far as his inheritance is concerned, however, said child has an undeniable right of life to be protected by the biological parents and the State. Here, I respectfully refer Sahih Muslim (Volume 4), Hadith [4432], Pages-471-472:--

"Then the Ghamidi woman came and said: "O Messenger of Allah, I have committed Zina, purify me;" but he turned her away. The next day she said: "O Messenger of Allah, why are you turning me away? Perhaps you are turning me away as you turned Ma'iz away. But by Allah, I am pregnant." He said: "Then no (not now), go away until you give birth." When she gave birth, she brought the child to him wrapped in a cloth, and said: "Here he is, I have given birth." He said: "Go away and breastfeed him until he is weaned." When she had weaned him, she brought the boy to him, with a piece of bread in his hand and said: "Here, O Prophet of Allah, I have weaned him, and he is eating food." He handed the boy

over to one of the Muslim men then he ordered that a pit be dug for her, up to her chest he ordered the people to stone her."

The Hon'ble Supreme Court of Pakistan in the case of Mst. Nusrat v. The State 1996 SCMR 973 has observed as under:-

"In famous case of Ghamidiyyah, our Holy Prophet Muhammad (P.B.U.H) has suspended the sentence on pregnant-woman, not only till delivery of the child but also postponed it till suckling period i.e., two years, obviously for the welfare of the child. This shows the paramount importance and significance of the right of a suckling child in Islam and the unprecedented care taken of, and the protection given to a child born or expected to be born, by our Holy Prophet Muhammad (P.B.U.H). This golden principle of administration of justice enunciated by the Holy Prophet Muhammad (P.B.U.H) must be strictly observed and followed in our country. So, respectfully following the same, I allow ad interim bail to the petitioner in the sum of Rs.20,000/- with one surety in the like amount to the satisfaction of the Assistant Commissioner/Duty Magistrate, Toba Tek Singh, till the hearing of the petition for leave to appeal."

5. Before parting with the order, I would like to add that the principles of justice enunciated by Muslim Jurists/Imams/Qazis are more illuminating and full of wisdom than principles enunciated by Western Jurists and scholars. For the true and safe administration of justice in civil and criminal cases, the Courts in Pakistan must seek guidance from the decisions given and the principles of dispensation of justice enunciated by our Holy Prophet Muhammad (P.B.U.H), the four Caliphs (Razi Allah Ta'aala un Hum), Imams and eminent Qazis. These decisions and principles should be given over-riding effect over western principles of justice."

The quoted reference is an exemplary rule for the mankind that right of life must be honoured even if the same is result of a sin of biological parents.

15. From criminal law perspective in Pakistan, a Court while convicting the accused under section 376, P.P.C. or section 496-B, P.P.C. can validly pass an order in favour of a child given birth in result of the crime committed by the accused while taking full advantage of section 544-A and section 545, Cr.P.C. To understand the scope of section 544-A and section 545, Cr.P.C. reproduction of both these sections shall be beneficial:-

[544-A. Compensation of the heirs to the person killed, etc.

(1) Whenever a person is convicted of an offence in the commission whereof the death of or hurt, injury, or mental anguish or psychological damage, to, any person is caused or damage to or loss or destruction of any property is caused the Court shall, when convicting such person, unless for reasons to be recorded in writing it otherwise directs, order, the person convicted to pay to the heirs of the person whose death has been caused, or to the person hurt or injured, or to the person to whom mental anguish or psychological damage has been caused, or to the owner of the property damaged, lost or destroyed, as the case may

be, such compensation as the Court may determine having regard to the circumstances of the case.

(2) The compensation payable under subsection (1) shall be recoverable as [an arrears of land revenue] and the Court may further order that, in default of payment [or of recovery as aforesaid] the person ordered to pay such compensation shall suffer imprisonment for a period not exceeding six months, or if it be a Court of the Magistrate of the third class, for a period not exceeding thirty days.

(3) The compensation payable under subsection (1) shall be in addition to any sentence which the Court may impose for the offence of which the person directed to pay compensation has been convicted.

(4) The provisions of subsections (2-B), (2-C) and (4) of section 250 shall, as far as may be apply to payment of compensation under this section.

(5) An order under this section may also be made by an Appellate Court or by a Court when exercising its powers of revision.]

545. Power of Court to pay expenses or compensation out of fine.--

(1) Whenever under any law in force for the time being a Criminal Court imposes a fine or confirms in appeal, revision or otherwise a sentence of fine, or a sentence of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied --

(a) in defraying expenses properly incurred in the prosecution;

(b) in the payment to any person of compensation for any loss [injury or mental anguish or psychological damaje caused by the offence, when substantial compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;

(c) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser, of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made, before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal."

Under both these sections, whenever a person is convicted of an offence and in the commission whereof, mental anguish or psychological damage is caused (to any person), the court shall order the convicted person to pay such compensation as the court may determine

having regard to the circumstances of the case. Plain reading of section 544-A, Cr.P.C. highlights that such compensation is not restricted to the complainant, the legal heirs of the deceased or the injured persons rather the same can be awarded to "any person" who suffers mental anguish or psychological damage and even to the owner of the property damaged, lost or destroyed, as the case may be, "in result of the crime committed" by the accused. Subsection (3) of section 544-A, Cr.P.C. further clarifies that compensation payable under subsection (1) shall be in addition to any sentence which the Court may impose for the offence.

Needless to add that an Appellate Court while examining the correctness or propriety of the sentence awarded by the learned trial court can also modify the same by invoking the provisions of sections 435, 439, 439-A and section 544-A(5), Cr.P.C. and this Court can do the same even under section 561-A, Cr.P.C. to ensure complete and safe administration of justice. Here, I respectfully refer the case of Mokha v. Zulfiqar and 9 others PLD 1978 SC 10 wherein the Apex Court has observed as under:--

"35. The trial Court had failed to award compensation under section 544-A, Cr.P.C. The Division Bench while maintaining the convictions of Zulfiqar, Azam and Rajada also did not award any compensation. Accordingly, there was no compliance with the mandatory provision. I would, therefore, direct, that the respondents shall pay a fine of Rs.1000/- each as compensation to the heirs of the two deceased in equal shares, under section 544-A, Cr.P.C. or in default, to suffer rigorous imprisonment for six months.

36. Accordingly, the appeal is allowed and the judgment of the High Court stands modified to the extent indicated above."

16. In view of all above, I am of the considered view that the minor baby girl born in result of crime committed by the appellant is "a person" suffering mental anguish and psychological damage for her whole life, thus, she is entitled for the compensation provided under the law. I, therefore under section 544-A(5), Cr.P.C. direct the appellant to pay a compensation of Rs.10,00,000 (Rupees One Million) to the victim child namely Shazia Nadeem (her name is mentioned in Exh.PG, an application to the SHO for incorporation of fact of birth of girl child dated 7-12-2010) and in case of default of payment of such compensation the appellant shall suffer further imprisonment for a period of six months. Needless to add that the victim having her independent right to sue the appellant under the Civil Law is at liberty to do the same as and when she so desires and this order of compensation in her favour shall not prejudice her any claim on civil side. The compensation amount after realization shall be deposited in the name of the minor girl in the shape of Defence Saving Certificates and the amount so deposited shall only be payable to the minor after she attains her majority. It is important to clarify that in case of dire need of the minor, her legal Guardian can apply to the court of learned Guardian Judge for encashment of any part or the whole amount and the learned Guardian Court concerned shall pass an order keeping in view the best interest of the minor strictly in accordance with law. As far as fine of Rs.100,000 ordered by the learned trial court is concerned, the amount of fine if realized shall be paid to the victim of the rape Mst. Humaira Yasmeen under section 545 Cr.P.C.

17. Resultantly, with the modification in the sentence mentioned above, this appeal is dismissed.

MH/N-29/L Appeal dismissed.

P L D 2015 Lahore 512
Before Muhammad Anwaarul Haq, J
SAFDAR ALI alias SONI---Appellant
versus
THE STATE and another---Respondents

Criminal Appeal No.2 of 2011, heard on 20th March, 2015.

(a) Penal Code (XLV of 1860)--------S. 376---Criminal Procedure Code (V of 1898), Ss.544-A & 545---Rape---Appreciation of evidence---Sentence, reduction in---Imposition of fine---Compensation, award of---Scope---Accused was convicted by Trial Court for committing rape with a minor girl of 5-6 years of age and sentenced to imprisonment for twenty five years---Accused opted not to challenge conviction and sought suitable reduction in sentence---Validity---High Court reduced sentence of imprisonment from twenty five years awarded to accused under S.376, P.P.C. to imprisonment for ten years, with benefit of S.382-B, Cr.P.C.---High Court maintained sentence of fine and further detention in default thereof, however in case payment of fine High Court directed that the amount would be paid to victim through her mother as compensation under S.545, Cr.P.C.---Amount of compensation (fine) in shape of Defence Saving Certificates was handed over to complainant (mother of victim)---Appeal was dismissed accordingly.

1995 SCMR 1679; Bahadar Ali v. The State 2002 SCMR 93 and Anwar Ali Shah v. The State 1992 SCMR 1224 fol.

(b) Penal Code (XLV of 1860)--------Ss. 376 & 377---Criminal Procedure Code (V of 1898), S.544-A---Victim of sexual offences---Compensation---Scope---Comparative study of foreign laws on the subject---In modern era, penal laws of various countries provide substantive punishments for offence of rape---Recently a tendency has developed to provide compensatory relief to victims of rape for their rehabilitation and revival in society---Under S.544-A, Cr.P.C. words 'hurt', 'injury', 'mental anguish' and 'psychological damage caused to victim' are key words qualifying victims of rape and sodomy entitled for compensation under S.544-A, Cr.P.C.

PLD 2004 SC 89; 1995 SCMR 1679; 1992 SCMR 549 and The State v. Rab Nawaz and another PLD 1974 SC 87 rel.

(c) Penal Code (XLV of 1860)--------Ss. 376 & 377---Criminal Procedure Code (V of 1898), Ss.544-A, 435, 439, 439-A & 561-A---Rape and un-natural sexual offence---Non-imposing of compensation---Validity---In case no order for payment of compensation to victim of crime has been passed by Trial Court, victim can invoke provisions under Ss.435, 439 & 439-A, Cr.P.C. before appellate forums as well as before High Court under S.561-A, Cr.P.C.

for award of compensation under S.544-A, Cr.P.C. while examining correctness or propriety of sentence awarded by Trial Court.

Mokha v. Zulfiqar and 9 others PLD 1978 SC 10 fol.

(d) Criminal trial--------Sentence, award of---Principles---While dealing with question of sentence approach of court should be dynamic and court has to find ways and means to guarantee complete dispensation of justice to all stakeholders of criminal case, as most of them are unaware of legal technicalities, flaws/lacunae left in investigation and defects in conduct of their trial---People only see result announced by court and form their opinion about prevailing system of administration of justice---Question of sentence after conviction of accused in a criminal trial essentially requires serious consideration of court to meet ends of justice and court should answer it keeping in view facts and circumstances of each case, subject of course, to penal provisions under relevant law and sentence provided thereunder without causing any prejudice to either side in any manner whatsoever---Benefiting and proper approach of Trial Court in such regard can substantially reduce volume of litigation as appropriate sentence can satisfy victims of offence and also the convicted accused who can be saved to knock the doors of appellate forums for redress of their grievance.

Abdul Khaliq Safrani and Muhammad Saad Bin Ghazi for Appellant.
Mirza Abid Majeed, Deputy Prosecutor General for the State.
Date of hearing: 20th March, 2015.

JUDGMENT

MUHAMMAD ANWAARUL HAQ, J.---Appellant Safdar Ali alias Soni, through Criminal Appeal No.2 of 2011, has challenged the judgment dated 7-12-2010 passed by learned Additional Sessions Judge, Phalia whereby he has been convicted under section 376, P.P.C. and sentenced to 25 years rigorous imprisonment with fine of Rs.1,00,000/-, in default thereof, to further undergo two years' S.I. The benefit of section 382-B, Cr.P.C. was extended to the appellant.

2. The allegation against the appellant is that he committed rape with Laiba Altaf aged about 5/6 years in his shop that was witnessed by the complainant Mst. Asia Altaf (mother of the victim). After conclusion of trial the learned trial court vide impugned judgment convicted and sentenced the appellant as mentioned above.

3. After failing to establish innocence of the appellant, learned counsel for the appellant has frankly conceded and opted not to challenge the conviction of the appellant with the requests for suitable reduction in his sentence.

4. On the other hand learned law officer while opposing the request of the learned counsel for the appellant contends that the learned trial court has already taken a lenient view while not awarding death sentence to the appellant therefore, he does not deserve any further leniency.

5. The father of the complainant present in Court states that the complainant along with her children including the victim has already been deserted by her husband and she is now living with him. He confirms that respectables of the locality have intervened and an amount of Rs.7,50,000/- has already been agreed to be paid to the victim as compensation. Complainant present in Court has acknowledged the deposit of compensation in the shape of Defence Saving Certificates and prays for reduction in the sentence awarded to the appellant for finalization of compromise between the parties subject to the approval of this Court.

6. Heard. Record perused.

7. After having heard both the sides and scrutinized the prosecution evidence available on the file, I am of the considered view that the learned trial court has rightly convicted the appellant under section 376, P.P.C., thus, the conviction even otherwise unchallenged is maintained.

8. As far as question of quantum of sentence of the appellant is concerned, keeping in view the stance taken by the complainant and dirt poor financial condition of the family of the victim, I am quite convinced to examine the same.

9. In the modern era Penal Laws of various countries provide substantive punishments for the offence of rape and recently a tendency has developed to provide compensatory relief to the victims of rape for their rehabilitation and revival in the society. In the United States of America, Victims of Crime Act 1984 provides compensation to the victims of crime including sexual abuse. In the United Kingdom, Sexual Offences Act, 2003 penalizes rape with imprisonment whereas Criminal Injuries Compensation Scheme 2012 is in field that provides compensation in the suitable cases through the Criminal Injuries Compensation Authority. In India section 376 of the Indian Penal Code, 1860 proposes imprisonment and fine as primary punishments and additionally section 357 of Code of Criminal Procedure 1973 empowers a criminal court that the whole or any part of fine recovered can be paid to the victim as compensation for any loss or injury caused by the offence. The said section also casts an obligation on State Governments to introduce Victim Compensation Schemes for provision of funds for the purpose of compensation to the victims. The Superior Courts in various countries have regarded rape as violation of fundamental right to life and as such compensation has been awarded under the public law remedies to be paid by the State.

10. In Pakistan section 376, P.P.C. provides the following punishment for rape:--

[376. (1) Whoever commits rape shall be punished with death or imprisonment for either description for a term which shall not be less than ten years or more than twenty-five years and shall also be liable to fine;

(2) When rape is committed by two or more persons in furtherance of common intention of all, each of such persons shall be punished with death or imprisonment for life.] In addition to the punishment provided under section 376, P.P.C., Code of Criminal Procedure, 1898 provides adequate compensation to the crime victims under sections 544-A. For ready reference section 544-A Cr.P.C. is reproduced hereunder:--

"[544-A. Compensation of the heirs to the person killed, etc.

(1) Whenever a person is convicted of an offence in the commission whereof the death of or hurt, injury, or mental anguish or psychological damage, to, any person is caused or damage to or loss or destruction of any property is caused the Court shall, when convicting such person, unless for reasons to be recorded in writing it otherwise directs, order, the person convicted to pay to the heirs of the person whose death has been caused, or to the person hurt or injured, or to the person to whom mental anguish or psychological damage has been caused, or to the owner of the property damaged, lost or destroyed, as the case may be, such compensation as the Court may determine having regard to the circumstances of the case.

(2) The compensation payable under subsection (I) shall be recoverable as [an arrears of land revenue] and the Court may further order that, in default of payment [or of recovery as aforesaid] the person ordered to pay such compensation shall suffer imprisonment for a period not exceeding six months, or if it be a Court of the Magistrate of the third class, for a period not exceeding thirty days.

(3) The compensation payable under subsection (I) shall be in addition to any sentence which the Court may impose for the offence of which the person directed to pay compensation has been convicted.

(4) The provisions of subsections (2-B), (2-C) and (4) of section 250 shall, as far as may be apply to payment of compensation under this section.

(5) An order under this section may also be made by an Appellate Court or by a Court when exercising its powers of revision.]

The Hon'ble Supreme Court of Pakistan has held in various cases that compensation awarded under section 544-A Cr.P.C. is mandatory requirement of law in addition to any sentence, which the Court may impose upon the convict. PLD 2004 SC 89, 1995 SCMR 1679, 1992 SCMR 549 and many other cases can be quoted to highlight the importance of awarding compensation to the crime victims under section 544-A Cr.P.C. Suffice it to refer a portion of the observations of the Hon'ble Supreme Court in the case of "The State v. Rab Nawaz and another" (PLD 1974 SC 87): --

"24. Before I conclude it is important to observe that section 544-A, Cr.P.C., which on conviction of the accused in a case involving death, hurt or injury to or loss, destruction or theft of property requires the Court to "award compensation to the heirs of the person killed" or to an injured person, or who has suffered loss of property, is very salutary. Its provision is mandatory and casts a clear duty on the Court to award compensation "unless for reasons to be recorded it otherwise directs". The plain object is to alleviate the suffering of the bereaved family or as the case may be, the injured person, or who suffers loss of property. It can also be an effective deterrent against violent crime and crime against property, the incidence of which is on the increase and becoming disquieting.

It is also important to point out that "compensation" is a very well understood expression. It is something to be paid which makes up for the loss that the other person has suffered. Under section 544-A, Cr.P.C. the amount of compensation though recoverable as fine is not fine. Therefore, for proper discharge of its statutory obligation under section 544-A, Cr.P.C. the Court at the penultimate stage of the case, may have to receive evidence to determine the quantum of compensation, appropriate in a particular case. It is obvious that for the purpose of substantive sentence under section 302, P.P.C., the law does not distinguish between the murder of an infant and that of an adult who is also a bread winner of his family. Similarly financial position of an accused is not material so far as substantive punishment is concerned. But these considerations become highly relevant for the purpose of determining proper compensation under section 544-A, Cr. P. C. Such inquiry becomes necessary so that, on the one hand the compensation awarded is commensurate with the loss suffered by the victim of the crime or his family and on the other hand the order for compensation is not made in vain for want of capacity of the convict to pay. Power to conduct such inquiry must be regarded as incidental or ancillary to the main power exercisable under section 544-A, Cr. P. C., which, the section being remedial, will be necessarily read into it so as to advance the remedy and to give effect to the legislative intent."

The words hurt, injury, mental anguish and psychological damage caused to the victim are the key words in section 544-A, Cr.P.C. qualifying victims of rape and sodomy entitled for compensation under section 544-A, Cr.P.C. This Court has observed in numerous cases that even after insertion of section 544-A, Cr.P.C., trial courts are not passing any order for compensation to the victims of rape and sodomy ignoring this mandatory provision of law. Needless to add that in appropriate cases victims of such offences can validly draw the attention of the learned trial courts for award of adequate compensation under section 544-A, Cr.P.C. and in case no such order is passed by the learned trial court, victim can also invoke the provisions under sections 435, 439 and 439-A, Cr.P.C. before the appellate forums as well as before this Court under section 561-A, Cr.P.C. for award of compensation under section 544-A, Cr.P.C. while examining the correctness or propriety of the sentence awarded by the learned trial court. The Hon'ble Supreme Court of Pakistan in the case of "Mokha v. Zulfiqar and 9 others" (PLD 1978 SC 10) has clarified this aspect of the proposition in the following words: --

35. The trial Court had failed to award compensation under section 544-A, Cr.P.C. The Division Bench while maintaining the convictions of Zulfiqar, Azam and Rajada also did not award any compensation. Accordingly, there was no compliance with the mandatory provision. I would, therefore, direct, that the respondents shall pay a fine of Rs.1000/- each as compensation to the heirs of the two deceased in equal shares, under section 544-A Cr.P.C. or in default, to suffer rigorous imprisonment for six months.

36. Accordingly, the appeal is allowed and the judgment of the High Court stands modified to the extent indicated above."

11. The case in hand is also an example where the learned trial court even after passing conviction and sentence against the accused has not passed any order regarding payment of

any compensation to the victim of the offence. Even learned trial court remained fail to notice section 545, Cr.P.C. while passing the sentence of fine in this case that empowers the trial court to pay expenses or compensation out of fine. Section 545, Cr.P.C. reflects as under:--

[545. Power of Court to pay expenses or compensation out of fine.

(1) Whenever under any law in force for the time being a Criminal Court imposes a fine or confirms in appeal, revision or otherwise a sentence of fine, or a sentence of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied-

(a) in defraying expenses properly incurred in the prosecution;

(b) in the payment to any person of compensation for any loss [injury or mental anguish or psychological damage] caused by the offence, when substantial compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;

(c) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser, of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made, before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal]

12. Adverting to the question of acceptance of joint request of the parties for reduction of sentence of the appellant in the backdrop of a settlement between them outside the Court, I am of the considered view that while dealing with the question of sentence, approach of the court should be dynamic and the court has to find ways and means to guarantee complete dispensation of justice to all stakeholders of a criminal case, as most of them being unaware of the legal technicalities, flaws/lacunas left in the investigation and defects in conduct of their trials, only see the result announced by the court and form an opinion about the prevailing system of administration of justice. The question of sentence after conviction of an accused in a criminal trial essentially requires serious consideration of the Court to meet the ends of justice, thus, the court should answer it keeping in view facts and circumstances of each case subject of course to the penal provisions under the relevant law and sentence provided thereunder without causing any prejudice to either side in any manner whatsoever. The benefitting and proper approach of the trial court in this regard can substantially reduce the volume of litigation as the appropriate sentence can satisfy the victims of the offence and also the convicted accused who can be saved to knock the doors of the appellate forums for redressal of their grievance. Keeping in view all above, I am convinced that case in hand is a fit case where will of the parties can validly be adhered to. I shall take advantage of quoting

here an observation of the Hon'ble Supreme Court of Pakistan in the case of "Mst Sarwar Jan v. Ayub and another" (1995 SCMR 1679) wherein the Hon'ble Supreme Court of Pakistan when found the sentence passed against the accused inadequate, on the request of the counsel for the accused has held as under:-

"36. Facing embarrassing situation the learned counsel for the respondents pleaded that his clients have already undergone their sentences. They are out. It would be harsh if their sentences of imprisonment are enhanced. They are rearrested and remanded to custody. However, there was consensus at the bar that it would in the interest of justice and interest of victim that if adequate compensation under section 544-A Cr.P.C. is paid to the victim. We are impressed by such consensus.

37. We are therefore, inclined to maintain the conviction and sentences awarded to the respondents by the Judicial Magistrate but additionally award compensation under section 544-A Cr.P.C. to the victim. The respondents are directed to pay compensation of Rs.25,000/- each to the victim Muhammad Iqbal. They shall deposit it in the Court of Judicial Magistrate, Haripur within a period of one month. If fine has already been deposited as directed by the Judicial Magistrate by the respondents and paid to the victim the same shall be deducted from the compensation of Rs.25,000. In failure whereof they shall suffer R.I. for six months in jail. The Judicial Magistrate shall issue coercive process for their arrest and remand them to custody in that event. Besides the Magistrate, to recover the compensation as arrears of Land Revenue from the respondents."

In the case of "Bahadar Ali v. The State" (2002 SCMR 93) the apex Court has observed as under: --

9. Reverting to Criminal Appeal No.359 of 1999 at the behest of complainant Nazir Ahmad, Mr. Khadim Hussain Qaiser, learned Advocate Supreme Court as against Bahadur Ali did not press his prayer for enhancement of sentence of life imprisonment to death but he pressed for enhancement of compensation payable to the legal heirs of the deceased. In support of his submission, learned counsel referred to Razia Begum v. Jehangir reported in PLD 1982 SC 302, in which this Court while refraining from awarding death sentence of convict, although he deserved it, imposed a fine of Rs.25,000/- as enhancement of sentence. It was directed that on realization the amount shall be paid as compensation to the heirs of the deceased under section 544-A Cr.P.C. In the facts and circumstances of the case, while we are not inclined to enhance the sentence of life imprisonment in view of release of the convict but would enhance the amount of compensation from Rs.50,000/- to Rs.1,00,000/- which shall be recovered by way of arrears of land revenue and paid to the legal heirs of the deceased. Reference may be made to the precedent reported as Muhammad Sharif v. Muhammad Javed (PLD 1976 SC 452) relevant page 461." (Emphasis supplied)

In the case of Anwar Ali Shah v. The State (1992 SCMR 1224) the Hon'ble Supreme Court of Pakistan while dealing with the similar question whether the sentence of imprisonment can be converted into a sentence of fine so as to compensate the victim of an offence, has observed as under:--

"We are also of the view that the sentence of ten years' R.I. could have been enhanced by adding some more years of R.I.; but, ultimately both the learned counsel agreed that instead of enhancing rigorous imprisonment, the sentence of fine may be enhanced so as to compensate the heirs of the deceased. This approach is reasonable and satisfies the Islamic Ethos also. We, accordingly, instead of enhancing the rigorous imprisonment, enhance the fine to Rs.1,50,000/-. The entire amount, when recovered, shall be paid as compensation to the heirs of the deceased. In default of payment of fine, the accused-appellant shall suffer rigorous imprisonment for 6-1/2 years. The acquittal appeal, namely, Criminal Appeal No.169 of 1991 is partly allowed with the enhancement of sentence of fine and award of compensation." (Emphasis supplied)

Therefore, by seeking guidance from the case-law referred above, sentence of 25 years rigorous imprisonment awarded to the appellant under section 376, P.P.C. is reduced to 10 years' R.I. with the benefit of section 382-B, Cr.P.C. Sentence of fine of Rs.1,00,000/- and further detention in default thereof are maintained, however, in case of payment of fine the same shall also be paid to the victim through her mother as compensation under section 545, Cr.P.C. The original Defence Saving Certificates of an amount of Rs.7,50,000/- bearing registration No.29275 dated 18-3-2015 have already been handed over to the complainant. Deputy Registrar (Judicial) of this Court shall direct Officer Incharge, National Saving Centre concerned to make an endorsement in the relevant book that no one is authorized to encash these certificates except the victim herself upon attaining her majority. Needless to add that in the utmost need of the victim, her guardian can validly apply for encashment of the full amount or part thereof before the learned Guardian Judge concerned who can pass an appropriate order keeping in view the best interest of the minor victim of the offence. With this modification in the quantum of sentence of the appellant, this Criminal Appeal stands dismissed.

MH/S-57/L Order accordingly.

2015 Y L R 2409
[Lahore]
Before Muhammad Anwaarul Haq and Syed Shahbai Ali Rizvi, JJ
GHULAM AKBAR---Petitioner
Versus
The STATE and others---Respondents

Writ Petition No.17681 of 2015, decided on 29th June, 2015.

(a) Anti-Terrorism Act (XXVII of 1997)---
----Preamble, Ss. 23, 6 & 7---Object of Anti-Terrorism Act, 1997---"Terrorism", meaning and scope---Definition of "terrorism", as incorporated in S. 6 of Anti-Terrorism Act, 1997, reflected that meaning of "terrorism" included use or threat of action that fell within the meaning of subsection (2) of said section and included use or threat, if designed to coerce and intimidate or overawe the Government or the public, or a section of public or community or sect; or create a sense of fear or insecurity in the public-atlarge; or use of threat for the purpose of advancing a religious sectarian or ethical use or intimidation and

terrorism against the public, social sectors, business community etc. and attacking civilian, Government Officials, installations, security forces or law enforcing agencies--- While applying a particular law, court must take into consideration the object for which the law had been enacted---Anti-Terrorism Act, 1997, as per its Preamble, was enacted "to provide for the prevention of terrorism, sectarian violation and for speedy trial of heinous offences and for matters connected therewith, and incidental thereto"---Interpretation of criminal law required that, the same should be interpreted in the way it defined the object and not to construe in a manner, what could defeat the ends of justice, or the object of law itself---For determining the issue as to whether the offence, was triable under the Anti-Terrorism Act, 1997 or not, nature of offence, had to be seen in the light of the averment that how the same had been omitted along with the particular place of incident and further that by that act, a sense of fear and insecurity in the society, had been created in the minds of the people at large or not---Striking of terror, was sine qua non for the application of the provisions, as contained in S.6 of Anti-Terrorism Act, 1997.

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

----Ss. 452, 337-H(2), 342, 440, 447, 511, 148 & 149---Anti-Terrarism Act (XXVII of 1997), Ss.7 & 23---Constitution of Pakistan, Art. 199---Constitutional petition---House trespass after preparation for hurt, assault or wrongful restraint, causing hurt by rash or negligent act, wrongful confinement, mischief committed after preparation made for causing death or hurt, criminal trespass, attempt to commit offence, rioting, common object, act of terrorism---Application for transfer of case to the court of ordinary jurisdiction---Dismissal of application---Incident in the case took place at odd hours of night---Civil litigation was pending between the parties regarding property possessed by the complainant---Altercation took place between the complainant and accused, when they went to attend to persue their case before Director Anti-Corruption---No body had received any injury in that occurrence, and commission of the crime by accused at some public place, was not borne out from the record, whereby it could be termed that accused had frightened the general public and created terror and fear amongst the people---Motive for the occurrence in the case was enmity inter se the parties on account of their longstanding civil litigation---Applicability of S.7 of Anti-Terrorism Act, 1997, which primarily required the spread of sense of insecurity and fear in the common mind, did not attract, in circumstances-Impugned order passed by the Special Judge Anti-Terrorism Court, being not based upon proper appreciated facts and the relevant law on the subject, was set aside---Application moved by the petitioner under S.23 of Anti-Terrorism Act, 1997 for transfer of case FIR, was accepted---Case pending before the Special Judge Anti-Terrorism, stood transferred to the court of ordinary jurisdiction.

Bashir Ahmad v. Muhammad Siddique and others PLD 2009 SC 11 ref.

Azam Nazeer Tarar and Mazhar Ali Ghallu for Petitioners.

Sittar Sahil, Assistant Advocate General and Mazhar-ul-Haq, Inspector for the State

Syed Zahid Hussain Bokhari and Muhammad Ahsan Bhoon, for Respondent No.2.

ORDER

Through this petition, the petitioner assails the order dated 5-6-2015 passed by the learned Special Judge, Anti-Terrorism Court, Faisalabad, whereby his application under Section 23

of Anti-Terrorism Act, 1997 for transfer of case FIR No.113/2015 dated 22-4-2015 under Sections 452, 337-H(2), 342, 440, 447, 511, 148, 149, P.P.C. read with Section 7 of Anti, Terrorism Act, 1997, to the court of ordinary jurisdiction has been dismissed.

2. Heard. Record perused.

3. FIR in this case was registered against the petitioner and others with the allegation that at about 09:40 p.m. they all while armed with lethal weapons attacked the house of the complainant, resorted to indiscriminate firing, entered into the house while breaking the main gate and damaged the household articles, as such, created a sense of fear in the vicinity.

4. Definition of "terrorism" has been incorporated in Section 6 of Anti-Terrorism Act, 1997 that reflects that meaning of "terrorism" includes use or threat of action that falls within the meaning of subsection (2) of the same and it includes use or threat if designed to coerce and intimidate or overawe the government or the public or a section of public or community or sect or create a sense of fear or insecurity in the public at large. It also includes use of threat for the purpose of advancing a religious, sectarian or ethnic cause or intimidation and terrorism against the public, social sectors, business community etc. It also includes attacking civilians, government officials, installations, security forces or law enforcing agencies. The Hon'ble Supreme Court of Pakistan has held in numerous cases that while applying a particular law, court must take into consideration the object for which the law has been enacted. Needless to refer that Anti-Terrorism Act, 1997, as per its preamble, was enacted "to provide for the prevention of terrorism, sectarian violence and for speedy trial of heinous offences and for matters connected therewith and incidental thereto." The interpretation of criminal law requires that the same should be interpreted in the way it defines the object and not to construe in a manner which may defeat the ends of justice or the object of law itself. Thus for determining the issue whether the offence is triable under the Anti-Terrorism Act or not, nature of offence has to be seen in the light of the averments that how the same has been committed along with the particular place of incident and further that by that act a sense of fear and insecurity in the society has been created in the minds of the people at large or not. Striking of terror is sine qua non for the application of the provisions as contained in Section 6 of Anti-Terrorism Act, 1997.

5. We have noted that the incident in this case took place at odd hours of night. As per contents of the FIR itself civil litigation is pending between the parties regarding the disputed property possessed by the complainant and according to the complainant's own version on the day before the night of occurrence i.e. 21-4-2015 an altercation took place between him and the accused Muhammad Abbas when they went to attend the hearing of their case before Director Anti-Corruption, Faisalabad. We have also noted that no body has received any injury in this occurrence and commission of the crime by the accused at some public place also does not borne out from the record whereby it can be termed that the accused had frightened the general public and created terror and fear amongst the people. We are of the considered view that motive for the occurrence in this case is enmity inter se the parties on account of their longstanding civil litigation, as such, the application of Section 7 of Anti-Terrorism Act, 1997, which primarily requires the spread of sense of

insecurity and fear in the common mind, does not attract. In this context, we respectfully refer the case of Bashir Ahmad v. Muhammad Siddique and others (PLD 2009 SC 11), wherein the Hon'ble Supreme Court of Pakistan has held as under:-

> "In order to determine as to whether an offence would fall within the ambit of section 6 of the Anti-Terrorism Act, 1997, it, would be essential to have a glance over the allegations made in the FIR, record of the case and surrounding circumstances. It is also necessary to examine that the ingredients of alleged offence have any nexus with the object of the case as contemplated under sections 6, 7 and 8 thereof. Whether a particular act is an act of terrorism or not, the motivation, object, design or purpose behind the said act is to be seen. It is also to be seen as to whether the said act has created a sense of fear and insecurity in the public or any section of the public or community or in any sect. Examining the case in hand on the above touchstone, it is manifest on the face of it that the alleged offence took place because of previous enmity and private vendetta. A perusal of the record would reveal, that occurrence has taken place in front of the `haveli' of the respondents, situated in village Ratoowala'. The motive for the occurrence is enmity inter se the parties on account of some previous murders. In this view of the matter, we are of the opinion that since motive was enmity inter se the parties, the application of section 7 of the Act, which primarily requires the spread of sense of insecurity and fear in the common mind is lacking in the present case."

6. Therefore, by allowing this writ petition, the impugned order dated 5-6-2015 passed by the learned Special Judge, Anti-Terrorism Court, Faisalabad being not based upon proper appreciation of facts and the relevant law on the subject is hereby set aside with the result that application moved by the petitioner under Section 23 of Anti-Terrorism Act, 1997 for transfer of case F.I.R No.113/2015 dated 22-4-2015, registered at Police Station Qadirpur District Jhang is accepted. Consequently, case pending before the learned Special Judge, Anti-Terrorism Court, Faisalabad stands transferred to the court of ordinary jurisdiction.

HBT/G-27/L Petition allowed.

PLJ 2015 Cr.C. (Lahore) 41 (DB)

Present: **MUHAMMAD ANWAAR-UL-HAQ AND SARDAR MUHAMMAD SHAMIM KHAN, JJ.**

SHAKEEL and 4 others--Appellants

versus

STATE and another--Respondents

Crl. A. No. 1535 of 2011, Crl. No. 1 of 2013 decided on 13.3.2014.

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

----S. 426(1A)(c)--Pakistan Penal Code, (XLV of 1860), S. 302(b)--Suspension of sentence--Statutory ground--Petitioner/appellant was convicted u/S. 302(b), PPC and sentenced to imprisonment for life by Additional Sessions Judge--Perusal of record further revealed that appeal of petitioner/appellant was filed but same has not been fixed for hearing till yet--

Keeping in view sub-clause (c) of sub-section (1A) of Section 426, PPC, petitioner is entitled for suspension of his sentence on statutory ground--Petition was accepted. [P. 42] A

Prince Rehan Iftikhar Sheikh, Advocate for Appellants.
Malik Saleem Iqbal Awan, Advocate for Complainant.
Ch. Muhammad Mustafa, DPG for Respondents.
Date of hearing: 13.3.2014.

ORDER

This is 2nd petition for suspension of sentence on behalf of the petitioner; earlier petition i.e. Crl.Misc.No. 01 of 2012, filed by petitioner Sajid, was dismissed on merits by this Court vide order dated 21.03.2013.

2. Sajid, petitioner/appellant seeks suspension of sentence awarded to him by learned Additional Sessions Judge, Pakpattan Sharif, vide judgment dated 29.08.2011, whereby, he was convicted under Section 302(b), PPC and sentenced to imprisonment for life with compensation of an amount of Rs. 100,000/- to be paid to the legal heirs of the deceased and in default to further undergo S.I. for six months in a private complaint for the offences under Sections 302,109,148 and 149, PPC in case FIR No. 222/2008 registered at Police Station City PakpattanSharif. Benefit of Section 382-B, Cr.P.C. was also given to the petitioner.

3. Learned counsel for the petitioner/appellant contended that petitioner/appellant was convicted and sentenced to imprisonment for life on 29.08.2011 and a period of more than three years and four months has lapsed t;ut the appeal of the petitioner/appellant has not been fixed for hearing till yet; that delay in decision of appeal has not been occasioned by any act or omission of the petitioner/appellant or any other person acting on his behalf; that petitioner/appellant is previously non-convicted offender and that he is neither hardened, desperate nor dangerous criminal, therefore, sentence of the petitioner/appellant is liable to be suspended and he be released on bail on statutory ground.

4. Learned counsel for the complainant and learned Deputy Prosecutor General, Punjab have opposed this petition and prayed for its dismissal.

5. We have heard the arguments, advanced by learned counsel for the parties and perused the record with care.

6. It has been noticed that petitioner/appellant was convicted under Section 302(b), PPC and sentenced to imprisonment for life by learned Additional Sessions Judge, PakpattanSharif vide judgment dated 29.08.2011. Perusal of record further reveals that appeal of the petitioner/appellant was filed on 12.09.2011 but the same has not been fixed for hearing till yet. Keeping in view sub-clause (c) of sub-section (1A) of Section 426, PPC, petitioner is entitled for suspension of his sentence on the statutory ground.

7. Learned DPG has frankly conceded that petitioner/ appellant is neither previously convicted offender nor he is hardened, desperate or dangerous criminal.

8. Resultantly, this petition is accepted and sentence of the petitioner is suspended and he is ordered to be released on bail, subject to his furnishing bail bonds in the sum of Rs.2,00,000/-, with two sureties in the like amount to the satisfaction of Deputy Registrar (Judicial) of this Court. The petitioner/appellant is directed to appear before this Court on each and every date of hearing till the final disposal of his appeal.

(A.S.) Petition accepted.

PLJ 2015 Cr.C. (Lahore) 65 (DB)

Present: **MUHAMMAD ANWAAR-UL-HAQ AND SYED SHAHBAZ ALI RIZVI, JJ.**

MUHAMMAD ASLAM *alias* NANNHA & others--Appellants

versus

STATE and others--Respondents

Crl. Appeal Nos. 296-J of 2009, 478 of 2007, Crl. Rev. No. 227 and M.R. No. 259 of 2007, heard on 15.9.2014.

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

----S. 302(b)--Conviction and sentence--Challenge to--Benefit of doubt--It is true that it is not quantity but quality of evidence that is to be taken into consideration while believing same and solitary statement of a witness when reliable is sufficient to bring home guilt of accused--But, here in this case Court was unable to place reliance on statement of only witness relied by trial Court for reasons that as per case of complainant he did not know any of accused who made firing upon deceased and injured, thus he did not nominate accused in F.I.R while making his statement before police and it was PW who disclosed names of assailants to him for first time after registration of case--This piece of medical evidence clearly provides that PW was conscious and was just normal to make any statement, therefore, explanation advanced by prosecution that F.I.R was lodged against unknown accused because PW became unconscious was not believable--It was worth mentioning that as per prosecution case injured was laying unconscious when police reached place of occurrence but relevant portion of complaint 'Karwai Police' was totally silent about this very important aspect of case and same was position in site-plan prepared by Investigating Officer at spot--In Medico-legal Certificate, has been mentioned who brought injured to hospital, but said constable was not produced by prosecution and in view of withholding of this most important evidence in peculiar circumstances of this case Court have no option but to draw an adverse inference against prosecution keeping in view Article 129(g) of Qanun-e-Shahadat Order, 1984--Alleged injured PW and complainant have taken stance of unconsciousness of PW only to fabricate a story against appellants who were known to them being residents of same area and substituting them with unknown accused in F.I.R was not possible without twisting prosecution case in this manner--Recovery of fire-arms shown to be recovered from appellants was inconsequential as there was no report of Forensic Science Laboratory available on record--Another question which arises with reference to corroboration was whether medical evidence can corroborate ocular evidence qua appellants--Answer was in negative, because when we talk of corroboration, it was always with regard to story of prosecution and with regard to identity of each accused--Medical evidence may confirm ocular evidence with regard to receipt of injury, kind of weapon used for causing injury,

duration between injury and death, but it cannot connect accused with commission of crime--**Held:** Prosecution story in circumstances was doubtful in nature and accused/appellants were entitled to benefit of doubt not as a matter of grace but as a matter of right--Prosecution story in circumstances was doubtful in nature and accused/appellants were entitled to benefit of doubt not as a matter of grace but as a matter of right. [Pp. 74, 75, 76 & 77] A, B, C, E & F 2009 SCMR 230, *ref.*

Testimony of prosecution witness--

----It has been well settled by Hon'ble Supreme Court of Pakistan in plethora of case law that mere absence of enmity of a prosecution witness does not provide a stamp of truth to his testimony and real test to believe same is his statement if same is in consonance with natural probabilities and materially fits in with other evidence on record and inspires confidence. [P. 76] D 1995 SCMR 1639, *rel.*

Mr. Pervaiz Inayat Malik, Advocate for Appellant (in Crl. Appeal No. 296-J of 2009).

Rana Muhammad Nawaz, Advocate for Appellant (in Crl. Appeal No. 478 of 2007).

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

Mr. Azam Nazeer Tarar, Advocate for Complainant/Petitioner (in Crl. Revision No. 227 of 2007).

Date of hearing: 15.9.2014.

JUDGMENT

Muhammad Anwaar-ul-Haq, J.--Muhammad Aslam *alias* Nannha (appellant in Criminal Appeal No. 296-J of 2009) and Rashid Ahmad *alias* Shaddi (appellant in Criminal Appeal No. 478 of 2007) alongwith their co-accused namely Mumtaz, Rehmat Ali *alias* Iftikhar *alias* Khari and Navid *alias* Navidi were tried in case F.I.R. No. 574/2005 dated 13.09.2005, registered at Police Station Satiana District Faisalabad, in respect of offences under Sections 302, 324, 396, 412, 148, 149, PPC. After conclusion of trial, the learned trial Court *vide* its judgment dated 19.02.2007 has acquitted the accused namely Mumtaz and Rehmat Ali *alias* Iftikhar *alias* Khari and has convicted and sentenced the appellants Muhammad Aslam *alias* Nannha and Rashid Ahmad *alias* Shaddi as well as co-accused Navid *alias* Navidi as under:--

Muhammad Aslam *alias* Nannha:

(i) Death Sentence under Section 302(b)/34, PPC and to pay compensation of Rs. 100,000/- under Section 544-A, Cr.P.C. to legal heirs of the deceased and in default of payment of compensation to further undergo six months S.I.

(ii) One Year R.I. under Section 337-F(iii)/34, PPC and to pay Daman of Rs.5000/- to injured PW Muhammad Din *alias* Manna.

Rashid Ahmad *alias* Shaddi & Navid *alias* Navidi:

(i) Imprisonment for Life each under Section 302(b)/34, PPC and to pay compensation of Rs.50,000/- each under Section 544-A, Cr.P.C. to legal heirs of the deceased and in default of payment of compensation to further undergo six months S.I. each.

(ii) One Year R.I. each under Section 337-F(iii)/34, PPC and to pay Daman of Rs.5000/- each to injured PW Muhammad Din *alias* Manna.

Murder Reference No. 259 of 2007 for confirmation or otherwise of death sentence awarded to appellant Muhammad Aslam *alias* Nannha and **Criminal Revision No. 227 of 2007** filed by the complainant for enhancement of sentence of accused Rashid Ahmad *alias* Shaddi and Navid *alias* Navidi shall also be disposed of through this single judgment.

2. It is pertinent to mention here that co-convict of the appellants namely Navid *alias* Navidi has also filed Criminal Appeal No. 336 of 2007 before this Court against his conviction and sentence, however, the same has already abated *vide* order dated 18.06.2014 passed in that appeal when it was brought to the notice of the Court that appellant Navid *alias* Navidi has been murdered. It is also relevant to mention that Criminal Appeal No. 453 of 2007 filed by the complainant against acquittal of accused Mumtaz and Rehmat Ali *alias* Iftikhar *alias* Khari was dismissed in limine by a Division Bench of this Court on 20.09.2007.

3. F.I.R in this case (Ex.PJ/1) was registered on the statement (Ex.PJ) of complainant Attique-ur-Rehman (PW-9). Briefly the prosecution story unfolded in the statement of the complainant is that on 13.09.2005 at about 5:00 p.m., the complainant alongwith his brother Muhammad Nawaz were coming to their house on foot from Square No. 60 and on their way his brother Muhammad Younis (deceased) and Muhammad Din *alias* Manna (injured PW) crossed them while riding on Motorcycle No. FS-3232 (Honda 125-CC); when Muhammad Younis and Muhammad Din *alias* Manna reached near the intervening 'Watt' of Killa Nos. 1 and 2 falling in Square No. 60, three unknown accused while armed with fire-arms emerged from the sugarcane crop and came on the road; meanwhile, two other unknown accused riding on a motorcycle also reached there; they all raised *lalkara* and three unknown accused started firing with their fire-arms; first fire shot hit Muhammad Younis on his left flank due to which Muhammad Younis and Muhammad Din *alias* Manna fell down from the motorcycle; thereafter, two unknown accused who were riding on the motorcycle also made firing upon Muhammad Younis and Muhammad Din *alias* Manna and the fire shots hit below the left and right ears of Muhammad Younis and at the lower part of the left leg of Muhammad Din *alias* Manna; the witnesses raised hue and cry and all the accused fled away while making aerial firing and they also took away the motorcycle of Muhammad Younis; they attended Muhammad Younis who succumbed to the injuries at the spot; that the accused have murdered Muhammad Younis and have injured Muhammad Din *alias* Manna for some unknown reasons. However, appellants alongwith their three other co-accused were introduced by the complainant as assailants through his supplementary statement (not produced during the trial).

4. Accused were formally charge sheeted under Sections 302, 324, 396, 412, 148, 149, PPC, to which they pleaded not guilty and claimed trial. Prosecution examined as many as 14 witnesses to prove the charge against the accused. Dr. Sohail Tariq (PW-1) provided medical evidence; Nazir Hassan, S.I. (PW-13) and Munir Ahmad, Inspector (PW-14) conducted investigation of this case; Attique-ur-Rehman, complainant (PW-9) and Muhammad Din *alias* Manna (PW-10) have furnished the ocular account, whereas Rauf-ur-Rehman (PW-6) and Muhammad Malik (PW-7) are the witnesses of 'Wajtakkar'.

5. Learned SPP gave up PWs Muhammad Nawaz, Abdul Rehman, Muhammad Bashir, Muhammad Amin, Saeed-ur-Rehman, Sikandar Hayat No. 213/C and Zulfiqar Ali No. 2938/C being unnecessary witnesses and after tendering in evidence report of Chemical Examiner (Ex.PX) and report of Serologist (Ex.PY) closed the prosecution case.

6. On 14.09.2005 at 7:00 a.m., Dr. Sohail Tariq, PW-1 conducted post-mortem examination on the dead body of Muhammad Younis and observed as under:--

(i) A fire-arm lacerated wound of entry measuring 3.0 x 2.5 cm present on left side of neck, just posterior to left ear (1.5 cm postro-inferior to base of left ear). The wound was bone deep. Blackening and burning were present.

(ii) A fire-arm lacerated wound of exit 4 in number present on right side of neck, had appearance of a big wound measuring 2.0 cm x 1.5 cm, about 6.5 cm right to mid-vertebral line and 2.5 cm from the base of left ear. There were 3 other wounds 1.0 cm x 1.0 cm each (exit) lying about 1.0 cm superior to big hole of exit and those 3 wounds were separate from each other about 1.5 cm. All were bone deep. Crepitus of survical spines was appreciable.

(Injury No. 1 and Injury No. 2 were communicating with each other).

Injury No. 2 was present in an area of 6.00 cm x 5 cm.

(iii) A fire-arm lacerated wound, grazing, through and through measuring 2.00 x 2.5 cm present on pinna of left ear.

(iv) There were wound 8 in number, entry, present in an area of 10.00 cm x 10.00 cm on the back of right side of chest upper part, 15 cm from acromioclavicular joint, on scapular region, there was a skin deep laceration circular in shape of 2.00 cm x 2.00 cm present in centre of said area of 10.00 cm x 10.00 cm (wad injury). All were bone deep and had slightly burned-abraded margins.

(v) A fire-arm lacerated wound of entry measuring 4 cm x 4 cm present on postro-lateral aspect of left side of chest, 28 cm inferior to left shoulder and 22 cm above to left iliac crest and 28 cm left to mid-vertebral line. Wound was cavity deep and had burned-abraded inverted margins.

Corresponding holes were present on Qameez for Injury No. 4 and were present on Qameez and Bunyan for Injury No. 5.

(vi) A fire-arm lacerated wounds of entry 1 cm x 1 cm with swelling of said area of 3 cm x 5 cm present on Dorsal aspect of proximal of middle finger of left hand and was bone deep.

(vii) A fire-arm grazing wound lacerated, skin deep, present on dorsal-o-lateral aspect of ring finger of left hand measuring 1.5 x 0.7 cm.

On dissection of Injury No. 1, a wad of cartridge was searched out in left side of neck, near survical vertebrae.

In his opinion, Injuries No. 1, 4 and 5 were too fatal to cause death in this particular case (amongst Injuries No. 1, 4 and 5, Injury No. 1 was most lethal and other two injuries were contributory) that caused damage to most vital organs, brain, spinal cord, lungs, aorta resulting in massive hemorrhage leading to sock and were sufficient to cause death in ordinary course of nature; all the injuries were ante mortem and caused by fire-arm; the

probable time elapsed between injuries and death was immediate and between death and post-mortem within 15 hours.

On 13.09.2005 at about 06:30 p.m., PW-1 medically examined Muhammad Din *alias* Manna and found the following injury on his person:--

> "A fire-arm lacerated wound, grazing in type, measuring 16 cm x 6.0 cm, which was muscle deep, present on lower part of postro-medial aspect of left leg, inferior end of wound was just posterior to medial malleolus and upper end of wound was wider than inferior end."

In his opinion, the injury was caused by fire-arm and was fresh on arrival of the injured; he has further observed that the patient was well-oriented in time and space and that the patient was profusely bleeding from the injury but peripheral pulses of left leg were intact.

7. In their statements under Section 342, Cr.P.C., both the appellants refuted all the allegations levelled against them and professed their innocence. While answering to question (Why this case against you and why the PWs have deposed against you?), appellants replied as under:-

Muhammad Aslam *alias* Nannha:

"The PWs are related interse, while injured PW Muhammad Din is a servant of the complainant. The complainant party was supporting Ch. Mukhtar Ahmad Jat in the election of Nazim and came to me for vote and I flatly refused and supported Rana Rab Nawaz of our village. Therefore, the complainant party nourished grudge against me. Furthermore, one Ghulam Qadir from brotherhood of the complainant party, who got registered a murder case against my co-accused Navid *alias* Navidi and his relatives, prior to the occurrence came to me alongwith the complainant and asked to provide them spy information about Navid and his relatives, who were on visiting terms with Munir Wattoo, whose Dera was situated near the poultry farm of Navid accused, but I refused to become a party in the murder enmity of Navid accused and Ghulam Qadir as well as the complainant, on which Ghulam Qadir threatened me of dire consequences. In fact, Muhammad Younis was murdered by some unknown persons, who could not be traced out by the police and the complainant and they involved me in this case due to above said enmity. The complainant and aforesaid Muhammad Nawaz had not given the features of any culprit so that they could involve any person. No identification parade was held in this case. Muhammad Din injured PW, when appeared before Ameer Ali ASI had not nominated me in Ex.PE."

Rashid Ahmad *alias* Shaddi:

"It is a false case. The PWs being closely related to the deceased and due to political rivalry have made false statements. Muhammad Bashir, uncle of Younis deceased was contesting the election of Local Bodies held on 25.08.2005 as Nazim, Naimat Ullah maternal uncle of Mumtaz accused was his opponent. Due to the said political rivalry and jealously of the business with Attique-ur-Rehman PW1 have been involved in this case falsely. Mumtaz accused is running the business of Baluch Goods Transport at the Adda of Chak No. 33/GB. Moon Star Goods is being run by

Muhammad Sarwar, cousin of Attique-ur-Rehman PW, who is also rivals with the business of Mumtaz accused. There exists old enmity between Navid accused and the complainant party of murder case. We have relationship inter-se with Rehmat Ali *alias* Iftikhar *alias* Khari and Rashid Ahmad accused. We all the 3 persons have been involved in this case due to rivalry and enmity. The PWs did not see the occurrence and they have made false deposition. During investigation, the complainant party could not substantiate his case."

8. Both the accused/appellants did not opt to appear as their own witness under Section 340(2), Cr.P.C. and have also not produced any defence evidence. However, after conclusion of the trial, the appellants have been convicted and sentenced by the learned trial Court, as mentioned above.

9. Learned counsel for the appellants contend that it is a case of blind murder as the complainant Attique-ur-Rehman, real brother of the deceased, when got recorded his statement before the police at 05:40 p.m. on 13.09.2005 has categorically stated that five unknown accused had murdered his brother Muhammad Younis for some unknown reasons; that formal F.I.R was also recorded at 05:45 p.m. in the Police Station with the same version of the complainant; that it was daylight occurrence and out of five accused four persons namely Rashid Ahmad *alias* Shaddi, Mumtaz, Rehmat Ali *alias* Iftikhar *alias* Khasi and Navid *alias* Navidi were residents of the same village of the complainant i.e. Chak No. 32/GB whereas fifth accused Muhammad Aslam *alias* Nannha was resident of an adjacent Chak No. 30/GB, but astonishingly the complainant has not identified them and stamped them unknown that speaks *mala-fide* of the complainant; that recovery of guns .12-bore shown against appellants Muhammad Aslam *alias* Nannha and Rashid Ahmad *alias* Shaddi is inconsequential as no empty was recovered from the spot for comparison of the same and there is no report of the Forensic Science Laboratory; that no motive has been set up by the prosecution even during the trial against the appellants; that injury on the person of injured Muhammad Din *alias* Manna is a fabricated injury; that Mureed Hussain No. 2403/C who allegedly took the injured to the doctor has not been produced during the trial; that as per site-plan (Ex.PH/1), all the accused were at a distance of minimum three to four karams from the injured and the deceased whereas as per post-mortem of the deceased, he was fired at from a very close range because wad was also recovered and the doctor has observed blackening and burning on the injuries, therefore, medical evidence is in conflict with the ocular account furnished by PWs and with the site-plan; that during the trial, the learned trial Court has not believed the evidence of PW-9 (complainant) and that of PW-6 and PW-7 (witnesses of wajtakkar) and has only relied upon the evidence of injured PW-10 Muhammad Din *alias* Manna; that sole statement of PW-10 was not sufficient to convict the appellants for the reason that the stance taken by the injured PW that he became unconscious on receiving the injury is neither supported by contents of the F.I.R nor from karwai of police or from statement of the doctor who medically examined the injured; that accused Rehmat Ali *alias* Iftikhar *alias* Khari against whom there was allegation of causing fire-arm injury to injured Muhammad Din *alias* Manna has already been acquitted by the learned trial Court and appeal against his acquittal has also been dismissed by this Court on 20.09.2007; that the prosecution failed to prove its case against the appellants beyond any shadow of doubt, therefore, they deserve acquittal by giving them the benefit of doubt.

10. On the other hand, learned Deputy Prosecutor General assisted by learned counsel for the complainant has controverted the arguments of learned counsel for the appellants by submitting that it was a daylight occurrence and the matter was reported to the police immediately after the occurrence; that there is statement of the injured PW Muhammad Din *alias* Manna who neither has any enmity with the appellants nor has any blood relationship with the deceased; that statement of the injured PW reflects that he sustained injury during this occurrence and the learned trial Court has rightly believed his evidence that is fully corroborated by the medical evidence available on record; that evidence of one single witness especially when he received injury during the occurrence can be made basis for awarding capital sentence; that acquittal of accused Rehmat Ali *alias* Iftikhar *alias* Khari does not affect the evidence of injured PW-10 as the learned trial Court has extended him benefit of doubt and there is no observation of the learned trial Court that injured Muhammad Din *alias* Manna has not received fire-arm injury during this occurrence; that both the eye-witnesses have no enmity with the accused persons and they remained consistent on all material aspects of the prosecution case; that ocular account is fully supported by the medical evidence, therefore, prosecution has proved its case against the appellants beyond any shadow of doubt.

11. We have heard the learned counsel for the parties at length, have given anxious consideration to their arguments and have also scanned the record with their able assistance.

12. As per F.I.R, some unknown accused have committed this occurrence for some unknown reasons, however, through supplementary statement of the complainant five accused were nominated. We have noticed with concern that such supplementary statement of the complainant has not been produced during the trial.

13. At the very outset, learned counsel for the complainant has not much emphasized on the evidence of the complainant/PW-9 Attique-ur-Rehman and the evidence of Wajtakkar provided by PW-6 Rauf-ur-Rehman and PW-7 Abdul Malik and has only stressed upon the evidence of the injured PW Muhammad Din *alias* Manna by stating that he is the star witness who had received fire-arm injury during the occurrence, thus his statement is trustworthy and reliable.

14. The ocular account has been furnished by PW-9 Attique-ur-Rehman and PW-10 Muhammad Din *alias* Manna. PW-9 Attique-ur-Rehman is real brother of the deceased and PW-10 Muhammad Din *alias* Manna as per his own deposition before the learned trial Court was a contractor of fruit orchards and remained lessee of the orchard owned by the complainant party. Admittedly, four accused namely Rashid Ahmad *alias* Shaddi, Mumtaz, Rehmat Ali *alias* Iftikhar *alias* Khari and Navid *alias* Navidi were also residents of the same village where both the PWs (PW-9 & PW-10) were residing i.e. Chak No. 32/GB, Police Station Satiana District Faisalabad, whereas accused Muhammad Aslam *alias* Nannha was resident of a nearby village i.e. Chak No. 30/GB and the injured PW-10 Muhammad Din *alias* Manna in his cross-examination has admitted that accused Aslam *alias* Nannha was known to him prior to the occurrence and that he also used to visit the orchard of the complainant. Admittedly, learned trial Court has disbelieved the evidence of PW-6, PW-7

and that of PW-9 (complainant of this case) and has only relied upon PW-10 Muhammad Din *alias* Manna.

15. It is true that it is not the quantity but the quality of evidence that is to be taken into consideration while believing the same and solitary statement of a witness when reliable is sufficient to bring home guilt of the accused. But, here in this case we are unable to place reliance on the statement of only witness relied by the learned trial Court i.e. PW-10 Muhammad Din *alias* Manna for the reasons that as per case of the complainant he did not know any of the accused who made firing upon the deceased and the injured, thus he did not nominate accused in the F.I.R at 05:40 p.m. while making his statement before the police and it was PW-10 Muhammad Din *alias* Manna who disclosed the names of the assailants to him for the first time after the registration of the case on 13.09.2005. We have noticed that this case remained against unknown accused even till the preparation of site-plan (Ex.PH/1) by the draftsman (PW-3) on 16.09.2005 who has stated as under:--

> "It is correct that in Ex.PH the name of any of the accused has not been mentioned. The PWs did not inform me about the name of any accused."

Astonishingly PW-10 who knew all the accused had disclosed the names to the complainant on the same day but the complainant did not disclose the names even on 16.09.2005 at the time when the draftsman was taking rough notes for the preparation of scaled site-plan. The reason advanced by the prosecution that PW-10 became unconscious is not supported by any evidence. PW-10 has stated before the Court as under:-

> "Then Khari accused made fire hitting upon the lower side of my left leg and then I became unconscious. I was taken to Civil Hospital, Satyana, where I regained my senses."

This part of the statement of PW-10 has been contradicted by the statement of Dr. Sohail Tariq (PW-1) who medically examined PW-10 on 13.09.2005 at 06:30 p.m. and has stated before the Court as under:--

> "On 13.09.2005 at about 6.30 P.M. Muhammad Din s/o Mehar Din injured, aged 60 years, Male, Caste Mochi, Occupation Labour, R/o Chak No. 32/GB, brought to me by police constable Murid Hussain No. 2403/C. Following injuries were noted:--
>
> 1. A fire-arm lacerated wound, grazing in type, measuring 16 cm x 6.0 cm, which was muscle deep, present on lower part of postro-medial aspect of left leg, inferior end of wound was just posterior to medial malleolus and upper end of wound was wider than inferior end.
>
> **Condition of Patient:--**
>
> "Patient was well-oriented in time and space. B.P was 110/80. Temperature was normal. Pulse was 108 bpm and respiratory A rate was normal. S1 + S2 + O, Chest was clear bilaterally.
>
> Patient was profusely bleeding from Injury No. 1, but periepheral pulses of left leg were intact.

This piece of medical evidence clearly provides that at 06:30 p.m., PW-10 was conscious and was just normal to make any statement, therefore, explanation advanced by the prosecution that F.I.R was lodged against unknown accused because PW-10 became unconscious is not believable.

16. It is worth mentioning that as per prosecution case the injured was laying unconscious when police reached the place of occurrence but the relevant portion of the complaint 'Karwai Police' (Ex.PJ) is totally silent about this very important aspect of the case and same is the position in the site-plan prepared by the Investigating Officer at the spot. We have further noticed that in the Medico-legal Certificate, name of Mureed Hussain No. 2403/C has been mentioned who brought the injured to the hospital, but said constable was not produced by the prosecution and in view of withholding of this most important evidence in the peculiar circumstances of this case we have no option but to draw an adverse inference against the prosecution keeping in view Article 129(g) of Qanun-e-Shahadat Order, 1984. We are of the considered view that the alleged injured PW and the complainant have taken the stance of unconsciousness of PW 10 only to fabricate a story against the appellants who were known to them being residents of the same area and substituting them with the unknown accused in the F.I.R was not possible without twisting the prosecution case in this manner.

17. Argument of learned counsel for the complainant that PW-10 has no enmity with the appellant and, therefore, his evidence cannot be discarded is misconceived. It has been well settled by the Hon'ble Supreme Court of Pakistan in plethora of case law that mere absence of enmity of a prosecution witness does not provide a stamp of truth to his testimony and the real test to believe the same is his statement if the same is in consonance with the natural probabilities and materially fits in with other evidence on record and inspires confidence. In this context, we respectfully rely on the case of *Muhammad Arshad alias Achhi vs. The State* (1995 SCMR 1639).

18. Recovery of fire-arms shown to be recovered from the appellants is inconsequential as there is no report of the Forensic Science Laboratory available on the record. Another question which arises with reference to the corroboration is whether medical evidence can corroborate the ocular evidence qua the appellants. The answer is in the negative, because when we talk of corroboration, it is always with regard to the story of the prosecution and with regard to the identity of each accused. The medical evidence may confirm the ocular evidence with regard to the receipt of the injury, kind of weapon used for causing the injury, duration between the injury and the death, but it cannot connect the accused with the commission of the crime.

19. In the light of our above discussion, we find that the prosecution story in the circumstances is doubtful in nature and the accused/appellants are entitled to the benefit of doubt not as a matter of grace but as a matter of right. In this context, we respectfully refer the case of *Muhammad Akram vs. The State* (2009 SCMR 230), wherein the Hon'ble Supreme Court has held as under:--

> "The nutshell of the whole discussion is that the prosecution case is not free from doubt. It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of *Tariq Pervez v. The State* 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be

entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

In the case of *Muhammad Luqman vs. The State* (PLD 1970 SC 10), it was held that "a finding of guilt against an accused person cannot be based merely on the high probabilities that may be inferred from evidence in a given case. The finding as regards his guilt should be rested surely and firmly on the evidence produced in the case and the plain inferences of guilt that may irresistibly be drawn from that evidence. Mere conjectures and probabilities cannot take the place of proof. If a case was to be decided merely on high probabilities regarding the existence or non-existence of a fact to prove the guilt of a person, the golden rule of "benefit of doubt" to an accused person, which has been a dominant feature of the administration of criminal justice in this country with the consistent approval of the Superior Courts, will be reduced to a naught."

20. Therefore, Criminal Appeal No. 296-J of 2009 and Criminal Appeal No. 478 of 2007 are allowed, the convictions and sentences recorded by the learned trial Court against the appellants through the impugned judgment dated 19.02.2007 are set aside and by extending them the benefit of doubt they are acquitted of the charges. Appellant Muhammad Aslam *alias* Nannha is in jail and shall be released forthwith if not required in any other case, whereas appellant
Rashid Ahmad *alias* Shaddi is on bail and his surety is discharged from the liability of bail bond.

21. In the light of our above findings, Criminal Revision No. 227 of 2007 filed by the complainant for enhancement of sentence of Accused/Respondents No. 1 and 2 namely Rashid Ahmad *alias* Shaddi and Navid *alias* Navidi stands dismissed.

22. Death sentence of convict Muhammad Aslam *alias* Nannha is not confirmed and Murder Reference No. 259 of 2007 is answered in the Negative.
(A.S.) Appeal allowed.

PLJ 2015 Cr.C. (Lahore) 290
Present: **MUHAMMAD ANWAAR-UL-HAQ, J.**
MUHAMMAD ABBAS--Petitioner
versus
STATE and another--Respondents

Crl. Misc. No. 17318-B of 2014, decided on 21.1.2015.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 302, 148, 149--Bail, grant of--Further inquiry--Joint allegation against petitioner was that he alongwith four nominated and two unknown co-accused, made indiscriminate firing with their respective automatic weapons hitting deceased, who succumbed to injuries at spot, subsequently, on same day complainant in her supplementary statement while specifying and attributing role to each accused has categorically stated that present petitioner made only aerial firing at time of

occurrence and did not cause any injury to deceased--Counsel for petitioner pointed out that in final report prepared by Investigating Officer u/S. 173, Cr.P.C. he has concluded that during course of investigation, petitioner has been found innocent in this case, however, on insistence of complainant, he has been challaned while leaving him at mercy of Court--Law Officer after consulting record confirms stance taken by counsel for petitioner that petitioner has been declared innocent during investigation and there was supplementary statement available on record made by complainant on same day stating therein that petitioner did not cause any injury to deceased, however, made only aerial firing at spot--He further confirms that no specific weapon of offence has been alleged against petitioner in F.I.R. and during investigation, no recovery of any weapon of offence has been affected from him--Final result of investigation case against in petitioner squarely falls within purview of sub-section (2) of Section 497, Cr.P.C. and is one of further inquiry into his guilt--Question of vicarious liability of petitioner in peculiar circumstances of case, can validly be determined by trial Court only after recording of some evidence--Counsel for petitioner stated at bar that petitioner was previously non-convict and was behind bars--Mere abscondance of petitioner cannot come in way when otherwise he has a good case for bail after arrest in his favour--Bail was granted. [P.] A & B

Haji Khalid Rehman, Advocate for Petitioner.

Mr. Muhammad Nawaz Shahid, D.D.P.P. for State.

Nemo for Complainant.

Date of hearing: 21.1.2015.

ORDER

Through this petition, Muhammad Abbas petitioner seeks post-arrest bail in case F.I.R. No. 1057, dated 07.08.2011, registered at Police Station Civil Lines, District Faisalabad, in respect of offences under Sections 302 and 148/149, PPC.

2. At the very outset, learned Law Officer is satisfied that a duly served notice upon the complainant of this case is available on the police file. Despite repeated calls, no one is putting appearance on behalf of the complainant, therefore, I have no other option but to decide this bail petition after hearing learned counsel for the petitioner and learned Law Officer.

3. Arguments heard. Record perused.

4. As per contents of the F.I.R. joint allegation against the petitioner is that he alongwith four nominated and two unknown co-accused, made indiscriminate firing with their respective automatic weapons hitting the deceased Imtiaz Ahmad, who succumbed to the injuries at the spot, subsequently, on the same day the complainant in her supplementary statement while specifying and attributing role to each accused has categorically stated that present petitioner made only aerial firing at the time of occurrence and did not cause any injury to the deceased. Learned counsel for the petitioner points out that in the final report prepared by the Investigating Officer under Section 173, Cr.P.C. he has concluded that during the course of investigation, petitioner has been found innocent in this case, however, on the insistence of the complainant, he has been challaned while leaving him at the mercy of the Court. Learned Law Officer after consulting the record confirms the stance taken by

learned counsel for the petitioner that petitioner has been declared innocent during the investigation and there is supplementary statement available on the record made by the complainant on the same day stating therein that petitioner did not cause any injury to the deceased, however, made only aerial firing at the spot. He further confirms that no specific weapon of offence has been alleged against the petitioner in the F.I.R. and during the investigation, no recovery of any weapon of offence has been affected from him.

Keeping in view the divergent stance taken by the complainant and final result of the investigation case against in the petitioner squarely falls within the purview of sub-section (2) of Section 497, Cr.P.C. and is one of further inquiry into his guilt. Question of vicarious liability of the petitioner in the peculiar circumstances of the case, can validly be determined by the learned trial Court only after recording of some evidence. Learned counsel for the petitioner states at bar that petitioner is previously non-convict and is behind the bars since 22.07.2014. Mere abscondance of the petitioner cannot come in the way when otherwise he has a good case for bail after arrest in his favour. Therefore, without further commenting upon the merits of the case, I accept this petition and admit the petitioner to post-arrest bail subject to his furnishing bail bonds in the sum of Rs. 2,00,000/- (Rupees two hundred thousand only) with two sureties each in the like amount to the satisfaction of the learned trial Court.

5. It is, however, clarified that observations made herein above are just tentative in nature and strictly confined to the disposal of this bail petition.
(A.S.) Bail granted.

KLR 2015 Criminal Cases 190

[Lahore]

Present: **MUHAMMAD ANWAARUL HAQ and ARSHAD MAHMOOD TABASSUM, JJ.**

Mst. **Ayyan Ali**

Versus

The State, etc.

Criminal Miscellaneous No. 9211-B of 2015, decided on 14th July, 2015.

CONCLUSION

(1) The act of taking foreign currency out of Pakistan beyond the prescribed limit was not immoral or anti-social in nature, but was technical.

BAIL (SMUGGLING OF AMOUNT) --- (Further inquiry)

Criminal Procedure Code (V of 1898)---

---S. 497(2)---Customs Act, 1969, Ss. 2(s), 156(1)(8), 70, 157, 178---Foreign Exchange Regulating Act, 1947, S. 8 r/w S. 3(1) of ITC---F.I.R.---Petitioner-lady allegedly attempted to smuggle out of Pakistan US Dollars beyond permissible limit---Bail concession---Further inquiry---Petitioner had not yet obtained boarding pass nor her baggage had been tagged to be placed in the aeroplane---It was yet to be seen as to whether petitioner in fact intended to smuggle out of Pakistan amount in question---Plea of petitioner was that the said amount of

US Dollars was sale proceeds of her five plots and that she was to hand over said amount to her brother---**Held:** Case called for further probe into guilt of petitioner---Being a female having no previous record petitioner deserved some leniency---Petitioner was no more required for purpose of investigation and her further detention would not serve any useful purpose---Bail after arrest allowed. (Paras 6, 7, 8)

Ref. 2009 SCMR 304.

سائلہ کے خلاف بیرون پاکستان یو ایس ڈالر اسمگلنگ کی کوشش کا الزام تھا۔ سائلہ نے ابھی بورڈنگ پاس حاصل نہ کیا تھا جب وہ ایئر پورٹ سے گرفتار ہوئی۔ کیا وہ پاکستان سے باہر متنازعہ رقم سمگل کرنا چاہتی تھی۔ معاملہ مزید تحقیق طلب ۔ نیز سائلہ ایک خاتون تھی۔ جرم مذکورہ میں ضمانت عطا ہوئی۔

[Allegation against petitioner was that she attempted to smuggle out of Pakistan US Dollars. As yet, petitioner had not obtained boarding card when she was apprehended at Airport. Question as to whether she intended to smuggle out of Pakistan disputed amount call for further inquiry. Moreover, petitioner was a female. Bail was allowed].

For the Petitioner: **Sardar Muhammad Latif Khan Khosa, Sardar Khurram Latif Khan Khosa, Aamer Chaudhry and Nasir Ali Turabi, Advocates.**

For the State: **Syed Zafar Abbas, Deputy Attorney General for Pakistan with Muhammad Saleem, Inspector Customs.**

For the Complainant: **Muhammad Amin Feroze Khan, Advocate.**

Date of hearing: **14th July, 2015.**

ORDER

Through special order dated 8th of July, 2015, the Hon'ble Chief Justice has been pleased to entrust this petition to this Bench.

2. The petitioner has been unsuccessful before the two forums including the Court of learned Judge, Special Court, (Customs, Taxation and Anti-Smuggling) Rawalpindi/ICT and the learned Special Appellate Court, constituted under the Prevention of Smuggling Act for the Province of Punjab, as her petitions for grant of post arrest bail were dismissed by the said Courts vide orders dated 16.3.2015 and 29.6.2015, respectively. Hence, through this petition the petitioner seeks her enlargement on bail in case FIR No. 10, dated 14.3.2015, registered under sections2(s), 156(1)8, 70, 157,178 of the Customs Act, 1969 read with section 8 of the Foreign Exchange Regulating Act, 1947, and section 3(1) of I.T.C, 1950, at police station I & P Branch, MCC, Islamabad.

3. The allegation against the petitioner is that on 14.3.2015, she was apprehended at ASF Counter in the Rawal Lounge of Benazir Bhutto International Airport, Islamabad, when Waqas ASI, of ASF, considering her suit-case as suspicious, conducted search of the same and recovered therefrom US Dollars 506800. He then handed her over to the Customs officials who booked her in the said case.

4. It is the claim of the prosecution that the petitioner attempted to smuggle out of Pakistan US Dollars beyond the permissible limit.

5. Having heard the learned counsel for the parties, it is observed that the petitioner was admittedly apprehended at the ASF counter and by that time she had not

appeared before the Customs Counter, where she was supposed to make a correct declaration of the contents of her baggage as provided under Section 139 of the Customs Act, 1969. She had not yet obtained boarding pass nor her baggage had been tagged to be placed in the aeroplane. Since the stage of making a declaration of the contents of her baggage had not yet arrived, therefore, it is yet to be seen as to whether the petitioner in fact intended to smuggle out of Pakistan the above said amount of US Dollars. Particularly, keeping in view the plea of the petitioner that the said amount of US dollars was the sale proceeds of her five plots, situated in Karachi and that she was to hand over the said amount to her brother, who was scheduled to arrive at Benazir Bhutto International Airport Islamabad from Dubai through the same Flight. This aspect of the case, to our mind, calls for further probe into the guilt of the petitioner.

6. The petitioner was arrested in this case on 14.3.2015 and ever since then she is behind the bars. Being a female having no previous criminal record deserves some leniency in view of the Ist proviso to Section 497, Cr. P.C. It has been ruled by the apex Court in the case titled "Mirza Farhan Ahmad vs. The State" (2009 SCMR 304) that although the offence under section 156(1)(8) of the Customs Act, 1969 carries a sentence of 14 years imprisonment, but the act of taking foreign currency out of Pakistan beyond the prescribed limit was not immoral or anti-social in nature, but was technical. The relevant portion of the order of apex Court is reproduced below for the sake of convenience:-

> "Since it has not been controverted by the learned Deputy Prosecutor General, Punjab, that the petitioner is not a previous convict, he is ill and his custody is no more required for the purpose of investigation and though the offence punishable under section 156(1)(8) carries a sentence of 14 years' imprisonment yet, the act of taking out foreign currency out of Pakistan beyond the prescribed limit being not immoral or anti-social in nature rather technical because as per clause (1) of the S.R.O in question, the Government itself has allowed taking out of Pakistan the amount upto US Dollars' 10,000/- or equivalent in other currencies, therefore, in our view a case for grant of bail in favour of the petitioner is made out. Accordingly, this petition is converted into appeal and allowed. The appellant shall be released on bail subject to his furnishing surety in the sum of Rs. 1,00,000/- (one lac), with P. R. bond in the like amount to the satisfaction of the trial Court."

7. The petitioner has since been remanded to judicial custody as such she is no more required for the purpose of investigation. Thus her further detention will not serve any useful purpose.

8. In view of the above discussion, we are inclined to allow this petition which is accordingly allowed. The petitioner is admitted to bail subject to her furnishing bail bonds

in the sum of rupees five lacs with two sureties each in the like amount to the satisfaction of the learned trial court.

Bail after arrest granted.

2016 P Cr. L J 535
[Lahore]
Before Muhammad Anwaarul Haq and James Joseph, JJ
UMAR KHUBAIB---Petitioner
Versus
The STATE and 2 others---Respondents

Writ Petition No. 33509 of 2014, decided on 28th January, 2015.

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

----S. 498---Offences in Respect of Banks (Special Courts) Ordinance (IX of 1984), Ss.5(6) & 10---Constitution of Pakistan, Art.199---Constitutional petition---Pre-arrest bail---Scope---Contention was that S. 498, Cr.P.C., was not applicable in the case falling under the Offences in Respect of Banks (Special Courts) Ordinance, 1984; and that when there was bar for a specific relief, that could not be granted by invoking Art.199 of the Constitution---Question of bail was always a question of analyzing the facts of a specific case and said exercise was not permissible under constitutional jurisdiction---Validity---In view of provisions of Ss.5(6) & 10 of the Offences in Respect of Banks (Special Courts) Ordinance, 1984, there was no bar to file a petition for pre-arrest bail under S.498, Cr.P.C., prior to conviction of accused under said special law.

Khan Asfandyar Wali and others v. Federation of Pakistan through Cabinet Division, Islamabad and others PLD 2001 SC 607; Chairman, National Accountability Bureau, Islamabad and another v. Asif Baig Muhammad and others 2004 SCMR 91; Abdul Majid v. The Judge, Special Court (Offences in Banks), Lahore and another 1985 PCr.LJ 890; Muhammad Moosa v. The State 1986 PCr.LJ 578 and Allied Bank of Pakistan Ltd. v. Khalid Farooq 1991 SCMR 599 ref.

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

----S. 498---Penal Code (XLV of 1860), Ss.409, 420, 468, 471, 477-A & 34---Prevention of Corruption Act (II of 1947), S.5(2)---Criminal breach of trust by Banker, forgery for purpose of cheating, using as genuine a forged document, falsification of account---Pre-arrest bail, grant of---Further inquiry---Allegation against accused was that he along with his co-accused had committed forgery and fraud by dishonestly and deceitfully withdrawing amount from the bank---Direct allegation was against co-accused---Accused was not nominated in the FIR; and he had been nominated in the case on the statement of co-accused; wherein no allegation was levelled against the accused that he opened the alleged fake account and withdrew any amount from the same---Only role assigned to accused was of an abettor---Statement of co-accused, was an exculpatory statement, as he had confessed his participation in the offence under the threat of a co-accused and not of his own---Except said exculpatory statement of co-accused, no other evidence was on the record against the accused---Question of guilt of accused was a matter of further inquiry, and his role of abettor; could only be determined by the Trial Court after recording of some legal evidence, if any---Ad interim pre-arrest bail granted to accused, was confirmed, in circumstances.

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

----S. 498---Pre-arrest bail---Scope and grant of---Grant of pre-arrest bail no doubt, was an extraordinary relief, and in ordinary circumstances could not be granted in routine, but for sending a person behind the bars, there must be some legal/tangible evidence with the prosecution to establish at least a prima facie case against him---In the absence of any such evidence, sending accused behind the bars was altogether unjustified, especially when no question of any recovery was involved against accused.

Nasir-ud-Din Khan Nayyer for Petitioner.

Mirza Abdullah Baig, Standing Counsel for Federation of Pakistan along with Muhammad Aftab Butt, Assistant Director, FIA/CBC, Lahore with record.

Adnan Shuja Butt for the Complainant-Bank.

ORDER

Through this petition, petitioner Umar Khubaib seeks pre-arrest bail in case FIR No.110/2013 dated 10.05.2013, registered at Police Station FIA/CCC, Lahore, in respect of offences under sections 409, 420, 468, 471, 477-A, 34, P.P.C. read with section 5(2) of Prevention of Corruption Act, 1947.

Allegation against the petitioner is that he along with his co-accused has committed forgery and fraud by dishonestly and deceitfully withdrawing an amount of Rs.23,00,000/- from the complainant-bank.

2. Heard. Record perused.

3. At the very outset, learned Law Officer has contended that section 498, Cr.P.C. does not apply in the cases falling under the Offences in Respect of Banks (Special Courts) Ordinance, 1984 and when there is a bar for a specific relief that cannot be granted by invoking Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 because the question of bail is always a question of analyzing the facts of a specific case that exercise is not permissible under the writ jurisdiction.

4. On the other hands learned counsel for the petitioner has contended that earlier the petitioner had filed Crl. Misc. No.14668-B of 2014 for the same relief, but the same was withdrawn on the objection raised by the learned Law Officer to avail the remedy through writ petition. However, the learned counsel placing reliance on the cases of Khan Asfandyar Wali and others v. Federation of Pakistan through Cabinet Division, Islamabad and others (PLD 2001 SC 607) and Chairman, National Accountability Bureau, Islamabad and another v. Asif Baig Muhammad and others (2004 SCMR 91) has stated that in the absence of any express provision for pre-arrest bail in such like cases the bail can also be granted under Article 199, of the Constitution of Islamic Republic of Pakistan, 1973.

5. First, we shall discuss the scope of pre-arrest bail and application of section 498, Cr.P.C. in the cases falling under the relevant special law and for ready reference, sections

5(6) and 10 of the Offences in Respect of Banks (Special Courts) Ordinance, 1984 are reproduced below:-

> **Section 5. Procedure of a Special Court.**
>
> (6) An accused person shall not be released on bail by a Special Court or by any other Court, if there appear reasonable grounds for believing that he has been guilty of a scheduled offence; nor shall an accused person be so released unless the prosecution has been given notice to show cause why he should not be so released.
>
> **Section 10. Appeals from sentences passed by Special Court, etc.**
>
> (1) A person sentenced by a Special Court shall have a right of appeal to the High Court within whose jurisdiction the sentence has been passed, but save as aforesaid and notwithstanding the provisions of the Code or of any other law for the time being in force or of anything having the force of law by whatsoever authority made or done, no Court shall have the authority to revise such sentence, or, to transfer any case from a Special Court or to make any order under section 426 or section 491 or section 498 of the Code, or have any jurisdiction of any kind in respect of any proceedings of a Special Court.
>
> (2) .....
> (3) .....

The question regarding the scope of section 498, Cr.P.C. came up for hearing before a learned Division Bench of this Court in the case of Abdul Majid v. The Judge, Special Court (Offences in Banks), Lahore and another (1985 PCr.LJ 890) and it was held that power to grant pre-arrest bail vests with the Special Court as well as with the High Court. Relevant portion of the order is reproduced below:-

> "The Special Court constituted under the Ordinance exercises all the powers conferred by the Code on a Court of Session exercising original jurisdiction including powers under section 498, Cr.P.C. To say, that Special Court has no jurisdiction to grant bail before arrest is against the provisions of section 6(1) of the Ordinance. The Special Court has the power to allow bail before arrest in the scheduled offence under the Ordinance."

The same question was duly answered in the case of Muhammad Moosa v. The State (1986 PCr.LJ 578) wherein the Hon'ble Division Bench has concluded as under:

> "The High Court has inherent powers under section 498 to admit a person to bail keeping in view the merits of the case. Sections 497 and 498 have not been excluded in subsection (6) of section 5. Section 10 of the Ordinance would attract after the conviction is recorded. During the pendency of the trial the High Court can exercise power under section 498. There is no specific bar of admitting an accused facing trial before a Special Court to bail as laid down in section 10 of the Ordinance."

The Hon'ble Supreme Court of Pakistan in the case of Allied Bank of Pakistan Ltd. v. Khalid Farooq (1991 SCMR 599) while dealing with the same question has observed as under:-

> "With regard to the question of ouster of power, it is a recognized principle of law that a claim in respect of the ouster of power of the High Court in respect of any matter or subject available to it under the Codes of Civil or Criminal Procedure cannot be lightly accepted, unless there is a clear, definite and positive provision ousting the jurisdiction. Express words or clear intendment or necessary implication are required to take away the jurisdiction of a High Court or any superior Court. In Zahoor Elahi v. The State (PLD 1977 SC 273), this Court has held that it is a well-settled principle relating to the construction of statutes that the exclusion of jurisdiction of superior Courts is not to be readily inferred, that there is a strong leaning against any such exclusion, that this rule is deep seated and if it is to be overturned, it must ordinarily be done by a clear, definite or positive provision, not left to mere implication. In this case the Supreme Court was considering the effect of section 13(1) of the Defence of Pakistan Ordinance of 1971, and rule 210 of the Rules framed thereunder and held that the High Court's jurisdiction to admit to bail persons under section 498 of the Code was not ousted. There are other cases as well, which need not to be referred; it being sufficient to state the principle.
>
> .....
> .....
>
> It is, therefore, clear that section 5(6) of the Ordinance does not completely oust the applicability of section 497 of the Code in respect of bails and though the rule of subsection (1) of section 497 with a slight change and the exception to the said rule as contained in the second proviso of the same subsection have been introduced in subsection (6) of section 5 of the Ordinance, which is couched in negative language, no express or implied ouster of the remaining provisions of section 497 of the Code can be spelt out from subsection (6) of section 5 of the Ordinance."

Keeping in view section 5(6) read with section 10 of the Ordinance and the case law referred above, we are of the considered view that there is no bar to file a petition for pre-arrest bail under section 498, Cr.P.C. prior to conviction of an accused under the Special Law i.e. Offences in Respect of Banks (Special Courts), Ordinance, 1984. Therefore, this writ petition filed by the petitioner is misconceived; however, in the interest of justice, the same is converted into a petition filed under section 498, Cr.P.C. Office is directed to assign a number of criminal miscellaneous to this petition after observing usual formalities in this regard.

6. As per contents of the FIR, there is direct allegation that co-accused of the petitioner namely Khurram Raza has fraudulently opened a fake bank account in the name of Muhammad Tahir Javed. Petitioner Umar Khubaib is not nominated in the FIR and he has been implicated in this case on the statement of his co-accused Khurram Raza made before the learned Area Magistrate under section 164, Cr.P.C. wherein there is no allegation against

the petitioner that either he opened the alleged fake account or withdrew any amount from the same rather the only role assigned to him is of an abettor. It is worth mentioning that statement of Khurram Raza prima facie is an exculpatory statement as he has confessed his participation in the offence under the threat of his co-accused and not of his own. Learned Law Officer and the learned counsel for the complainant-bank frankly concede that except the exculpatory statement of co-accused Khurram Raza there is no other evidence on the record against the petitioner. In the peculiar circumstances of this case, question of guilt of the petitioner is a matter of further inquiry and his role of abettor, if any, can only be determined by the learned trial court after recording of some legal evidence, if any comes on record against the petitioner.

7. No doubt grant of pre-arrest bail is an extra-ordinary relief and in ordinary circumstances cannot be granted in routine, but at the same time it is well settled principal of criminal jurisprudence that for sending a person behind the bars there must be some legal/tangible evidence with the prosecution to establish at least a prima facie case against him. In the absence of any such evidence, as in this case, sending the petitioner behind the bars is altogether unjustified especially when no question of any recovery is involved against him.

8. This petition is, therefore, accepted and the ad interim pre-arrest bail already granted to the petitioner by this Court vide order dated 23.12.2014 is hereby confirmed subject to his furnishing fresh bail bonds in the sum of Rs.46,00,000/- (Rupees forty six hundred thousand only) with two sureties each in the like amount to the satisfaction of the learned trial court, as required under section 5(7) of the Offences in Respect of Banks (Special Courts) Ordinance (IX of 1984).

9. It is, however, clarified that the observations made herein above are just tentative in nature and strictly confined to the disposal of this bail petition.

HBT/U-5/L Bail confirmed.

2016 P Cr. L J 697
[Lahore]
Before Muhammad Anwaarul Haq and Arshad Mahmood Tabassum, JJ
ADEEL HAIDER---Petitioner
Versus
GOVERNMENT OF THE PUNJAB through Secretary Home Department and 4 others---Respondents

Writ Petition No. 13843 of 2015, decided on 7th July, 2015.

Anti-Terrorism Act (XXVII of 1997)---

----S. 11-EEEE---Detention---Member of proscribed organization---Petitioner was taken into custody and detained by authorities under S. 11-EEEE of Anti-Terrorism Act, 1997 as he was member of a proscribed organization---Validity---Conclusions drawn by inquiry

officer were based on intelligence reports---No material was available to hold that such conclusions were irrelevant or without any substance---Petitioner regularly attended secret gatherings/meetings of proscribed organization and propagated nefarious designs of the organization---High Court declined to intervene in the detention order passed by authorities---Constitutional Petition was dismissed in circumstances.

Syed Iqbal Hussain Shah Gillani for Petitioner.
Sittar Sahil, Assistant Advocate-General for the State.

ORDER

In exercise of his powers conferred upon him under section 11-EEEE(1) of the Anti-Terrorism Act, 1997 (hereinafter referred to as the Act), read with Notification No.SO/(Judl-IV)7-1/2014, dated 15.01.2015, issued by Govt. of the Punjab, Home Department, Lahore, the District Coordination Officer, Bhakkar (respondent No.2) vide order dated 28.04.2015, has ordered detention of the petitioner for a period of three months in the custody of Superintendent Central Jail, Mianwali. Being aggrieved of the said order the petitioner has preferred the instant petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973.

2. Learned counsel for the petitioner has maintained that the petitioner has no concern or connection with any proscribed organization; that the allegation against the petitioner is that he is an active member of the proscribed organizations Tahreek-e-Jaafria Pakistan (TJP) and Majlis-i-Wahdatul Muslimeen (MWM); that the allegation is false and the fact of the matter is that the above named organizations are also not proscribed organisations; that in the criminal case referred to in the impugned order (FIR No.110 of 2014), the petitioner has already been released on bail by the Court of competent jurisdiction while the other criminal case registered against the petitioner vide FIR No.78, dated 25.03.2014, under sections 406/420, P.P.C. at Police Station City Darya Khan, District Bhakkar, is of ordinary nature, having no nexus with the terrorism. He has further maintained that in fact the petitioner has been detained on the behest of his opponents, who joined hands with a local DSP. Learned counsel for the petitioner has, therefore prayed for declaring the impugned order as illegal, ultra vires and without jurisdiction.

3. Conversely, learned AAG has fully supported the impugned order by maintaining that the impugned detention order has been passed on the basis of concrete information provided by the intelligence agencies, who have no ill-will or animosity against the petitioner.

4. Heard. Record perused.

5. As regards the issuance of impugned order, the District Coordination Officer, Bhakkar (respondent No.2), is competent under the provision of section 11-EEEE(1) of the Act, read with Notification No.SO/(Judl-IV)7-1/2014, dated 15.01.2015, issued by Govt. of the Punjab, Home Department, Lahore, to issue the same, therefore, it cannot be termed as illegal, ultra vires and without jurisdiction. However, the law requires that such an order can

be passed in respect of a person against whom a reasonable compliant has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned, in activities enumerated in subsection (1) of section 11-EEEE of the Act.

6. In the instant case in an inquiry conducted by the SP/Regional Officer, Counter Terrorism Department, Sargodha, Region Sargodha, it has been found that:-

> "I. Adeel Haider Shah belongs to banned organization TJP/MWM and regularly attends the secret gatherings/meetings of proscribed organization and propagates the nefarious designs of proscribed organization (TJP/MWM).
>
> II. The said person is a target killer. His activities are prejudicial to the public peace and harmony. He organizes the fund raising campaign of proscribed organization (TJP/MWM). He glorifies terrorist and criticizes the state of Pakistan. In this way he is helping and facilitating the terrorists.
>
> III. On 16-05-2014 at evening the foresaid Adeel Haider along with four co accused killed Rana Tassawar a shop keeper in city Bhakkar on which FIR No.110/14 dated 16-05-2014 under section 302/34, 7, A.T.A. PS City Bhakkar. The plan of murder was made at Adeel Haider's home. The case is under trial.
>
> IV. On 23.8.13 Adeel Haider Shah played a vital role in kotla jam incident in which 6 persons of banned SSP were killed and 1 injured. FIR No.319 dated 23.8.2013 under sections 302/324/148/149/435, P.P.C., 7, 9, A.T.A. PS Sadar Bhakkar was registered but unfortunately Adeel Haider Shah cannot be nominated in the FIR.
>
> V. He did not pay any regard to the lawful directions issued by the government from time to time and continued his anti-religious sects activities a routine. He was repeatedly directed by the Government officials to mend his ways and avoid spreading stricture against any sect but to no avail. Keeping in view the present wave of terror and law and order situation prevailing in the country, activities/engagements of Mr. Adeel Haider Shah are harmful and will create alarming situation. The same are prejudicial to public safety and maintenance or public order. The reports received from the law enforcing agencies also depict that detention under section 11-EEEE of A.T.A., 1997 of the foresaid of Mr. Adeel Haider Shah is need of the day and justified as well.
>
> VI. The local police has also recommended further detention of Mr. Adeel Haider Shah in order to maintain law and order situation as well as safety of public in the area."

7. The above conclusions drawn by the inquiry officer are based on the intelligence reports and no material is available with this Court to hold that such conclusions are irrelevant or without any substance.

8. In the comments furnished by the District Coordination Officer, Bhakkar (respondent No.2), it has been maintained that as per findings in the meeting of the District Intelligence Coordination Committee, Bhakkar dated 21.04.2015, the petitioner regularly attends the secrets gatherings/meetings of proscribed organizations and propagates the nefarious designs of the said organization. The learned AAG has also pointed out that Tehreek-e-Jaafria Pakistan (TJP), is a proscribed organization.

9. In the above circumstances, no ground is made out to interfere with the impugned order. This petition, therefore, has no merit, which fails and the same is hereby dismissed.

MH/A-114/L Petition dismissed.

2016 P Cr. L J 1054
[Lahore]
Before Muhammad Anwaarul Haq, J
Mian UMER IKRAM-UL-HAQ---Petitioner
Versus
ADDITIONAL DISTRICT AND SESSIONS JUDGE, LAHORE and 15 others---Respondents

Writ Petition No.35779 of 2015, decided on 4th February, 2016.

Criminal Procedure Code (V of 1898)---

----Ss. 22-A, 22-B & 200---Dismissal of application for registration of criminal case by Ex-Officio Justice of Peace---Private complaint---Petitioner was aggrieved of the order passed by Ex-Officio Justice of Peace dismissing application of petitioner for registration of criminal case---Validity---Private complaint filed by petitioner was dismissed for want of prosecution after dismissal of application under Ss. 22-A & 22-B, Cr.P.C.---Petitioner had already availed alternate remedy by filing private complaint regarding the similar occurrence, therefore, he could not invoke jurisdiction of Ex-Officio Justice of Peace---High Court declined to interfere in the order passed by Ex-Officio Justice of Peace---Constitutional petition was dismissed in circumstances.

Ch. Jawad Zafar for Petitioner.
Sittar Sahil, Assistant Advocate-General with Amjad Ali, S.I.
Ch. Shaigan Ijaz Chadhar for Respondent No.3.

ORDER

MUHAMMAD ANWAARUL HAQ, J.---Through this writ petition, petitioner Mian Umer Ikram-Ul-Haq seeks setting aside of an order dated 03.06.2014 passed by the learned Ex-officio Justice of Peace, Lahore whereby application of the petitioner under sections 22-A/22-B, Cr.P.C. for registration of a criminal case against the proposed accused was dismissed.

2. Learned counsel for the petitioner contends that the impugned order is illegal and has been passed, in a hasty manner without adverting to the actual facts of the case that the contents of application moved before the learned Ex-officio Justice of Peace did disclose commission of a cognizable offence but the application has been dismissed merely on the ground of pendency of a private complaint regarding the same facts, however, the said private complaint has already been dismissed for want of prosecution; that even otherwise pendency of a private complaint regarding the similar occurrence does not create any bar upon registration of a criminal case, therefore, by setting aside the impugned order an appropriate direction may be issued to the SHO Police Station concerned.

3. On the other hand, learned law officer assisted by learned counsel for respondent No.3 contends that the alleged occurrence mentioned in the application of the petitioner took place on 11.02.2014 whereas application under sections 22-A/22-B, Cr.P.C. was filed on 19.04.2014, however, private complaint regarding the same occurrence was filed prior to that i.e. 09.04.2014; that on the final date of hearing of application under sections 22-A/22-B, Cr.P.C. i.e. 03.06.2014 private complaint filed by the petitioner was fixed for arguments after recording of cursory evidence, therefore, learned Ex-officio Justice of Peace has rightly dismissed the application of the petitioner.

4. Heard. Record perused.

5. Admittedly, prior to filing of application under sections 22-A/22-B, Cr.P.C., petitioner had already moved a private complaint regarding the same occurrence on 09.04.2014 wherein cursory evidence had been recorded and it was fixed for arguments when application was dismissed vide the impugned order with the following observation:-

> "4. Perusal of record reveals that the petitioner has already invoked jurisdiction of judicial forum in which the matter is under inquiry. When the matter is already pending before the competent court of jurisdiction, no direction or order on this petition can be passed."

Learned counsel for respondent No.3 has placed on record certified copies of private complaint filed by the petitioner and the order sheet of the learned trial that reflects that private complaint has already been dismissed for want of prosecution on 02.07.2014 after dismissal of application under sections 22-A/22-B, Cr.P.C. on 03.06.2.014. As the petitioner has already availed the alternate remedy by filing the private complaint regarding the similar occurrence, therefore, he cannot invoke the jurisdiction of learned Ex officio Justice of Peace. I am of the considered view that impugned order is quite in accordance with law and does not call for any interference of this Court. This writ petition being devoid of any force is accordingly dismissed. Petitioner, however, can proceed with his private complaint, if permissible under the law.

MH/U-1/L Petition dismissed.

2016 P Cr. L J 1102
[Lahore]
Before Muhammad Anwaarul Haq, J
MUHAMMAD ZULFIQAR ALI---Petitioner
Versus
SHO POLICE STATION GHULAM MUHAMMAD ABAD FAISALABAD and 2 others---Respondents

Writ Petition No. 31122 of 2012, decided on 22nd January, 2016.

Criminal Procedure Code (V of 1898)---

----Ss. 22-A & 22-B----Penal Code (XLV of 1860), S. 489-F---Specific Relief Act (I of 1877), S. 39---Registration of FIR---Ex-officio Justice of Peace directed the police to register case on basis of dishonored cheque against the accused---Civil court, while decreeing the suit for cancellation of the cheque, had already declared the cheque having been issued without consideration, and said decree, having not been challenged, still held the field---No further action was required, in circumstances---High Court set aside the impugned order regarding registration of FIR--- Constitutional petition was allowed in circumstances.

Muhammad Ajmal Adil for Petitioner.

Naveed Saeed Khan, Additional Advocate-General with Naseer S.I. Police Station Ghulam Muhammad Abad, District Faisalabad.

Nemo for Respondent No.2.

ORDER

MUHAMMAD ANWAARUL HAQ, J.---Through this petition, Muhammad Zulfiqar Ali petitioner assails the order-dated 14.12.2012, passed by learned Ex-Officio Justice of Peace, Faisalabad, whereby he has directed the S.H.O. police station concerned to record version of respondent No. 2 and to proceed further in accordance with law.

2. At the very outset, learned counsel for the petitioner placing on record certified copies of civil suit filed by the petitioner for cancellation of documents and of judgment passed by learned Civil Judge 1st Class, Faisalabad, contends that the civil suit has been decreed in favour of the petitioner to the extent that the cheque mentioned in the application moved by respondent No.2 under sections 22-A and 22-B, Cr.P.C. has been declared to be issued without consideration, hence, the impugned order passed by the learned Ex-Officio Justice of Peace, is not sustainable in the eyes of the law.

3. Despite repeated calls, no one has turned up on behalf of respondent No.2/Muhammad Adnan. Learned Law Officer after consulting the record informs that police official present in Court has properly communicated regarding fixation of this writ petition to the respondent.

4. Learned Addl. Advocate-General referring certified copies of civil suit and judgment passed by learned Civil Court in favour of the petitioner, is of the view that the impugned order is not sustainable.

5. Arguments heard. Record perused.

6. I have examined the judgment dated 05.07.2014, passed by learned Civil Judge Ist Class, Faisalabad wherein he has mentioned the details of the disputed cheque in Paragraph No.1 of the schedule and has decreed the civil suit of the petitioner for cancellation of documents in his favour to the extent that the disputed cheque (mentioned in the application moved by respondent No.2 under sections 22-A and 22-B, Cr.P.C.), has been declared to be issued without consideration. Learned, counsel for the petitioner states at bar that the said decree in favour of the petitioner still holds the field and has not been challenged by any one. In the peculiar circumstances, no further action is required. Therefore, by allowing the instant writ petition, impugned order of the learned Additional Sessions Judge, Faisalabad, passed in his capacity as an Ex-Officio Justice of Peace, dated 14.12.2012, is set aside.

SL/M-84/L Petition allowed.

2016 P Cr. L J 1928
[Lahore]
Before Muhammad Anwaarul Haq, J
NISAR AHMAD and others---Appellants
Versus
The STATE and others---Respondents

Criminal Appeals Nos.418, 143 and Criminal Revision No.366 of 2013, heard on 18th May, 2016.

(a) Penal Code (XLV of 1860)---
----S. 302---Qanun-e-Shahadat (10 of 1984), Art. 129(g)---Qatl-i-amd---Adverse presumption---Complainant intentionally did not report the matter to police when his wife (injured and died later on) was in a position to make her statement before police---Effect---Such statement of injured/deceased, even if recorded, during her lifetime at police station, at District Headquarter Hospital or before police official who accompanied her to the hospital, was not brought on record by prosecution as the same was unfavourable to prosecution case---Presumption under Art. 129(g) of Qanun-e-Shahadat, 1984, was inferred in circumstances.

(b) Penal Code (XLV of 1860)---
----S. 302---Qanun-e-Shahadat (10 of 1984), Art. 129(g)---Qatl-i-amd---Adverse presumption---Dishonest narration of facts---Both parties, complainant and accused did not narrate occurrence in honest manner and maliciously tried to twist facts in their own favour---Effect---Occurrence was admitted by accused to the extent of injuries to the deceased while bashing with tractor, with a variation that he was not driving the tractor at relevant time---Ocular account was not believed even by Trial Court in its totality---High Court was

left with no other option but to sift grain from the chaff to draw its own independent conclusion for just decision of case.

Syed Ali Bepari v. Nibran Mollah and others PLD 1962 SC 502 fol.

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

----Ss. 302(b) & 315---Criminal Procedure Code (V of 1898), S. 200---Qatl-i-amd and qatl shibh-i-amd---Appreciation of evidence---Sentence, reduction in---Private complaint was filed wherein complainant alleged that accused had murdered his wife by running tractor over her---Trial Court convicted the accused for qatl-i-amd and sentenced him to imprisonment for life---Quarrel took place between accused and complainant and in the same sequel deceased received injuries on her person being struck with tractor driven by accused---Occurrence was not a case of driving over the tractor upon deceased as narrated by complainant and prosecution witness---Conviction of accused under S. 302(b), P.P.C. was not a legal conviction as element of intention to cause death of wife of complainant was totally missing---High Court set aside conviction from qatl-i-amd under S. 302(b), P.P.C. to qalt shibh-i-amd under S. 315, P.P.C. and sentence was reduced to imprisonment for seven years with payment of Diyat amount to legal heirs of deceased---Appeal was allowed accordingly.

Humayoun Rashid for Appellant No.1 (in Criminal Appeal No. 418 of 2013).

Humayoun Rashid for Appellant No.2 (in Criminal Appeal No. 143 of 2013).

Humayoun Rashid for Respondent No.1 (in Criminal Appeal No. 366 of 2013).

Chaudhry Muhammad Mustafa, Deputy Prosecutor-General for the State.

Ch. Rab Nawaz for the Complainant.

Date of hearing: 18th May, 2016.

JUDGMENT

MUHAMMAD ANWAARUL HAQ, J.---Nisar Ahmed and Wajahat Ahmad appellants along with their co-accused Muhammad Akram, Abdul Jabbar and Naseer Ahmad, were tried in a complaint case titled Sajwar Ahmed v. Nisar Ahmed etc. pertaining to case FIR No.439 of 2010, dated 27.10.2010 registered at Police Station Gogera, District Okara in respect of offences under sections 302, 337-A(iii), 337-L(2)/34, P.P.C. After conclusion of trial, the learned trial Court vide judgment-dated 13.02.2013 has acquitted co¬-accused Naseer Ahmed and convicted and sentenced the appellants and their co-accused as under:

Nisar Ahmed

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

Imprisonment for Life as Taz'ir for committing Qatl-i-amd of Mst. Suraya Bibi with compensation of Rs.4,00,000/- to be paid to the legal heirs of the deceased under section 544-A, Cr.P.C. or in default thereof to undergo Six month's Simple Imprisonment.

Abdul Jabbar

Under section 337-A(iii), P.P.C.

Two Years' Rigorous Imprisonment as Taz'ir. He was also ordered to pay 10% of Diyat amounting to Rs.1,46,516/- for causing injury with a Sota on the nose of the complainant.

Under section 337-L(2), P.P.C.

Two Years' Rigorous Imprisonment with Daman of Rs.10,000/- for causing injury with a Sota on the right leg of the complainant Sajwar Ahmed.

His punishments were ordered to run concurrently.

Muhammad Akram and Wajahat Ahmed

Under section 337-L(2), P.P.C.

Two Years' Rigorous imprisonment each with Daman of Rs.25,000/- each to be paid to injured/complainant Sajwar Ahmed, for causing injury with Sotas on the ribs of the complainant Sajwar Ahmed.

Benefit of section 382-B, Cr.P.C. was extended in favour of the appellants and his co-accused.

2. Feeling aggrieved by the impugned-judgment, the appellant Nisar Ahmed has challenged his conviction and sentence through Criminal Appeal No. 418 of 2013, the appellant Wajahat Ahmad has challenged his conviction and sentence through Criminal Appeal No.143 of 2013 whereas complainant Sajwar Ahmed has filed Criminal Revision No 366 of 2013 against the appellant Nisar Ahmed seeking suitable enhancement in his sentence as well as in the compensation amount. All the interconnected matters are being disposed of together by this single judgment.

It is pertinent to mention that earlier complainant had filed P.S.L.A. No.54 of 2013 against acquittal of co-accused of the appellant namely Muhammad Akram, Abdul Jabbar, Wajahat Ahmad and Naseer Ahmad from the charges under sections 302/109/148/149, P.P.C. but that was dismissed having been withdrawn on 17.03.2016 whereas Crl. Appeal No. 524 of 2013, filed by two co-convicts of the appellant namely Akram and Abdul Jabbar, has also been dismissed having been withdrawn by this Court, today.

3. Initially, complainant Sajwar Ahmed got registered case FIR No.439/2010 dated 27.10.2010 at Police Station Gogera, District Okara in respect of offences under sections 302, 337-A(iii), 337-L(2)/34, P.P.C. on the basis of written complaint (Ex.PA) and being dissatisfied with the investigation, he preferred a private complaint,. (Ex.PB) alleging therein that one year prior to the occurrence, he obtained the agricultural land of one Mahmood Alam on lease in Moza Bhojjan, out of that, he prepared six kanals of land for cultivation and left remaining six kanals pending under the process of cultivation. On 26.10.2010 at about 01:30 p.m. the complainant and his wife Mst. Surayya Bibi were present in the above said agricultural land where accused Nisar Ahmed, Wajahat Ahmad, Naseer Ahmad, Abdul Jabbar and Muhammad Akram all armed with sotas came there on a tractor FIAT having no registration number and started ploughing the crop; the complainant and his wife restrained the accused in result of that, accused Abdul Jabbar gave sota blow, that landed on the right leg of the complainant, accused Muhammad Akram gave sota blow that landed on his ribs in result of that he fell on the ground and accused Abdul Jabbar gave another sota blow on his nose, Wajahat accused also gave sota blow, that landed on his ribs, thereafter, accused Abdul Jabbar, Muhammad Akram and Wajahat gave sota blows on different parts of his body. In the meantime when Mst. Suraya Bibi wife of the complainant

tried to rescue the complainant and restrained the accused, Abdul Jabbar, Wajahat and Muhammad Akram accused put her in front of the tractor by lifting from her arms and raised lalkara to the appellant Nisar Ahmed to run over the tractor upon her and then appellant Nisar Ahmad ran over the tractor upon Mst. Suraya Bibi in result of that her ribs were fractured, she became seriously injured and her chest was also damaged. Upon hue and cry, two PWs Fakhar Hayat and Khalid Shah reached the spot witnessed the occurrence and rescued the complainant and his wife from the clutches of accused, thereafter, the accused persons while brandishing their sotas left the spot. The PWs took the complainant and his wife Mst. Suraya Bibi in injured condition to R.H.C. Gogera from where, they were referred to D.H.Q. Hospital, Okara, where their medical examination was done, on the next day, the doctor referred Mst. Suraya Bibi to Jinnah Hospital, Lahore but she succumbed to the injures on the way to Lahore.

It has also been alleged in the complaint that the accused had committed the occurrence on the instigation/abetment of accused Naseer Ahmad and in this regard complainant was informed by two PWs Noor Hassan and Safdar Mehmood that at about 10:00 a.m. the accused Naseer Ahmad had instigated his co-accused Nisar Ahmad, Wajahat Ahmad, Abdul Jabbar and Muhammad Akram to occupy the above said leased land of the complainant and his wife, damage their crop and if they create hurdle, commit their murder.

Motive behind the occurrence as per complaint was that accused persons wanted to occupy the leased land in possession of the complainant.

4. On 27.10.2010 Jafar Hussain S.I./Investigating Officer (CW-8) visited the place of occurrence, prepared rough site plan (Ex.CW-8/B), and reached to D.H.Q. Hospital, Okara where he took into possession the dead body of the deceased Mst. Suraya Bibi vide recovery memo (Ex.CW-8/C), prepared inquest report (Ex.PG) and application for post-mortem examination (Ex.PF) and sent the dead body of the deceased through Hashim Ali 152/C along with police papers for autopsy. On 28.10.2010, Hashim Ali constable 152/C handed over to him the last worn clothes of the deceased i.e. Kameez (P-2), Shalwar (P-3), Bunyan (P-4), that were taken into possession vide recovery memo (Ex.CW-1/A), then, he recorded statements of the witnesses under section 161, Cr.P.C. and started search of the accused. On 03.11.2010, he arrested Nisar Ahmed accused, who while in police custody led to the recovery of tractor Fiat (P-1) from his Haveli/cattle shed, then, on 23.11.2010 he arrested the accused Abdul Jabbar and Muhammad Akram and on 25.11.2010 accused Abdul Jabbar led to the recovery of sota (P-5) whereas accused Muhammad Akram led to the recovery of sota (P-6). During the investigation, accused Nisar Ahmad, Muhammad Akram and Naseer Ahmed were found involved in the occurrence whereas the accused Wajahat Ahmad was declared innocent in the case.

On 17.02.2011, investigation of the case was handed over to Abdul Basit Inspector (CW-9) and after open and secret investigation he concluded that the accused were rightly challaned by the local police.

On 20.05.2011, Ghias-ud-Din D.S.P. Investigation Branch (CW-7) was entrusted investigation of this case, who concluded that at the time of occurrence, accused Munir Ahmed (proclaimed offender) was driving the tractor and he is involved in the occurrence.

On 19.11.2011, Muhammad Zubair S.I. (CW-4) also partly investigated the case, who also found the accused Munir Ahmad (proclaimed offender) involved in the occurrence regarding

murder of the deceased Mst. Suraya Bibi and on his application (Ex.CW-4/B), the learned Area Magistrate issued proclamation against said accused Munir Ahmad (P.O.)

5. After completion of investigation, challan was submitted before, the learned trial court and the appellant and his co-accused Muhammad Akram, Abdul Jabbar, Wajahat Ahmad and Naseer Ahmad were formally charge sheeted on 30.01.2012, to which they pleaded not guilty and claimed trial. To substantiate the charges, prosecution had examined seven witnesses whereas twelve witnesses were examined as court witnesses to prove the charge against the accused. Ocular account was furnished by Sajwar Ahmad complainant-injured (PW-1) and Khalid Abbas (PW-2), Dr. Nosheen (PW-3), Dr. Akbar Ali (PW-4) and Dr. Jawaria Tariq (PW-5) provided medical evidence, Noor Hassan (PW-6) and Safdar Mahmood (PW-7) provided evidence of abetment whereas Muhammad Zubair S.I. (CW-4), Ghias-ud-Din D.S.P. (CW-7), Jafar Hussain S.I. (CW-8) and Abdul Basit Inspector (CW-9) had conducted investigation of this case.

6. Initially, Dr. Nosheen (PW-3) conducted medical examination of Mst. Suraya Bibi and found the following injuries on her body:--

(i) Complain of pain on front of both sides of upper chest. On examination, tenderness positive. Advised X-ray Chest P.A. view.

(ii) Complain of pain on left side of upper abdomen. Advised ultrasound of abdomen.

In her opinion based upon X-Ray report, the fracture of ribs Nos.2, 3, 4 and 5 seen on left side of chest and there was fracture of left clavicle as well. At two sides soft tissue emphysema seen on left side of chest. Injury No.1 was declared as Hashma, this injury was consistent with road traffic accident, the injured was admitted in the emergency in D.H.Q. Hospital, Okara and being in serious condition, she was referred to Jinnah Hospital, Lahore.

Probable time elapsed between injuries and medical examination was three to five hours.

Dr. Jawairia Tariq (PW-5) conducted post-mortem examination on the dead body of Mst. Suraya Bibi (deceased) and did not observe any external injury on the dead body. On dissection she observed "left clavicle was fractured, left thorasic cavity was full of blood and ribs on the left side were anteriority fractured. The left lung was ruptured on its upper part. The stomach contained three ounces of juices. The bladder was empty. All the other organs of the body were healthy"

In her opinion, an extensive injury to the left lung being vital organ, resulted into irreversible shock and respiratory failure and this injury was sufficient to cause death in ordinary course of nature. The injury was ante- mortem and consistent with run over by heavy vehicle.

The probable duration between injuries and death was approximately 13-1/2 hours whereas time elapsed between death and post-mortem was 11 hours.

On 26.10.2010 Dr. Akbar Ali (PW-4) conducted medical examination of Sajwar Ahmed complainant-injured and observed the following injuries:-

i) Contused swelling of 4 cm x 2 cm bridge of nose. Tenderness present. Clotted blood present in both nostrils. X-ray Nose AP-L.

ii) Contusion 4 cm 2 cm on outer part of left lower chest.

iii) Contused swelling 3 cm x 2 cm, on front of right knee joint.

In the opinion of the doctor, as per X-Ray report, fracture nasal bone seen, so, Injury No.1 was declared as Shajja-¬e-Hashimah. Injuries Nos. 2 and 3 were declared falling under section 337-L(2), P.P.C.

Probable duration of injuries was within 4-5 hours.

7. Appellants and their co-accused when examined under section 342, Cr.P.C. they denied the allegations and professed their innocence. While answering to question, "Why this case against you and why the PWs have deposed against you?" appellants Nisar Ahmed and Wajahat Ahmad replied as under:-

"It is a false case, Sajwar Ahmed complainant is husband of the deceased whereas Khalid Abbas Shah PW is a fast friend of our opponent Mahmood Alam Khan. He has made false statement to favour the complainant party. In fact he was not present at the place of occurrence on the fateful day. He is resident of Pindi Sheikh Mosa District Faisalabad which is at a distance of ten KM from the place of occurrence on the other side of river ravi. The occurrence did riot take place in the manner as stated by the complainant party."

Answering to another question, "Have you anything else to say?" appellant Nisar Ahmed replied as under:-

"I am innocent. In fact the land i.e. Khasra No. 11/17 where the occurrence took place belongs to my father. The land comprising Khasra 11/17 was under our cultivation since before the present occurrence and we had sown charri crop in Khasra No. 11/17 before the occurrence and thereafter we had sown wheat crop in the said Khasra number and accordingly the Khasra gardawri was recorded in the name of my father Naseer Ahmed accused according to copy of Khasra gardawri Ex.CW-12/C. Mahmood Alam aforesaid, our opponent wanted to forcibly occupy our land and as such he managed Muhammad Sajwar complainant to create mischief in this connection. On the day of occurrence at the relevant time. Khasra No.11/17 in the area of village Bhojian was under our cultivation possession. Our servant Munir Ahmed Sheikh was in fact driving the tractor and he was ploughing our land in Khasra No. 11/17 where Sajwar Ahmed complainant his wife Suraya Bibi deceased and others arrived there in order to forcibly occupy the said land which was in our possession since long. They assaulted Munir Ahmed Sheikh our driver and caused injuries to him who in order to save, his life speed away his tractor and in this manner Mst. Suraya Bibi sustained the injuries. I was not present at the time of occurrence at the spot and I was not driving tractor at the relevant time. Munir Ahmed Sheikh the driver of the tractor got himself medically examined with the order of the Illaqa Magistrate. He also got recorded his statement under section 164, Cr.P.C. before the Judicial Magistrate Okara wherein he frankly admitted that he was in fact driving the tractor at the relevant time. Munir Ahmed driver was found involved in this case and the police wanted to arrest him in this case but he intentionally absconded and was thereafter declared a proclaimed offender in this case. In these circumstances, it is a case of two versions."

8. The appellants and their co-accused did not make statements under section 340(2), Cr.P.C. however, the appellant Nisar Ahmad produced confessional statement of absconding

accused Munir Ahmad in his defence as Ex.DA. The learned trial Court found the appellants and their co-accused guilty and convicted and sentenced them as mentioned above.

9. Learned counsel for the appellants in support of Criminal Appeal No. 418 of 2013 filed by the appellant Nisar Ahmad contends that there is delay of about 28 hours in reporting the matter to the police even no explanation in this regard has been given by the complainant, that makes the prosecution case highly doubtful; that time of death of the deceased given by the complainant i.e. 06:15 p.m. on 27.10.2010 is not corroborating to time given by the doctor in post-mortem report that reflects time between injuries and death 13-1/2 hours meaning thereby the deceased died on 27.10.2010 around 02:00 a.m., thus, ocular account furnished by the prosecution is not supported by medical evidence; that the complainant and his PWs with mala fide intention have converted an accident into a murder case and acquittal of three co-accused of the appellant from the charge of murder, of the deceased, further strengthens the suggestion made by the defence to the PWs that it was an accident; that both the eye-witnesses i.e. Sajwar Ahmed (PW-1). and Khalid Abbas (PW-2) are interested witnesses and they cannot be believed in the absence of any corroborative evidence; that the eye-witnesses remained fail to explain their presence at the relevant time at the place of occurrence; that Dr. Nosheen (PW-3) in her cross-examination has categorically stated that the injured was in full senses when she was medically examined but even then there is no dying declaration or statement of the deceased in this regard; that an absconding co-accused of the appellant namely Munir Ahmad made judicial confession (Ex. DA) before learned Area Magistrate to the effect that at the time of occurrence he was driving the tractor. Learned counsel in the alternative contends that even if for the sake of argument it is believed that the appellant was driving the tractor even then it is a case of accident and conviction and sentence of the appellant under section 302(b), P.P.C. is not sustainable.

10. Learned Law Officer assisted by learned counsel for the complainant seriously contesting Crl. Appeal No. 418 of 20113 filed by the appellant Nisar Ahmad, contends that the appellant is specifically nominated in a promptly lodged FIR, wherein all the details are mentioned along with role of the appellant and of his co-accused; that there is sufficient evidence available on record to prove that it was the appellant Nisar Ahmad, who was driving the tractor at the relevant time and has committed murder of the deceased Mst. Suraya Bibi in the backdrop of dispute of possession over the agricultural land; that medical evidence available on record broadly supports the prosecution case; that recovery of Fiat tractor at the instance of the appellant during the investigation further strengthens the prosecution case; that both the eye-witnesses produced by the prosecution remained consistent on all material aspects of this case; that Khalid Abbas (PW-2) is an independent witness whereas complainant Sajwar Ahmed (PW-1) is an injured witness, who had received injuries during the occurrence and being husband of the deceased cannot be expected to substitute the real culprits in this case; that confessional statement of an employee of the appellant (Ex.DA) is just an attempt of the appellant to save his skin; that mere acquittal of three co-accused of the appellant from the charge under section 302, P.P.C. is not a ground to disbelieve prosecution case as a whole, hence, appellant is not entitled for any leniency.

11. I have heard learned counsel for the parties at length, have given anxious consideration to their arguments and have also scanned the record with their able assistance.

12. The prosecution case set-up in the FIR has been narrated by PW-1 Sajwar Ahmed before the trial court in the following words:-

> "On 26.10.2010 at about 1.30 p.m. I and Mst. Suraya Bibi my deceased wife were present in above said agricultural land in Moza Bhojian where accused Nisar Ahmed, Wajahit, Akram armed with sotas came there on a tractor. Nisar Ahmed accused was driving the tractor and they started ploughing berseen crop which was being sown by me. I and my wife restrained the accused persons upon which Abdul Jabbar gave sota blow which landed on my right leg. Akram accused gave sota blow landed on my ribs due to which I fell on the ground and Abdul Jabbar accused gave an other sota blow on my nose due to which my nasal bone was fractured. Wajahit accused then gave sota blow which landed on my ribs. There upon Abdul Jabbar, Akram and Wajahit gave sota blows on different parts of my body. In the meanwhile my wife Suraya Bibi deceased tried to rescue me and tried to restrain the accused persons. Upon which Abdul Jabbar Wajahit and Akram accused persons put my wife Suraya Bibi deceased in front of tractor by lifting her from her arm and exhorted Nisar Ahmed co-accused to drove away the tractor upon her. Nisar accused drove away his tractor upon Mst. Suraya Bibi deceased due to which her ribs were fractured and she became seriously injured and her chest was also damaged....."

13. Admittedly, occurrence was not reported to the police by the Complainant despite the fact that complainant and his injured wife Mst. Surayya Bibi were taken to the police station on the same day. Complainant in his cross-examination has admitted as under:-

> "Again said that I along with my injured wife visited PS. Gogera at about 1.30/2 p.m. on 26.10.2010. It is correct that I did not make any statement regarding this occurrence when I visited PS. Gogera on 26.10.2010 prior to 6.15 p.m. It is incorrect that since I had not yet built up a case and as such I did not make any statement regarding this occurrence at P.S., either at 1.30 PM or 3.PM on 26.10.2010. I did not get recorded any report at the PS. Gogera on that day."

The injured as per statement of Dr. Nosheen (PW-3) was in her full senses but strangely she did not utter even a word regarding the occurrence to the lady doctor to incorporate the same in the column of history of the occurrence. Muhammad Akram 676/14.C, who took Mst. Surayya Bibi to the lady doctor for her medical examination, has not been cited as prosecution witness. In this backdrop, I am left with no other option but to infer under Article 129(g) of the Qanun-e¬-Shahadat, 1984 that in the life time of the injured Mst. Surayya Bibi, complainant has intentionally not reported the matter to the police when his wife was validly in a position to make her statement before the police on 26.10.2010 when she was taken to Police Station Gogera immediately, after the occurrence as mentioned above. Admittedly she had not reported the manner in which she had received injuries to the lady doctor when she was medically examined on 26.10.2010, and remained admitted in District Headquarter Hospital, Okara till 27.10.2010. From the facts narrated above it appears that statement of Mst. Suraya Bibi even if was recorded during her life time at Police Station Gogera, in District Headquarter Hospital, Okara or before. Muhammad

Akram Head Constable, who was accompanying her to the hospital, the same has not been brought on record by the prosecution being unfavourable to the prosecution case.

14. Another important aspect of the prosecution case is that when quarrel took place between the accused and the complainant three accused inflicted numerous injuries with their respective weapons on the person of the complainant Sajwar Ahmad. Medico-Legal Report of Sajwar Ahmad within 4 to 5 hours of the occurrence, reflects only three contusions on his person. Evidence of Sajwar Ahmad complainant (PW-1) keeping in view his Medico-Legal Certificate (Ex.PD) is full of exaggerations and same is the position regarding evidence of Khalid Abbas (PW-2). The story as narrated by PW-1 Sajwar Ahmad also reflects that in the main quarrel target was he complainant and not his wife who when intended to rescue her husband then three co-accused of the appellant put her under the tractor and only then she had received injuries.

15. The above referred eye-witness account remained fail to get any necessary corroboration from medical evidence of Mst. Surayya Bibi, especially when Dr. Jawairia (PW-5), who conducted post-mortem examination of the deceased, did not observe any mark of injury on her dead body and in her cross-examination, she has categorically stated "it is correct that if a human body/person is run over by any heavy vehicle like tractor etc. there must be external injuries on that person" Doctor Nosheen (PW-3) who firstly conducted medical examination of Mst. Surayya Bibi, in her cross-examination has stated "The ribs in this case were fractured due to striking with any type of vehicle." This portion of medical evidence furnished by PW-3 and PW-5, is sufficient to contradict the stance taken by PW-1 and PW-2 that three accused while holding arms of the deceased Mst. Surayya Bibi threw her in front of the tractor and the same was run over by the appellant Nisar Ahmad while crushing the deceased. I have noticed that learned trial Judge has himself concluded that this part of prosecution case remained unproved. Observation of learned trial court in Paragraph No.40 of the impugned-judgment while extending mitigation to the extent of quantum of sentence, is as under:-

> "Death penalty is not being awarded to accused Nisar Ahmed because during scuffle it was very natural that when accused Nisar Ahmed was trying to run away tractor but he run over the tractor over Suraya Bibi wife of complainant who was forbidding the accused from taking possession of the disputed property. According to medical evidence, ribs of the deceased were broken, her chest was also injured. Admittedly there are four wheels of the tractor and from the medical evidence it is proved that one side of tyres of tractor was run over the deceased Suraya Bibi and had it been deliberately run over the deceased Suraya Bibi, then there would have been different injuries with the measurement of front wheel, injuries would have been on at least legs or foots and head or neck of the deceased. So these are the mitigating circumstances due to which accused Nisar Ahmed has not been awarded death penalty."

The observation of the learned trial Judge that it was not a case of deliberate running over the tractor upon the deceased, required more careful application of relevant law but learned trial court remained fail to apply correct law on the subject.

16. Defence taken by accused-appellants that Mst. Surayya Bibi in result of an altercation with driver of the appellant namely Munir Ahmad had received injuries accidently when she came in front of the tractor, remained unproved. Defence plea of the accused appellant during the trial on the basis of an alleged judicial confession of said Munir Ahmad (Ex.DA), does not appeal to reason and the learned trial court has rightly rejected this plea of the appellant Nisar Ahmad. I am quite in agreement with the observations made by learned trial court in Paragraph No. 39 of the impugned-judgment to the effect that statement of Munir Ahmad is an after thought and is an attempt to save the skin of his master.

17. It is a typical case where both the parties complainant and the accused have not narrated the occurrence in an honest manner and both the parties have maliciously tried to twist the facts in their own favour. Occurrence has been admitted by the accused to the extent of injuries to the deceased while bashing with the tractor, however, with a variation that appellant Nisar Ahmad was not driving the tractor at the relevant time. Ocular account has not been believed even by the trial court in its totality. In such a situation, court is left with no other option but to sift grain from the chaff to draw its own independent conclusion for just decision of this case. I respectfully place reliance on the case of Syed Ali Bepari v. Nibran Mollah and others (PLD 1962 SC 502) wherein Hon'ble Supreme Court of Pakistan has been pleased to observe as under:-

> "Here we may observe that in a case of this type the parties do not generally come out with the true story. It is a normal incident of an "adversary proceeding" to minimize one's own part in the incident. In such a case the Court must not be deterred by the incompleteness of the tale from drawing the inferences that properly flow from the evidence and circumstances....."

Keeping in view the trend of cross-examination by the defence, plea taken by the accused and more particularly acquittal of three co-accused of the appellant Nisar Ahmad from the charge of murder against whom there was direct allegation that they put the deceased under the tractor while holding from her arms, I am convinced that quarrel took place between the accused and the complainant and in the same sequel Mst. Surayya Bibi (deceased) had received injuries on her person being struck with the tractor driven by the appellant Nisar Ahmad but as discussed above it is not a case of driving over the tractor upon the deceased as narrated by the complainant (PW-1) and Khalid Abbas (PW-2).

In view of all above, I am of the considered view that conviction of the appellant Nisar Ahmad under section 302(b), P.P.C. is not a legal conviction as element of intention to cause death of Mst. Surayya Bibi is totally missing in the present case and case of the appellant Nisar Ahmad falls within the definition of Qatl Shibh-i-Amd under section 315, P.P.C. that reflects as under:-

Section 315. "Qatl shibh-i-amd: Whoever, with intent to cause harm to the body or mind of any person, causes the death of that or of any other person by means of a weapon or an act which in the ordinary course of nature is not likely to cause death is said to commit qatl shibh-i-amd."

Therefore, while setting-aside conviction and sentence of the appellant Nisar Ahmad under section 302(b), P.P.C., I convict him under section 316, P.P.C. and sentence him to pay

Diyat amount to the legal heirs of the deceased that as per Notification No. SRO 670(I)/2010, dated 01.07.2010 is Rs.14,65,163/-. He is further sentenced to seven years' Rigorous Imprisonment as Taz'ir with the benefit of section 382-B, Cr.P.C. With this alteration in the conviction and sentence of the appellant, Criminal Appeal No. 418 of 2013 stands disposed of.

18. Consequent upon the reasons mentioned above, Crl. Revision No. 366 of 2013 filed by the complainant, seeking enhancement of sentence of appellant-respondent Nisar Ahmad as well as compensation amount, stands dismissed.

19. As regards Crl. Appeal No. 143 of 2013, learned counsel for the appellant frankly concedes that he does not assail conviction of the appellant Wajahat Ahmad under section 337-L(2), P.P.C., however, simply prays for reduction in his sentence.

20. Learned Law Officer in view of the stance taken by learned counsel for the appellant, does not seriously oppose his prayer to the extent of reduction of sentence of the appellant Wajahat Ahmad.

21. After perusing the record, I find that judgment of learned trial court regarding conviction and sentence of the appellant Wajahat Ahmad under section 337-L(2), P.P.C., is based upon well-settled principles of appreciation of evidence calling for no interference, however, in view of his acquittal under section 302(b), P.P.C. by the learned trial court and dismissal of P.S.L.A. No. 54 of 2013, against his acquittal, keeping in view section 337-N(2), P.P.C., I reduce the sentence of Two Years, awarded to the appellant Wajahat Ahmad under section 337-L(2), P.P.C., to the sentence already undergone by him. However, the sentence of Daman of Rs.25,000/- payable by him to the complainant Sajwar Ahmad, is maintained. The appellant is on bail, therefore, subject to payment of Daman within three months from today, his bail bond and sureties stand discharged. With this modification in the quantum of sentence, Criminal Appeal No. 143 of 2013, stands disposed of.

MH/N-39/L Order accordingly.

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Before Muhammad Anwaarul Haq and Erum Sajad Gull, JJ

BASHIR AHMAD---Petitioner

Versus

The STATE and others---Respondents

Writ Petition No.34275 of 2015, decided on 19th August, 2015.

Anti-Terrorism Act (XXVII of 1997)---

----S. 23 & Third Sched. Para 4(iv)---Penal Code (XLV of 1860), Ss.336-B, 452 & 34---Constitution of Pakistan, Art.199---Constitutional petition---Hurt by corrosive substance (acid)---Jurisdiction of Anti-Terrorism Court---Scope---Offence of throwing acid on victim in a house---Plea of accused that since such alleged offence took place in the room of a house, and did not create any sense of fear or insecurity in the mind of public at large,

therefore the Anti-Terrorism Court did not have the jurisdiction to try the case---Application for transfer of case from Anti-Terrorism Court to ordinary court was allowed by Anti-Terrorism Court---Validity---Offence (of throwing acid) committed by the accused, in the present case, fell under S.336-B, P.P.C. and the same was duly reflected in the Third Schedule to the Anti-Terrorism Act, 1997---Paragraph No. 4(iv) of Third Schedule to the Anti-Terrorism Act, 1997 clearly postulated that the Anti-Terrorism Court to the exclusion of any other court shall try the offence relating to hurt caused by corrosive substance or attempt to cause hurt by means of a corrosive substance---Medico-legal certificate of the victim issued, in the present case, clearly reflected that the injuries on the person of the victim were the result of acid---Anti-Terrorism Court constituted under the Anti-Terrorism Act, 1997 had direct jurisdiction in the offences mentioned in Paragraph No.4(iv) of Third Schedule to the Anti-Terrorism Act, 1997 and no nexus was required to be searched for such scheduled offences as the very commission of said offences created terror, panic and sense of insecurity amongst the general public---Application moved by accused for transfer of his case from Anti-Terrorism Court to the court of ordinary jurisdiction was dismissed in circumstances---Constitutional petition was allowed accordingly.

2013 PCr.LJ 1880 distinguished.

Muhammad Yousaf v. The State and another PLD 2014 Lah. 644; Rana Abdul Ghaffar v. Abdul Shakoor and 3 others PLD 2006 Lah. 64 and Mst. Ruqqia Bibi v. Special Judge, Anti-Terrorism Court and 2 others 2015 PCr.LJ 456 ref.

Ch. Zaheer Ahmad Cheema and Muhammad Younas Bhullar for Petitioner.

Ch. Muhammad Mustafa, Deputy Prosecutor General for the State.

Ch. Muhammad Anwar Bhinder for Respondents.

Date of hearing: 19th August, 2015.

JUDGMENT

MUHAMMAD ANWAARUL HAQ, J.---Through this petition, the petitioner assails the order dated 15-12-2014 passed by the learned Special Judge, Anti-Terrorism Court-II, Gujranwala, whereby the application under section 23 of Anti-Terrorism Act, 1997 moved by respondents Nos.2 and 3/accused for transfer of case FIR No.200/2014 dated 15-5-2014 under sections 336-B, 452, 34, P.P.C. to a court of ordinary jurisdiction has been allowed.

2. Learned counsel for the petitioner contends that offence under section 336-B, P.P.C. is a scheduled offence and is triable by the special court constituted under Anti-Terrorism Act, 1997, therefore, the impugned order is not sustainable in the eyes of law.

3. Learned counsel for respondents Nos.2 and 3 has vehemently argued that irrespective of the fact that offence under section 336-B, P.P.C. has been included in the Schedule to Anti-Terrorism Act, 1997, the same has to be read jointly with the provisions of sections 6 and 7 of Anti-Terrorism Act, 1997 as well as with the preamble of the Act and that the offences mentioned in the Schedule to the Act should have nexus with sections 6 and 7 of Anti-Terrorism Act, 1997; further that the offence mentioned in the FIR has no nexus with

terrorism as the alleged occurrence took place in a room of the house of the victim and that has not created any sense of fear and insecurity in the mind of public at large.

4. Heard. Record perused.

5. Law on the subject is very much clear. Section 12 of Anti-Terrorism Act, 1997 clearly provides that a scheduled offence committed in an area in a province shall be triable only by Anti-Terrorism Court exercising territorial jurisdiction in relation to such area. Offence committed by the accused in this case falls under section 336-B, P.P.C. and the same duly reflects in the Third Schedule to Anti-Terrorism Act, 1997. Plain reading of section 336-A, P.P.C. provides that "Whoever with the intention or knowingly causes or attempts to cause hurt by means of a corrosive substance or any substance which is deleterious to human body when it is swallowed, inhaled, comes into contact or received into human body or otherwise shall be said to cause hurt by corrosive substance", and in the Explanation it has been clarified that "corrosive substance" also includes every kind of acid which has a corroding effect and is deleterious to human body. Paragraph No.4(iv) of the Third Schedule to Anti-Terrorism Act, 1997 clearly postulates that the Anti-Terrorism Court to the exclusion of any other court shall try the offence relating to hurt caused by corrosive substance or attempt to cause hurt by means of a corrosive substance. Medico-Legal Certificate issued in the case clearly reflects that the injuries on the person of the victim were result of acid.

6. Learned trial Judge while deciding the application of respondents Nos.2 and 3 has relied upon the judgment dated 23-4-2013 passed in Writ Petition No.2902 of 2013 by another Hon'ble Division Bench of this Court and has been reported as 2013 PCr.LJ (Lahore) 1880, and has further observed that the same has been upheld by the Hon'ble Supreme Court of Pakistan in Civil Petition No.700 of 2013 titled "Malik Zafar Hussain v. Saifullah Saleem Arshad and others". We are afraid, the learned trial Judge remained totally fail to distinguish the present case than the case in the aforementioned Writ Petition No.2902 of 2013 as in that case the matter under consideration was application of section 7 of Anti-Terrorism Act, 1997 and the Hon'ble Supreme Court of Pakistan while dismissing Civil Petition No.700 of 2013 filed against the judgment dated 23-4-2013 passed in Writ Petition No.2902 of 2013 has observed as under:--

> "We have heard the learned counsel for the petitioner and have also gone through the impugned judgment, particularly para. 7 thereof reproduced herein above. The learned High Court after having taken into consideration the peculiar facts and circumstances of the case, rightly came to the conclusion that section 7 of the Act does not attract in this cases as the offence did not create panic or sense of insecurity among the people in terms of the provisions of the Act."

The above referred paragraph clearly reflects that section 7 of Anti-Terrorism Act, 1997 does not attract in the absence of any panic or sense of insecurity among the people as provided under the law itself, but the learned trial Judge remained oblivious of para 5 of the judgment of the apex Court wherein it has been observed as under:--

> "In view of the foregoing discussion, we find no merit in this petition which is dismissed and leave to appeal is declined. However, we leave it open for examination the jurisdiction of Anti-Terrorism Court in respect of the offence of causing hurt by corrosive substance or attempt to cause hurt by means of a corrosive substance, as inserted in the Third Schedule vide notification noted herein above."

In this case, there was no question of application of section 7 of Anti-Terrorism Act, 1997 that, as observed by the Hon'ble Supreme Court of Pakistan, necessarily requires its nexus with the preamble of the Act, rather the matter only relates to the trial of offence against the respondents under section 336-B, P.P.C. that is a scheduled offence. In the case of Muhammad Yousaf v. The State and another (PLD 2014 Lahore 644), another Hon'ble Division Bench of this Court after taking into consideration the facts and circumstances of a case relating to the similar offence has observed that the Special Court constituted under the Anti-Terrorism Act, 1997 shall have direct jurisdiction in the offences mentioned in paragraph No.4 of the Schedule to Anti-Terrorism Act, 1997 and no nexus is required to be searched for such scheduled offences as very commission of the said offences creates terror, panic and sense of insecurity amongst the general public. The Hon'ble Division Bench has also taken into consideration the case of Malik Zafar Hussain v. Saifullah Saleem Arshad and others (Civil Petition No.700 of 2013) supra and while dismissing the writ petitions filed against the orders of dismissal of applications under section 23 of Anti-Terrorism Act, 1997 for transferring the matters to the ordinary court has observed as under:--

> "From the above mentioned verdict of the august Supreme Court of Pakistan, it is clear that above said judgment passed by the learned Division Bench of this Court was confined to the fact and circumstances of the case in question and point of jurisdiction in respect of the offences of causing hurt by corrosive substance or attempt to cause hurt by means of corrosive substances as inserted in Third Schedule was kept open for Anti-Terrorism Court."

In the case of Rana Abdul Ghaffar v. Abdul Shakoor and 3 others (PLD 2006 Lahore 64), the Hon'ble Division Bench of this Court has observed as under:--

> "According to subsection (1) of section 12 of the Anti-Terrorism Act, 1997 an offence mentioned in the Third Schedule appended with the Anti-Terrorism Act, 1997 can be tried only by an Anti-Terrorism Court constituted under the said Act and no other Court has any jurisdiction in that regard. The Third Schedule appended with the Anti-Terrorism Act, 1997 not only mentions the offence of 'terrorism' but also mentions other offences which now, through the above mentioned amendment introduced on 11-1-2005, includes an offence of abduction or kidnapping for ransom. This unmistakably shows that an Anti-Terrorism Court can try not only an offence of 'terrorism' as defined in section 6 of the Anti-Terrorism Act, 1997 but it can also try any other offence which is declared by the law to be exclusively triable by such a Court."

The same view has also been expressed in the case of Mst. Ruqqia Bibi v. Special Judge, Anti-Terrorism Court and 2 others (2015 PCr.LJ 456).

7. Therefore, keeping in view the peculiar circumstances of this case and the case-law referred above, this writ petition is allowed, the impugned order dated 15-12-2015 passed by the learned Special Judge, Anti-Terrorism Court-II, Gujranwala being not sustainable in the eyes of law is set aside resulting in dismissal of the application moved by the accused/respondents Nos.2 and 3 for transfer of case to the court of ordinary jurisdiction. However, the learned trial court is directed to conclude the trial of the case within a period of four months after the receipt of this order.

MWA/B-27/L Petition allowed.

P L D 2016 Lahore 255
Before Muhammad Anwaarul Haq, J
ABDUL WAHEED and another---Appellants
Versus
THE STATE and others---Respondents

Criminal Appeal No.977 of 2015, decided on 12th February, 2016.

Criminal Procedure Code (V of 1898)---

----S. 408(b)---Notification SO(JII)1-8/75(P-V), dated 21-3-1996---Accused convicted and sentenced by Magistrate empowered under S.30, Cr.P.C.---Direct appeal before the High Court---Not maintainable---Persual of S.408(b), Cr.P.C. [as amended through Notification No.SO(J-II)1-8/75(P-V), dated 21-3-1996 to the extent of Punjab] showed that any sentence passed by any class of Magistate including Special Magistrate was appealable to the Court of Session and any such appeal directly filed before the High Court was not maintainable.

Aman Ullah v. The State 2005 PCr.LJ 1435 and Jehanzeb and 3 others v. The State and another 2013 MLD 1054 ref.

Ch. Abdul Ghaffar for Appellants.

Ch. Muhammad Mustafa, Deputy Prosecutor General along with Maqsood Ahmad, S.I. for the State.

Humayoun Rashid for the Complainant.

Date of hearing: 12th February, 2016.

JUDGMENT

MUHAMMAD ANWAARUL HAQ, J.---This appeal has been filed by the appellants against judgment dated 16.03.2015 passed by learned Magistrate Section 30, Okara, whereby they have been convicted under Section 392 read with Section 397, P.P.C. and sentenced to seven years R.I. with a fine of Rs.10,00,000/- each.

2. Office had raised an objection on direct filing of this appeal before the High Court, however, on the insistence of learned counsel for the petitioner subject to decision of the office objection on judicial side the same was overruled.

3. Learned counsel for the complainant requests for decision of question of maintainability of this appeal in pursuance of order dated 07.05.2015 passed by this Court.

4. Heard. Record perused.

5. For resolving the controversy regarding maintainability of this appeal directly before this Court, I feel it expedient to reproduce the original Section 408 Cr.P.C. as under:-

> **"408. Appeal from sentence of Assistant Sessions Judge or Magistrate of the First Class.--**Any person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate or other Magistrate of the first class or any person sentenced under Section 349 or in respect of whom an order has been made or a sentence has been passed under section 380 by a Magistrate of the first class, may appeal to the Court of Session.
>
> Provided as follows:-
>
> (a) [Rep. by the Criminal Law Amendment Act (XII of 1923), S.23].
>
> (b) when in any case an Assistant Sessions Judge or a Magistrate specially empowered under section 30 passes any sentence of imprisonment for a term exceeding four years or any sentence of transportation, the appeal of all or any of the accused convicted at such trial shall lie to the High Court. (underlined for emphasis)
>
> (c) when any person is convicted by a Magistrate of an offence under section 124-A of the Pakistan Penal Code, the appeal shall lie to the High Court."

Section 408 Cr.P.C. was amended through Notification No.SO(J-II)1-8/75(P-V) dated 21.03.1996 to the extent of Punjab that reads as under:-

> **"408. Appeal from sentence of Assistant Sessions Judge or Judicial Magistrates.--**Any person convicted on a trial held by an Assistant Sessions Judge [or a Judicial Magistrate], Special Magistrate or any person sentenced under section 349 may appeal to the Court of Session."
>
> (a) [Rep. by the Criminal Law Amendment Act (XII of 1923), S.23].
>
> (b) when in any case an Assistant Sessions Judge passes any sentence of imprisonment for a term exceeding four years, the appeal of all or any of the accused convicted at such trial shall lie to the High Court.
>
> (c) when any person is convicted by a Magistrate of an offence under section 124-A of the Pakistan Penal Code, the appeal shall lie to the High Court."

6. Section 408, Cr.P.C., subsequently amended through notification referred above clearly reflects that any sentence passed by any class of Magistrate including Special Magistrate is appealable to the Court of Session.

In the case of Aman Ullah v. The State (2005 PCr.LJ 1435) a Division Bench of this Court after analysing significance 'of amended Section 408 Cr.P.C. has held as under:-

> "For the present discussion, section 408(b), Cr.P.C. is relevant, which reads, "when in any case an Assistant Sessions Judge passes any sentence of imprisonment for a term exceeding four years, the appeal of all or any of the accused convicted at such trial shall lie to the High Court". Reading of both forms of section 408 shows that words "or a Magistrate specially empowered under section 30" have been omitted in section 408(b). This omission is understandable and consistent with provisions of sections 6, 7, 9, 12, 17, 28, 30, 31, 32 and 34 of Code of Criminal Procedure and also with judgment as mentioned above i.e. Abdul Rafiq Kasoo v. State 1994 PCr.LJ 2507 authored by his Lordship Abdul Rahim Kazi, J. His Lordship held that all the three Courts i.e. Assistant Sessions Judge, Additional Sessions Judge and Sessions Judge are but one Court exercising jurisdiction in the same Sessions Division. The reason and logic of the amendment is that if a sentence is passed by an Assistant Sessions Judge exceeding 7 years, appeal against an order of Assistant Sessions Judge cannot be filed before a Sessions Judge since they are part of a one Court as noted above. Whereas, a Court of Magistrate may be Magistrate of Section 30, is not part of Court of Session; the Court of Magistrate Section 30 belongs to a class of Magistrates. Therefore, appeal against the decision of Magistrate Section 30 lies before a Court of Session which is an immediate Superior Court."

Hon'ble Islamabad High Court has also subscribed the same view in the case of Jehanzeb and 3 others v. The State and another (2013 MLD 1054).

7. In view of all above, I am of the considered view that as words and figure "or a Magistrate specially empowered under Section 30" have been omitted from Section 408(b) Cr.P.C. by Law Reform Ordinance, 1972 enforced in Punjab through Notification No.SO(J-II)1-8/75(P-V) dated 21.03.1996, therefore, any sentence passed by any class of Magistrates including Special. Magistrates is appealable to the Court of Session and any such appeal directly filed before the High Court is not maintainable.

8. As the change of forum shall have effect upon the question of limitation for filing of such an appeal, therefore, the matter is disposed of with a direction to the office to transmit this file to learned Sessions Judge, Okara, who may entertain this appeal himself or entrust the same to any other learned Additional Sessions Judge for its final adjudication within shortest possible time.

MWA/A-37/L Order accordingly.

P L D 2016 Lahore 405
Before Muhammad Anwaarul Haq, J
IMRAN BASHIR---Petitioner
Versus
RAI BILAL HAIDER and others---Respondents

Criminal Miscellaneous No.15444-CB of 2015, decided on 22nd March, 2016.

Criminal Procedure Code (V of 1898)---

----S. 497(5)---Penal Code (XLV of 1860), S.489-F---Dishonestly issuing a cheque---Pre-arrest bail, recalling of---Dispute between an advocate (accused) and complainant (a disabled person) over an agreement to sell---Pre-arrest bail of accused had been confirmed by the court below without pointing out any mala fide of the complainant or of the police, which was a sine qua non for the relief of pre-arrest bail---Observation of court below that complainant was not willing to return the original agreement to sell was not based upon facts because the complainant was admittedly not present before the court on the relevant date---Accused was given reasonable opportunity and time to fulfill his commitment to pay the outstanding amount to the complainant, but the accused failed to do the same---Stubborn attitude of the accused reflected that he had no regard for commitments made before the court---Whereas the complainant was a blind man pursuing present bail cancellation petition regularly despite his disability---Pre-arrest bail confirming order passed by court below was recalled in such circumstances.

Zohaib Riaz Cheema for Petitioner.
Ch. Muhammad Mustafa, Deputy Prosecutor-General for the State with Sarfraz Ahmad A.S.I. with record.
Ch. Mahmood Alam for Respondent No.1 along with Respondent No.1 Rai Bilal Haider in person.

ORDER

MUHAMMAD ANWAARUL HAQ, J.---Through this petition, Imran Bashir petitioner-complainant seeks cancellation of pre-arrest bail of respondent No. 1-Rai Bilal Haider, confirmed by learned Sessions Judge, Lahore vide order dated 14.11.2015, in case F.I.R. No. 110, dated 05.03.2015, registered at Police Station/Manga Mandi, Lahore, in respect of an offence under Section 489-F, P.P.C.

2. Heard. Record perused.

3. 1 have carefully examined the order dated 14.11.2015 passed by learned Sessions Judge, Lahore, who while confirming ad-interim pre-arrest bail of respondent No.1, has observed as under:-

> "The petitioner is a practicing Advocate. He admitted the issuance of cheque and contended that the complainant, who is blind, himself did not fulfill his part of

agreement and the parties agreed to rescind the agreement. The petitioner has also instituted a civil suit to this effect. The complainant, who was present in the court on last date of hearing, also admitted this fact and he made request that petitioner may be asked to pay his amount. The petitioner is ready to pay the amount but the only obstacle is that he demands return of original sale deed (agreement to sell) which is still lying with the complainant. Here the complainant asserts that he does not possess any such agreement. He showed his willingness to make statement regarding cancellation of any agreement to sell before the Civil Court.

It cannot be expected from a practicing Advocate that he would abscond from the lawful custody. Moreover, if bail application is refused and petitioner is sent behind the bar, it will serve no useful purpose because petitioner will likely to be released on after arrest bail. All the above narrated facts make it a case for further inquiry....."

I have noticed that pre-arrest bail of the respondent has been confirmed by learned Sessions Judge, Lahore without pointing out any mala fide of the complainant or of the police, that is a sine qua non for the relief of pre-arrest bail and the observation of learned Sessions Judge that the complainant is not willing to return the original agreement to sell, is not based upon actual facts because the complainant was admittedly not present before the Court on the relevant date.

4. Notice was issued to respondent No.1-Rai Bilal Haider on 27.11.2015 and in pursuance thereof, respondent along with his learned counsel Ch. Mehmood Alam, Advocate turned up before this Court on 25.01.2016 and the following order was passed:

"Respondent No.I Rai Bilal Haider, present before the Court, undertakes that on the next date of hearing he shall return whole disputed amount of Rs.8,55,000/- to the petitioner; further states that he had already signed some documents which are in possession of the petitioner and he may be directed to return the same. The petitioner is directed to bring all the said documents along with him on the next date of hearing and in case no such document is available with the petitioner he shall submit his affidavit in this regard and shall also undertake that such document shall not be binding upon respondent No.1 if the same is found in future. Adjourned for 12.02.2016. Learned counsel for the petitioner is also directed to ensure presence of Azam Ali Shaukat before this Court on the date fixed."

On 12.02.2016, 02.03.2016 and 14.03.2016, respondent Rai Bilal Haider did not appear, however, on the request of his learned counsel case was adjourned thrice and then bailable warrant of arrest of the respondent was issued. Resultantly, respondent made his appearance on 18.03.2016 and the case was adjourned with the following observations:-

"Petitioner Imran Bashir, present before the Court, states that respondent No.1 Rai Bilal Haider has not paid him any amount in pursuance of his undertaking given before this Court on 25.01.2016. When confronted, respondent No.1 requests for a short adjournment on the ground that his learned counsel is not available today. Adjourned for 21.03.2016."

On 21.03.2016 in the presence of respondent and his learned counsel, following order was passed: -

> "Respondent No.1 present in Court still requests for one day time to do the needful. In the interest of justice, matter is adjourned for tomorrow i.e. 22.03.2016."

5. Today, learned counsel for respondent No.1 has come up with entirely a strange stance contending that respondent has already paid an amount of Rs.8,55,000/- to Azam Ali Shaukat vide Receipt dated 26.12.2015 but at the moment he is not in possession of any such receipt. Further contends that challan in the case has already been submitted before the court and respondent is regularly appearing before the learned trial court. Learned counsel simply requests for decision of this petition on merits. This stubborn attitude of the respondent reflects that he has no regard for the commitments made before the learned Sessions Judge and then before this Court time and again. Respondent, who is an advocate, was given reasonable opportunity to fulfill his commitment made before this Court to pay his outstanding amount to the complainant, a blind man pursuing this petition regularly despite his disability but the respondent since 27.11.2015 is playing hide and seek on one pretext or the other even after tendering the disputed agreement before the Court as Mark-A.

In the backdrop mentioned above, I am of the considered view that respondent No.1-Rai Bilal Haider was allowed pre-arrest bail against the settled principles by the Hon'ble Supreme Court of Pakistan and order passed in his favour is an erroneous order not sustainable in the eyes of the law. Therefore, by allowing this petition, bail confirming order dated 14-11-2015, passed by learned Sessions Judge, Lahore in favour of respondent No.1-Rai Bilal Haider, is hereby recalled.

6. It is, however, clarified that observations made herein are just tentative in nature and strictly confined to the disposal of this petition.

MWA/I-12/L Bail recalled.

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[Lahore]
Present: **MUHAMMAD ANWAARUL HAQ, J.**
Safdar Ali *alias* Soni
Versus
The State and another
Criminal Appeal No. 2 of 2011, decided on 20th March, 2015.

CONCLUSION

(1) The superior Courts in various countries have regarded rape as violation of fundamental right to life and as such compensation has been awarded under the public law remedies to be paid by the State.

RAPE --- (Compensatory relief)

(a) Criminal Procedure Code (V of 1898)*---S. 410---Pakistan Penal Code, 1860, S. 376---Appellant allegedly committed rape with girl aged about 5/6 years---Charge---*

Compensatory relief---Quantum of sentence---Impugned sentence of 25 years' R.I. was reduced to 10 years' R.I.---Original Defence Saving Certificate of an amount of Rs. 7,50,000/- had already been handed over to complainant---Sentence reduced. (Para 12)

Ref. *1992 SCMR 1224, 2002 SCMR 93, 1995 SCMR 1679, PLJ 1978 SC 19, PLD 1974 SC 87, 1992 SCMR 549, PLD 2004 SC 79, 1995 SCMR 1679.*

(b) Criminal Trial*------Question of sentence---While dealing with the question of sentence, approach of the Court should be dynamic and the Court has to find ways and means to guarantee complete dispensation of justice to all stake holders of a criminal case. (Para 12)*

5/6 سال کی بچی کے ہمراہ ارتکاب زنا کا الزام تھا۔ ادائیگی معاوضہ کے پیش نظر سزایابی میں تخفیف کر دی گئی۔

[Commission of rape with a girl aged 5/6 years old. In view of payment of compensation, impugned sentence was reduced].

For the Appellant: **Abdul Khaliq Safrani and Muhammad Saad Bin Ghazi, Advocates.**

For the State: **Mirza Abid Majeed, Deputy Prosecutor General.**

Date of hearing: **20th March, 2015.**

JUDGMENT

MUHAMMAD ANWAARUL HAQ, J. --- Appellant Safdar Ali *alias* Soni, through Criminal Appeal No. 02 of 2011, has challenged the judgment dated 07.12.2010 passed by learned Additional Sessions Judge, Phalia whereby he has been convicted under Section 376, P.P.C. and sentenced to 25 years' rigorous imprisonment with fine of Rs. 1,00,000/-, in default thereof, to further undergo two years' S.I. The benefit of Section 382-B, Cr.P.C. was extended to the appellant.

2. The allegation against the appellant is that he committed rape with Laiba Altaf aged about 5/6 years in his shop that was witnessed by the complainant *Mst.* Asia Altaf (mother of the victim). After conclusion of trial the learned Trial Court *vide* impugned judgment convicted and sentenced the appellant as mentioned above.

3. After failing to establish innocence of the appellant, learned counsel for the appellant has frankly conceded and opted not to challenge the conviction of the appellant with the requests for suitable reduction in his sentence.

4. On the other hand learned law officer while opposing the request of the learned counsel for the appellant contends that the learned Trial Court has already taken a lenient view while not awarding death sentence to the appellant therefore, he does not deserve any further leniency.

5. The father of the complainant present in Court states that the complainant alongwith her children including the victim has already been deserted by her husband and she is now living with him. He confirms that respectables of the locality have intervened and

an amount of Rs. 7,50,000/- has already been agreed to be paid to the victim as compensation. Complainant present in Court has acknowledged the deposit of compensation in the shape of Defence Saving Certificates and prays for reduction in the sentence awarded to the appellant for finalization of compromise between the parties subject to the approval of this Court.

6. Heard. Record perused.

7. After having heard both the sides and scrutinized the prosecution evidence available on the file, I am of the considered view that the learned Trial Court has rightly convicted the appellant under Section 376, P.P.C., thus, the conviction even otherwise unchallenged is maintained.

8. As far as question of quantum of sentence of the appellant is concerned, keeping in view the stance taken by the complainant and dirt poor financial condition of the family of the victim, I am quite convinced to examine the same.

9. In the modern era Penal Laws of various countries provide substantive punishments for the offence of rape and recently a tendency has developed to provide compensatory relief to the victims of rape for their rehabilitation and revival in the society. In the United States of America, Victims of Crime Act, 1984 provides compensation to the victims of crime including sexual abuse. In the United Kingdom, Sexual Offences Act, 2003 penalizes rape with imprisonment whereas Criminal Injuries Compensation Scheme, 2012 is in field that provides compensation in the suitable cases through the Criminal Injuries Compensation Authority. In India Section 376 of the Indian Penal Code, 1860 proposes imprisonment and fine as primary punishments and additionally Section 357 of Code of Criminal Procedure, 1973 empowers a criminal Court that the whole or any part of fine recovered can be paid to the victim as compensation for any loss or injury caused by the offence. The said section also casts an obligation on State Governments to introduce Victim Compensation Schemes for provision of funds for the purpose of compensation to the victims. The Superior Courts in various countries have regarded rape as violation of fundamental right to life and as such compensation has been awarded under the public law remedies to be paid by the State.

10. In Pakistan Section 376, P.P.C. provides the following punishment for rape:--

[376. (1) Whoever commits rape shall be punished with death or imprisonment for either description for a term which shall not be less than ten years or more than twenty-five years and shall also be liable to fine;

(2) When rape is committed by two or more persons in furtherance of common intention of all, each of such persons shall be punished with death or imprisonment for life.]

In addition to the punishment provided under Section 376, P.P.C., Code of Criminal Procedure, 1898 provides adequate compensation to the crime victims under Sections 544-A. For ready reference Section 544-A, Cr.P.C. is reproduced hereunder:---

> "[544-A. *Compensation of the heirs to the person killed, etc.*
>
> *(1) Whenever a person is convicted of an offence in the commission whereof the death of, or hurt, injury, or mental anguish or psychological damage, to, any person is caused or damage to or loss or destruction of any property is caused the Court shall, when convicting such person, unless for reasons to be recorded in writing it otherwise directs, order, the person convicted to pay to the heirs of the person whose death has been caused, or to the person hurt or injured, or to the person to whom mental anguish or psychological damage has been caused, or to the owner of the property damaged, lost or destroyed, as the case may be, such compensation as the Court may determine having regard to the circumstances of the case.*
>
> *(2) The compensation payable under sub-section (1) shall be recoverable as [an arrears of land revenue] and the Court may further order that, in default of payment [or of recovery as aforesaid] the person ordered to pay such compensation shall suffer imprisonment for a period not exceeding six months, or if it be a Court of the Magistrate of the third class, for a period not exceeding thirty days.*
>
> *(3) The compensation payable under sub-section (1) shall be in addition to any sentence which the Court may impose for the offence of which the person directed to pay compensation has been convicted.*
>
> *(4) The provisions of sub-sections (2-B), (2-C) and (4) of Section 250 shall, as far as may be apply to payment of compensation under this section.*
>
> *(5) An order under this section may also be made by an Appellate Court or by a Court when exercising its powers of revision.]*

The Hon'ble Supreme Court of Pakistan has held in various cases that compensation awarded under Section 544-A, Cr.P.C. is mandatory requirement of law in addition to any sentence, which the Court may impose upon the convict. ***PLD 2004 SC 89, 1995 SCMR 1679, 1992 SCMR 549*** and many other cases can be quoted to highlight the importance of awarding compensation to the crime victims under Section 544-A, Cr.P.C. Suffice it to refer a portion of the observations of the Hon'ble Supreme Court in the case of ***"The State v. Rab Nawaz and another"*** **(PLD 1974 SC 87):---**

> *"24. Before I conclude it is important to observe that Section 544-A, Cr.P.C., which on conviction of the accused in a case involving death, hurt or injury to or*

loss, destruction or theft of property requires the Court to "award compensation to the heirs of the person killed" or to an injured person, or who has suffered loss of property, is very salutary. Its provision is mandatory and casts a clear duty on the Court to award compensation "unless for reasons to be recorded it otherwise directs". The plain object is to alleviate the suffering of the bereaved family or as the case may be, the injured person, or who suffers loss of property. It can also be an effective deterrent against violent crime and crime against property, the incidence of which is on the increase and becoming disquieting.

It is also important to point out that "compensation" is a very well understood expression. It is something to be paid which makes up for the loss that the other person has suffered. Under Section 544-A, Cr.P.C. the amount of compensation though recoverable as fine is not fine. Therefore, for proper discharge of its statutory obligation under Section 544-A, Cr.P.C. the Court at the penultimate stage of the case, may have to receive evidence to determine the quantum of compensation, appropriate in a particular case. It is obvious that for the purpose of substantive sentence under Section 302, P.P.C., the law does not distinguish between the murder of an infant and that of an adult who is also a bread winner of his family. Similarly financial position of an accused is not material so far as substantive punishment is concerned. But these considerations become highly relevant for the purpose of determining proper compensation under Section 544-A, Cr.P.C. Such inquiry becomes necessary so that, on the one hand the compensation awarded is commensurate with the loss suffered by the victim of the crime or his family and on the other hand the order for compensation is not made in vain for want of capacity of the convict to pay. Power to conduct such inquiry must be regarded as incidental or ancillary to the main power exercisable under Section 544-A, Cr.P.C., which, the section being remedial, will be necessarily read into it so as to advance the remedy and to give effect to the legislative intent."

The words hurt, injury, mental anguish and psychological damage caused to the victim are the key words in Section 544-A, Cr.P.C. qualifying victims of rape and sodomy entitled for compensation under Section 544-A, Cr.P.C. This Court has observed in numerous cases that even after insertion of Section 544-A, Cr.P.C., Trial Courts are not passing any order for compensation to the victims of rape and sodomy ignoring this mandatory provision of law. Needless to add that in appropriate cases victims of such offences can validly draw the attention of the learned Trial Courts for award of adequate compensation under Section 544-A, Cr.P.C. and in case no such order is passed by the learned Trial Court, victim can also invoke the provisions under Sections 435, 439 & 439-A, Cr.P.C. before the appellate forums as well as before this Court under Section 561-A, Cr.P.C. for award of compensation under Section 544-A, Cr.P.C. while examining the correctness or propriety of the sentence awarded by the learned Trial Court. The Hon'ble Supreme Court of Pakistan in the case of

"Mokha v. Zulfiqar & 9 others" **(PLJ 1978 SC 19)** has clarified this aspect of the proposition in the following words:---

> *"35. The Trial Court had failed to award compensation under Section 544-A, Cr.P.C. The Division Bench while maintaining the convictions of Zulfiqar, Azam and Rajada also did not award any compensation. Accordingly, there was no compliance with the mandatory provision. I would, therefore, direct, that the respondents shall pay a fine of Rs. 1000/- each as compensation to the heirs of the two deceased in equal shares, under Section 544-A, Cr.P.C. or in default, to suffer rigorous imprisonment for six months.*
>
> *35. Accordingly, the appeal is allowed and the judgment of the High Court stands modified to the extent indicated above."*

11. The case in hand is also an example where the learned Trial Court even after passing conviction and sentence against the accused has not passed any order regarding payment of any compensation to the victim of the offence. Even learned Trial Court remained fail to notice Section 545, Cr.P.C. while passing the sentence of fine in this case that empowers the Trial Court to pay expenses or compensation out of fine. Section 545, Cr.P.C. reflects as under:---

> *[545. Power of Court to pay expenses or compensation out of fine.*
>
> *(1) Whenever under any law in force for the time being a Criminal Court imposes a fine or confirms in appeal, revision or otherwise a sentence of fine, or a sentence of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied:---*
>
> *(a) in defraying expenses properly incurred in the prosecution;*
>
> *(b) in the payment to any person of compensation for any loss [injury or mental anguish or psychological damage] caused by the offence, when substantial compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;*
>
> *(c) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser, of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.*
>
> *(2) If the fine is imposed in a case which is subject to appeal, no such payment*

shall be made, before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal]

12. Adverting to the question of acceptance of joint request of the parties for reduction of sentence of the appellant in the backdrop of a settlement between them outside the Court, I am of the considered view that while dealing with the question of sentence, approach of the Court should be dynamic and the Court has to find ways and means to guarantee complete dispensation of justice to all stakeholders of a criminal case, as most of them being unaware of the legal technicalities, flaws/lacunas left in the investigation and defects in conduct of their trials, only see the result announced by the Court and form an opinion about the prevailing system of administration of justice. The question of sentence after conviction of an accused in a criminal trial essentially requires serious consideration of the Court to meet the ends of justice, thus, the Court should answer it keeping in view facts and circumstances of each case subject of course to the penal provisions under the relevant law and sentence provided thereunder without causing any prejudice to either side in any manner whatsoever. The benefitting and proper approach of the Trial Court in this regard can substantially reduce the volume of litigation as the appropriate sentence can satisfy the victims of the offence and also the convicted accused who can be saved to knock the doors of the appellate forums for redressal of their grievance. Keeping in view all above, I am convinced that case in hand is a fit case where will of the parties can validly be adhered to. I shall take advantage of quoting here an observation of the Hon'ble Supreme Court of Pakistan in the case of ***"Mst. Sarwar Jan v. Ayub and another"*** **(1995 SCMR 1679)** wherein the Hon'ble Supreme Court of Pakistan when found the sentence passed against the accused inadequate, on the request of the counsel for the accused has held as under:---

"36. Facing embarrassing situation the learned counsel for the respondents pleaded that his clients have already undergone their sentences. They are out. It would be harsh if their sentences of imprisonment are enhanced. They are re-arrested and remanded to custody. However, there was consensus at the bar that it would in the interest of justice and interest of victim that if adequate compensation under Section 544-A, Cr.P.C. is paid to the victim. We are impressed by such consensus.

37. We are therefore, inclined to maintain the conviction and sentences awarded to the respondents by the Judicial Magistrate but additionally award compensation under Section 544-A, Cr.P.C. to the victim. The respondents are directed to pay compensation of Rs. 25,000/- each to the victim Muhammad Iqbal. They shall deposit it in the Court of Judicial Magistrate, Haripur within a period of one month. If fine has already been deposited as directed by the Judicial Magistrate by the respondents and paid to the victim the same shall be deducted from the compensation of Rs. 25,000. In failure whereof they shall suffer R.I. for six months in jail. The Judicial Magistrate shall issue coercive process for their arrest and remand them to custody

in that even. Besides the Magistrate, to recover the compensation as arrears of Land Revenue from the respondents."

In the case of ***"Bahadar Ali v. The State"*** **(2002 SCMR 93)** the apex Court has observed as under:---

> *9. Reverting to Criminal Appeal No. 359 of 1999 at the behest of complainant Nazir Ahmad, Mr. Khadim Hussain Qaiser, learned Advocate Supreme Court as against Bahadur Ali did not press his prayer for enhancement of sentence of life imprisonment to death but he pressed for enhancement of compensation payable to the legal heirs of the deceased. In support of his submission, learned counsel referred to Razia Begum v. Jehangir reported in PLD 1982 SC 302, in which this Court while refraining from awarding death sentence of convict, although he deserved it, imposed a fine of Rs. 25,000/- as enhancement of sentence. It was directed that on realization the amount shall be paid as compensation to the heirs of the deceased under Section 544-A, Cr.P.C.* ***In the facts and circumstances of the case, while we are inclined to enhance the sentence of life imprisonment in view of release of the convict but would enhance the amount of compensation from Rs. 50,000/- to Rs. 1,00,000/- which shall be recovered by way of arrears of land revenue and paid to the legal heirs of the deceased.*** *Reference may be made to the precedent reported as Muhammad Sharif v. Muhammad Javed (PLD 1976 SC 452) relevant page 461." (Emphasis supplied)*

In the case of ***Anwar Ali Shah v. The State*** **(1992 SCMR 1224)** the Hon'ble Supreme Court of Pakistan while dealing with the similar question whether the sentence of imprisonment can be converted into a sentence of fine so as to compensate the victim of an offence, has observed as under:---

> ***"We are also of the view that the sentence of ten years' R.I. could have been enhanced by adding some more years of R.I.; but, ultimately both the learned counsel agreed that instead of enhancing rigorous imprisonment, the sentence of fine may be enhanced so as to compensate the heirs of the deceased. This approach is reasonable and satisfies the Islamic Ethos also.*** *We, accordingly, instead of enhancing the rigorous imprisonment, enhance the fine to Rs. 1,50,000/-. The entire amount, when recovered, shall be paid as compensation to the heirs of the deceased. In default of payment of fine, the accused-appellant shall suffer rigorous imprisonment for 6½ years. The acquittal appeal, namely, Criminal Appeal No. 169 of 1991 is partly allowed with the enhancement of sentence of fine and award of compensation." (Emphasis supplied)*

Therefore, by seeking guidance from the case-law referred above, sentence of 25 years rigorous imprisonment awarded to the appellant under Section 376, P.P.C. is reduced to 10 years' R.I. with the benefit of Section 382-B, Cr.P.C. Sentence of fine of Rs. 1,00,000/- and

further detention in default thereof are maintained, however, in case of payment of fine the same shall also be paid to the victim through her mother as compensation under Section 545, Cr.P.C. The original Defence Saving Certificates of an amount of Rs. 7,50,000/- bearing registration No. 29275, dated 18.03.2015 have already been handed over to the complainant. Deputy Registrar (Judicial) of this Court shall direct Officer Incharge, National Saving Centre concerned to make an endorsement in the relevant book that no one is authorized to encash these certificates except the victim herself upon attaining her majority. Needless to add that in the utmost need of the victim, her guardian can validly apply for encashment of the full amount or part thereof before the learned Guardian Judge concerned who can pass an appropriate order keeping in view the best interest of the minor victim of the offence. With this modification in the quantum of sentence of the appellant, this Criminal Appeal stands **dismissed.** Sentence reduced.

2017 P Cr. L J 603
[Lahore]
Before Muhammad Anwaarul Haq, J
HAKIM ALI---Petitioner
Versus
The STATE and others---Respondents

Criminal Misc. No. 13648-B of 2016, decided on 12th January, 2017.

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

----S. 498---Penal Code (XLV of 1860), S. 462-J---Theft of electricity---Ad interim pre-arrest bail, recalling of---Accused was nominated in the FIR with the specific allegation of committing theft of electricity by establishing a direct connection with the main line---Said allegation found support from the statements of Lineman and Assistant Lineman recorded under S. 161, Cr.P.C.---Accused had only paid a portion of the detection bill calculated by the electricity department, and a huge amount was still outstanding against him---Even if accused had deposited the whole detection bill, it still was not a valid ground to confirm his ad interim pre-arrest bail---Offence under S. 462-J, P.P.C. was non-bailable---Accused was unable to establish any mala fide or malice on part of the electricity department or the police for falsely implicating him in the present case---Ad interim pre-arrest bail granted to accused was recalled in circumstances.

Sana Ullah v. State 2016 SCMR 1527 ref.

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

----S. 498---Penal Code (XLV of 1860), S. 462-J---Theft of electricity---Ad interim pre-arrest bail--- Scope--- Detection bill, payment of---Effect---Mere deposit of even whole detection bill after registration of a criminal case against an accused for theft of national resource (like electricity) could not be considered a valid ground for confirmation of his pre-arrest bail.

Sardar Wajahat Ali Dogar along with Petitioner.

Ch. Muhammad Mustafa, Deputy Prosecutor General with Maqbool Hussain, ASI for the State.

Ch. Gulzar Hussain Sangla for the Complainant.

ORDER

MUHAMMAD ANWAARUL HAQ, J.---Petitioner Hakim Ali seeks pre-arrest bail in case FIR No.152 dated 13.05.2016 under section 462-J, P.P.C. registered at Police Station Ahmad Yar, Pakpattan.

2. Heard. Record perused.

3. Petitioner is nominated in the FIR with the specific allegation of committing theft of electricity by establishing a direct connection with the main L.T. line that finds support from

the statements recorded under section 161, Cr.P.C. of witnesses Talib Hussain, Lineman-II and Ali Raza, Assistant Lineman.

4. Learned counsel for the petitioner has stressed a lot on the sole argument that the petitioner has already paid the whole amount of detection bill calculated against him by the complainant department. Learned counsel for the complainant department informs that only a little amount has been deposited by the petitioner and a huge amount is still outstanding against him. I am of the considered view that mere deposit of even whole detection bill after registration of a criminal case against an accused for theft of national resources cannot be considered a valid ground for confirmation of his pre-arrest bail. Needless to add that such an argument in favour of an accused for grant of extraordinary relief of pre-arrest bail can definitely encourage thieves of national resources to save their skin only by deposit of an amount in the garb of detection bill manipulated after disclosure of their crime. Offence under section 462-J is non-bailable and besides the punishment of two years imprisonment, fine of Rupees one million is also provided. Learned counsel for the petitioner remained unable to establish any mala fide or malice on the part of the complainant department or of the police for false implication of the petitioner in this case that is sine qua non for the grant of pre-arrest bail. In such like cases, a very serious notice has already been taken by the Hon'ble Supreme Court of Pakistan in the case of "Sana Ullah v. State" (2016 SCMR 1527).

In view of all above, no case for bail before arrest is made out and this bail petition being devoid of any force is dismissed. The ad interim pre arrest bail granted to the petitioner on 07.10.2016 is recalled.

5. It is, however, clarified that the observations made herein are just tentative in nature and strictly confined to the disposal of this bail petition.

MWA/H-3/L Pre-arrest bail recalled.

2017 P Cr. L J 829
[Lahore]
Before Muhammad Anwaarul Haq, J
Ch. IRFAN ALI and another---Petitioners
Versus
The STATE and another---Respondents

Criminal Misc. No. 6428-B of 2016, decided on 1st August, 2016.

Criminal Procedure Code (V of 1898)---

----Ss. 497 & 498---Penal Code (XLV of 1860), Ss. 420, 468 & 471---Cheating and dishonestly inducing delivery of property, forgery for purpose of cheating, using as genuine a forged document---Bail, confirmation of---Further inquiry---Complainant alleged that accused persons with their co-accused prepared forged documents and tried to occupy the disputed property---Fingerprint Examination Report reflected that in fact complainant had himself thumb marked those documents---Complainant was not the affected party of the alleged crime but the real owners who could lodge FIR against culprits in the crime; no application was moved on behalf of real owners regarding preparation of forged documents-

--Investigating officer conceded that he failed to associate real owners of property in the investigation---Forged documents were allegedly prepared by accused and complainant; in absence of statements of real owners of disputed property, police failed to conclude the investigation---Prima facie, no direct evidence was available on record against accused persons regarding their involvement in commission of alleged forgery---Mens rea, if any, could validly be determined by Trial Court after recording of evidence---Ad interim pre-arrest bail already allowed to accused was confirmed accordingly.

Muhammad Ajmal Adil for Petitioners.

Muhammad Akhlaq, Deputy Prosecutor-General and Ghulam Qadir, ASI with record for the State.

Ch. Ishtiaq Ahmad Khan for the Complainant.

ORDER

MUHAMMAD ANWAARUL HAQ, J.---Through this petition, Ch. Irfan Ali and Sohail Anjum petitioners seek pre-arrest bail in case FIR No.112/16, dated 02.03.2016 registered at Police Station Kotwali, District Faisalabad in respect of offences under sections 420, 468 and 471, P.P.C.

2. Arguments heard. Record perused.

3. As per FIR there is general allegation against the petitioners and their co-accused Muhammad Razzaq that they with their common intention allegedly prepared forged documents i.e. agreement to sell regarding the disputed property in favour of petitioner Ch. Irfan Ali and some receipts of payment and on the basis of the same tried to occupy the disputed property.

4. Order sheet reflects that on 13.06.2016, Hon'ble Mrs. Justice Erum Sajad Gull (not available because of summer vacations) had directed the police official present in Court, to obtain thumb impressions of the complainant and verify the documents, in compliance thereof the alleged agreement to sell and three original receipts were sent to the Punjab Forensic Science Agency along with specimen of thumb impressions of the complainant Mian Muhammad Aslam Pervaiz and in this regard Latent Fingerprint Examination Report dated 15.07.2016 is available on police file that reflects that in fact complainant had himself thumb marked those documents and the result and conclusion of the Fingerprint Experts is as under:-

> "After complete examination, one questioned thumb impression marked as Exp/B-I on original "Iqrar Nama Baey" No. 45584 dated: 02-05-2015 (Item No. 1.1.) and two questioned thumb impressions marked as Exp-B-/II and Exp-B/III on two original "Raseed Wasooli Raqam" dated: 06-07-2015 and 29-10-2015 (Item No. 1.2) were individualized as the left thumb of Mian Muhammad Aslam Pervaiz son of Mian Khairati (Item No.1.3)."

When confronted, learned Law Officer confirms that complainant is not the affected party in the alleged crime because Muhammad Shafique and Nazir Ahmad are real owners of the property mentioned in the FIR who have been affected with the alleged forgery, if any and at the most they could lodge an FIR against the culprits in the crime. He further confirms, that no application has ever been moved on behalf of said Muhammad Shafique and Nazir

Ahmad regarding preparation of any forged documents, by the petitioners. Ghulam Qadir ASI/Investigating Officer present with record frankly concedes that he remained fail to associate said Muhammad Shafique and Nazir Ahmad real owners of the property in the investigation. Learned Law Officer also points out that the alleged forged documents have been prepared between the petitioners and the complainant and in absence of statements of original owners of the disputed property, police remained fail to conclude the investigation. Prima facie, there is no direct evidence available on record against the petitioners regarding their involvement in commission of the alleged forgery and in absence of any statement of original owners of the property, the mens rea, if any, against the petitioners can validly be determined by the learned trial court after recording of some evidence by the learned trial court and I do not find any justifiable reason to send them behind the bars. Therefore, without further commenting upon the merits of the case, this petition is accepted and ad interim pre-arrest bail already allowed to the petitioners by this Court vide order dated 20.05.2016, is hereby confirmed subject to their furnishing fresh bail bonds in the sum of Rs.500,000/- (Rupees five hundred thousand only) each with one surety each in the like amount to the satisfaction of the learned trial Court/Area Magistrate within a period of fifteen days from today.

5. It is, however, clarified that observations made herein are just tentative in nature and strictly confined to the disposal of this bail petition. It is further observed that after record statement of the original owners of the disputed property, in case any cogent evidence comes on record regarding the culpability of the petitioners in this case, the State or any affected party can move an application for cancellation of their bail, if so advised.

WA/I-6/L Bail confirmed.

2017 P Cr. L J 1077

[Lahore (Rawalpindi Bench)]

Before Muhammad Anwaarul Haq and Muhammad Tariq Abbasi, JJ

MUHAMMAD YASIR---Appellant

Versus

The STATE---Respondent

Criminal Appeal No. 507 of 2016, decided on 10th April, 2017.

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

----Ss. 9(b), 9(c) & 6--- Criminal Procedure Code (V of 1898), S. 382-B--- Possession of narcotic substances/drugs--- Sentence, quantum of---Determination---Weight of the contraband---Accuracy of weight of contraband to be determined by experts of Forensic Science Laboratory/Agency---Scope---Accused was convicted and sentenced under S. 9(c) of the Control of Narcotic Substances Act, 1997---Contention of accused was that he should be sentenced under S. 9(b) instead of S. 9(c) of the Control of Narcotic Substances Act, 1997, since sample of recovered contraband, when subjected to chemical analysis, weighed much less than what was determined by Investigating Officer---Validity---Recovery of contraband (charas) from the accused stood proved, and 1015 grams of the same were recovered, out of which 10 grams were sent for chemical examination, which report

reflected the 6.22 grams instead of 10 grams, which raised serious questions about accuracy of scale used by Investigating Officer at time of weighing of contraband, and therefore, scale used by the Investigating Officer was defective---Weight of contraband was of vital importance in deciding quantum of sentence and even difference of one gram was significant and in cases of controversy regarding weight of contraband, preference was to be given to the scale used by experts of the Forensic Science Laboratory---High Court observed that keeping in view deficiency found in weight of the sample, weight of total contraband recovered from accused should be determined after deduction of a percentage from 1015 grams, which meant, that the actual weight of the charas recovered became 631 grams, which fell within the purview of S. 9(b) of the Control of Narcotic Substances Act, 1997---Conviction of accused was converted from that under S. 9(c) of the Control of Narcotic Substances Act, 1997 to one under S. 9(b) of the Act, and his sentence was modified accordingly, along with benefit of S. 382-B, Cr.P.C.---Appeal was disposed of, accordingly.

Ghulam Murtaza and another v. The State PLD 2009 Lah. 362 rel.

Muhammad Nawaz Bhatti for Appellant.

Naveed Ahmad Warraich, Deputy District Public Prosecutor with Qasim, S.I. for the State.

Date of hearing: 10th April, 2017.

JUDGMENT

MUHAMMAD ANWAARUL HAQ, J.---Through this criminal appeal, Muhammad Yasir appellant has challenged the vires of judgment dated 28.09.2016 passed by the learned Additional Sessions Judge, Rawalpindi in case FIR No.07 dated 04.01.2015 registered under section 9(c) of Control of Narcotic Substances Act, 1997 at Police Station Banni, Rawalpindi whereby he has been convicted under section 9(c) of C.N.S.A., 1997 and sentenced to four years and six months' R.I. with fine of Rs.20,000/, in default thereof, to further undergo five months' S.I. The benefit of section 382-B, Cr.P.C. was extended to the appellant.

2. The facts giving rise to this appeal are that FIR referred above was lodged against the appellant with the allegation that at the time of his arrest by the police party he was found in possession of Charas weighing 1015 grams. After conclusion of trial, learned trial court convicted and sentenced the appellant as mentioned above.

3. At the very outset, learned counsel appearing on behalf of the appellant does not oppose conviction of the appellant, however, requests for its conversion for offence under section 9(b) of C.N.S.A., 1997 by stating that according to the report of Punjab Forensic Science Agency Ex.PD, sample of 10 grams Charas prepared by the complainant sent for chemical analysis has been found to be 6.22 grams, therefore, quantity of total Charas shown to have been recovered from the appellant as 1015 grams was infact much less than that weighed by the investigating officer with his defective scale.

4. Heard. Record perused.

5. We have gone through the evidence produced by the prosecution in support of its case and other incriminating material available on record and found that recovery of Charas from the appellant stands proved. However, we have noticed that it was the case of prosecution that upon search of the appellant 1015 grams ¬Charas was recovered from him out of which 10 grams was separated as sample and sent to the Punjab Forensic Science Agency for chemical analysis but its report Ex.PD reflects that actual weight of sample Charas was 6.22 grams instead of 10 grams that raises serious question about the accuracy of the scale used by the investigating officer at the time of weighing the Charas recovered from the appellant and it leads us to an irresistible conclusion that the scale used by the investigating officer was defective. Needless to add that after conviction of an accused under C.N.S.A., 1997, weight of the contraband is of vital importance in deciding quantum of his sentence and even a difference of one gram is quite significant. It goes without saying that in the case of controversy regarding the weight of contraband, preference shall always be given to the scale used by the experts of the Laboratory and the weight determined by them. Argument of learned law officer that by the time material reaches the office of Chemical Examiner it loses weight is of no help to the prosecution, as conviction and sentence of an accused can only be based upon the unchallenged report of the Chemical Examiner and not on the evaluation or assessment of the investigating officer. In this case despite receipt of the report of Punjab Forensic Science Agency and tendering the same in evidence prosecution remained totally fail to remove the above mentioned defect and never applied for ascertaining the actual weight by the court or by sending the whole contraband to the Laboratory for determination of its exact weight.

6. As per report of Forensic Science Agency Ex.PD the weight of the sample of 10 grams sent for chemical analysis had been found as 6.22 grams i.e. 30.78% less than the alleged weight. Therefore, keeping in view the percentage of deficiency found in the weight of the sample, the weight of total contraband recovered from the appellant should also be determined after deduction of 30.78% from 1015 grams Charas. Thus, in our view actual weight of the Charas proved to be recovered from the appellant becomes 631 grams that falls within the purview of section 9(b) of C.N.S.A., 1997. Hence, conviction of the appellant is converted from section 9(c) of C.N.S.A., 1997 to section 9(b) of C.N.S.A., 1997 and as per sentencing policy, formulated in the case of Ghulam Murtaza and another v. The State (PLD 2009 Lahore 362), appellant is sentenced to one year and nine months' R.I. with a fine of Rs.13000/-, in default thereof, to further undergo four months and 15 days' S.I. Benefit of section 382-B, Cr.P.C. is also extended to the appellant. With this modification in the conviction and sentence of the appellant, this criminal appeal stands dismissed.

KMZ/M-78/L Order accordingly.

PLJ 2017 Cr.C. (Lahore) 713

***Present*: MUHAMMAD ANWAAR-UL-HAQ, J.**

SHAHBAZ *alias* THATHA--Petitioner

versus

STATE and another--Respondents

Crl. Misc. No. 11218-B of 2015, decided on 22.10.2015.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 395 & 412--Post arrest bail--Dismissal of--Allegation of--Ground of statutory delay--Delaying trial--**Held:** It is by now well settled that while computing period of delay on part of accused or prosecution Court has to consider cumulative effect of adjournments sought in this regard--If prosecution witnesses appear on one date and case is adjourned on request of accused then delay subsequently caused in recording evidence of these witnesses cannot be excluded in favour of accused--Apex Court further observed in case referred above that while ascertaining cumulative effect of ultimate delay in disposal of case, it would not be merely mathematical calculation of excluding such days for which adjournment was obtained by accused or his counsel--Delay in conclusion of trial cannot be attributed to prosecution and same is on part of defence--Petition being devoid of any force is accordingly dismissed. [Pp. 715, 716 & 717] A, B & C PLJ 1998 SC 1241, *rel*.

Ch. Zaheer Ahmad Farooq, Advocate for Petitioner.

Ch. Muhammad Mustafa, D.P.G. for State.

Mian Shahid Ali Shakir, Advocate for Complainant.

Date of hearing: 22.10.2015.

ORDER

Through this 2nd petition, Shahbaz *alias* Thatha petitioner seeks post-arrest bail in case F.I.R. No. 28, dated 01.02.2014, registered at Police Station Saddar Lalamusa, District Gujratin respect of offences under Sections 395 and 412, PPC, his earlier petition i.e. Crl. Misc. No. 4054-B of 2015 was dismissed having been withdrawn *vide* order dated 14.04.2015 when after having argued the case at full length, his learned counsel opted to withdraw the same.

2. At the very outset, learned counsel for the petitioner contends that he only urges the ground of statutory delay in trial of the petitioner, who is behind the bars since 29.05.2014 and despite lapse of more than one year and four months, his trial has yet not been concluded.

3. Arguments heard. Record perused.

4. I have taken into consideration the sole ground urged today by the learned counsel for the petitioner that petitioner is behind the bars since 29.05.2014 and despite lapse of more than one year and four months his trial has yet not been concluded, suffice it to observe that learned counsel for the petitioner has placed on record certified copy of complete order sheet of the learned trial Court which reflects that examination-in-chief of PW-1 Saqib Amin was recorded on 24.02.2015, however, he was not cross-examined by the

defence side and case was adjourned, then, again on 10.03.2015, 20.04.2015, 16.05.2015 and 05.09.2015, case was adjourned on the requests of accused side on one pretext or the other. Order sheet further depicts presence of prosecution witnesses before the learned trial Court on different other dates of hearing i.e. 19.11.2014, 02.12.2014, 16.12.2014, 19.01.2015, 07.02.2015, 21.02.2015, 24.02.2015, 16.05.2015, 30.05.2015, 13.06.2015, 27.06.2015, 11.07.2015, 05.09.2015 and 19.09.2015 but because of multiple reasons, they could not be examined, therefore, delay if any, cannot be attributed to the prosecution alone. I have noticed that on 22.09.2015 a report was sought from the learned trial Judge directing him to specify the reasons for delay in conclusion of the trial and in pursuance thereof, learned trial Court/Judl. Magistrate Section 30, Kharian, *vide* his report dated 30.10.2015, fixing responsibility of delay in the trial upon the defence side, has observed as under:

> "I have the honour to submit that the subject criminal case is pending in the Court of the undersigned in which next date of hearing is 17.10.2015 for recording of prosecution evidence. It is also humbly submitted that prosecution witnesses are regularly appearing before the Court and the accused of the case including the accused Shehbaz have been seeking adjournments mainly on the ground that they have yet to engage their counsel. Lastly, it is humbly submitted that the delay in conclusion of trial is clearly attributed to the Accused side."

The above mentioned observations of the learned trial Court read with its order sheet, clearly reflect that accused side is delaying the trial on one pretext or the other. It is by now well settled that while computing the period of delay on the part of the accused or the prosecution the Court has to consider the cumulative effect of the adjournments sought in this regard. If the prosecution witnesses appear on one date and the case is adjourned on the request of the accused then the delay subsequently caused in recording evidence of these witnesses cannot be excluded in favour of the accused. I respectfully place reliance on the case of *Abdur Rashid Versus State* (PLJ 1998 SC 1241) wherein the Hon'ble Supreme Court of Pakistan has held as under:--

> "Factually, if the witnesses are in attendance and matter is ripe for recording evidence; but defence does not proceed with the case, it may seriously affect the prosecution because on the next date, possibly, for some or the other reason, witnesses who had in fact appeared may not attend. Therefore, if effective hearing is got postponed by the accused or his counsel, then they are bound to face entire risk and such period which may be consumed in procuring presence and examination of those witnesses who earlier appeared in the Court when adjournment was sought on behalf of accused would be important factor for considering question of bail merely on statutory ground under third proviso to Section 497, Cr.P.C."

The Apex Court further observed in the case referred above that while ascertaining cumulative effect of ultimate delay in disposal of the case, it would not be merely mathematical calculation of excluding such days for which adjournment was obtained by the accused or his counsel. In a very recent unreported judgment titled *"Zubaida Khatoon versus Muhammad Ashraf Ejaz & another"* (Crl P.L.A. No. 253-L of 2014), reiterating the esteemed guide line while deciding bail petition on the ground of statutory delay, the Hon'ble Supreme Court of Pakistan has held as under:

> "We may observe here that for considering the case of an accused for grant of bail on the ground of statutory delay, simplicitor exercise of making mathematical calculation is contrary to the mandate and spirit of law, to see that on how many

dates of hearing adjournments were sought by the accused side and on how many dates the matter could not proceed for other reasons not attributable to him. What is more important is that the Court has to see the overall conduct of the accused, keeping it in juxtaposition to various requests for adjournment made by him to delay the proceedings in the case and its cumulative effect. In a situation, where the prosecution witnesses are in attendance before the trial Court and the matter is likely to be proceeded, if a request for adjournment is made by the accused or his counsel with the calculated object of not proceedings with the case or for causing harassment and inconvenience to the prosecution witnesses even, one such instance could be fatal for refusal of bail to him on the ground of statutory delay. In the instant case, from the reproduction of some portion of the impugned order, it is evident that it was not once or twice, but at least on ten dates of hearing after framing of charge in the criminal case against Respondent No. 1 that calculated steps were taken from his side by seeking adjournments when the prosecution witnesses were in attendance, to delay and obstruct the proceedings. This conduct of Respondent No. 1 has disentitled him from the benefit of grant of bail on the ground of statutory delay even after the expiry of more than two years period during which no adjournments were obtained by him or the delay could be attributable to the prosecution. If further guidance is needed in this regard, reference can be made to the case of *Abdur Rasheed versus The State* (1998 SCMR 897)."

In view of all above, I am of the view that the delay in conclusion of the trial cannot be attributed to the prosecution and the same is on the part of the defence. Therefore, this petition being devoid of any force is accordingly dismissed. However, learned trial Court is directed to conclude the trial in this case expeditiously preferably within a period of three months after the receipt of this order.

(A.A.K.) Bail dismissed.

P L D 2018 Lahore 423
Before Muhammad Anwaarul Haq, J
MUHAMMAD LATIF---Petitioner
Versus
THE STATE and others---Respondents

Criminal Miscellaneous No.156603-B of 2018, decided on 1st March, 2018.

Criminal Procedure Code (V of 1898)---

----S. 497 ---Penal Code (XLV of 1860), Ss. 324, 334, 337-G, 353, 109 & 186---Attempt to commit qatl-i-amd, itlaf-i-udw, hurt by rash or negligent driving, assault or criminal force to deter public servant from discharge of his duty, abetment, obstructing public servant in discharge of public functions---Bail, refusal of---Allegation against the accused was that he intentionally drove his truck over a police official who tried to stop him for inspection of driving licence and other documents---Accused was arrested by the police at the spot when he was trying to escape after the alleged occurrence---Injury attributed to the accused had admittedly resulted into amputation of right leg of the police official up to the knee---Contention of accused that he was not driving the vehicle but was working as a conductor and after the escape of the driver from the spot he was detained by the police officials with mala fide intention was not supported by any material on record---Even otherwise, it was not believable that the police including the injured police official who had lost his leg would substitute the real culprit with an innocent conductor who was not driving the vehicle---Other contention of the accused that the alleged occurrence fell within the purview of S.337G, P.P.C. and the same was bailable, was also misconceived---Benefit of S.337G, P.P.C. could not be claimed by any person whose act by itself was unlawful i.e. driving a truck without a driving licence---Even otherwise the contentions of the accused were contradictory as on one side he argued that he was not driving the vehicle at the time of incident and on the other hand he claimed benefit of S.337G, P.P.C.---Accused was refused bail accordingly.

Abid Saqi for Petitioner.

Saeed Ahmad Sheikh, Additional Prosecutor General for the State with Mushtaq Hussain, ASI.

Complainant Muhammad Akram, S.I. in person.

ORDER

MUHAMMAD ANWAARUL HAQ, J.---Through this second petition, petitioner Muhammad Latif seeks his post arrest bail in a case FIR No.196 dated 16.06.2017 registered under sections 324, 353, 334, 186 and 109, P.P.C. at Police Station City, Pindi Bhattian District, Hafizabad. The first petition i.e. Criminal Miscellaneous No.71377-B of 2017 was dismissed for want of prosecution on 14.12.2017.

2. Allegation against the petitioner is that he deliberately and intentionally drove his dumper/truck over Muhammad Aslam ASI who at the relevant time was performing his duty in uniform. It is duly mentioned in the FIR that complainant along with Muhammad Aslam ASI and other officials tried to stop the petitioner for inspection of driving licence and other

documents but he did not stop his truck and police officials followed him on their motorbikes who because of some road jump reduced speed of the truck upon which officials crossed the truck and Muhammad Aslam ASI again cautioned the petitioner to stop his vehicle but he, with the intention to kill Muhammad Aslam ASI, drove his vehicle over him in result of which police official lost his leg under his knee.

3. Heard. Record perused.

4. Petitioner was arrested by the police at the spot when he was trying to escape after the alleged occurrence. The injury attributed to the petitioner had admittedly resulted into amputation of right leg up to the knee of Muhammad Aslam ASI and that was subsequently declared attracting the offence under section 334, P.P.C. Argument of learned counsel for the petitioner that the petitioner was not driving the vehicle but was working as a conductor and after the escape of the driver from the spot he was detained by the police officials with mala fide intention is not supported by any material on record. Even otherwise it is not believable that police officials including the injured one who has lost his leg would substitute the real culprit with an innocent conductor who was not driving the vehicle. The other argument of learned counsel for the petitioner that the alleged occurrence falls within the purview of section 337G, P.P.C. and the same is bailable, is also misconceived. In the normal course of action, in an accident case "criminal intent" is found missing whereas in this case the same has specifically been alleged in the F.I.R and statements of the eye-witnesses. In a considerable number of cases in different jurisdictions, causing death/injury by driving over the vehicle especially in the backdrop of terrorism has been termed as deliberate and intentional when the vehicle was used as a weapon of offence, hence, benefit of section 337G, P.P.C. cannot be claimed by any person whose act by itself was unlawful i.e. driving a heavy duty truck without a driving licence. Even otherwise the argument of learned counsel for the petitioner is two folded, on one side he argued that the petitioner was not driving the vehicle at the time of incident and on the other hand he claimed benefit of section 337G, P.P.C. i.e. an exception to the general rule. It goes without saying that deeper appreciation of evidence is not permissible at bail stage and it is for the trial court to make a determination as to the "rash and negligent driving" or "intentional and deliberate act" of the petitioner.

5. Needless to add that driving of heavy duty vehicles by unlicenced drivers showing high handedness and using their vehicles as weapon of offence against the police officials cannot be encouraged as it validly creates a sense of insecurity in the minds of the officials on duty to control traffic offences for the safety of public at large.

In view of all above, this bail petition being devoid of any force is **dismissed.**

6. It is, however, clarified that the observations made herein are just tentative in nature and strictly confined to the disposal of this bail petition.

MWA/M-53/L Bail refused.

2018 Y L R 467
[Lahore]
Before Muhammad Anwaarul Haq, J
MUHAMMAD ZAHID---Petitioner
Versus
The STATE and another---Respondents

Crl. Misc. No.61103-B of 2017, decided on 29th November, 2017.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), Ss. 302, 324, 337-F(iii), 337-A(i), 109, 148 & 149---Qatl-i-amd, attempt to commit qatl-i-amd, hurt, abettor present when offence committed, rioting armed with deadly weapon, unlawful assembly---Bail, grant of---Further inquiry---Accused allegedly fired shots with his pump action gun that injured two persons; subsequently one injured died after more than one month of the occurrence---Medico-legal report of deceased reflected only one injury on his person whereas besides accused, co-accused was also alleged to have fired shots that hit the deceased; there was only one injury on the person of deceased which was attributed to both the accused persons---Two injuries on the persons of injured (attributed to accused) had already been declared offences under Ss. 337-F(i) & 337-A(i), P.P.C.---Deceased as well as all the injured witnesses did not assign any specific role to any of the accused and stated that all the accused made firing due to which they became injured---Accused was behind the bars since one year and had no previous criminal record---No progress in trial---Case against accused fell within purview of subsection (2) of S.497, Cr.P.C. and was one of further inquiry into his guilt---Bail was granted accordingly.

Rana Saqib Mumtaz and Ch. Zeeshan Afzaal Hashmi for Petitioner.

Ch. Muhammad Mustafa, Deputy Prosecutor General for the State with Nadeem Khalid S.I.

Nemo for the Complainant.

ORDER

MUHAMMAD ANWAARUL HAQ, J.--- Petitioner Muhammad Zahid seeks post arrest bail in case FIR No.245 dated 18.03.2014 registered under sections 302, 324, 337-F(iii), 337A(i), 109 and 148/149, P.P.C. at Police Station Aroop District Gujranwala.

2. As per office report, learned counsel for the complainant Mr. Saif Ullah Maan Advocate was duly informed through mobile phone whereas notices Pervi had been issued to him as well as the other counsel Mr. Husnain Haider Advocate. Police official present in Court also confirms that complainant has duly been informed regarding fixation of this matter for today. However, even after repeated calls no one is appearing on behalf of the complainant and I am left with no other option but to decide this petition after hearing the arguments of learned counsel for the petitioner and the learned law officer.

3. Allegation against the petitioner is that he fired shots with his pump action gun that hit Muhammad Waris and Muhammad Hussain. Subsequently, Muhammad Hussain expired on 21.04.2014 after more than one month of the occurrence.

4. Heard. Record perused.

5. Medico Legal Report of the deceased Muhammad Hussain reflects only one injury on his person i.e. a lacerated wound of entry 3 x 3 cm x bone exposed x going deep on front of left leg upper part whereas besides petitioner co-accused Munir Ahmad is also alleged to have fired shots with his 44-bore rifle that hit Muhammad Hussain. Two injuries on the person of injured Haji Muhammad Waris, attributed to petitioner, have already been declared attracting the offences under sections 337-F(i) and 337-A(i), P.P.C. Muhammad Hussain deceased as well as other injured witnesses Munir Ahmad, Muhammad Kashif and Muhammad Waris in their statements under section 161, Cr.P.C. have not assigned any specific role to any of the accused and have stated that all the accused made firing due to which they became injured.

As there is only one injury on the person of the deceased that has been attributed to petitioner as well as his co-accused Munir Ahmad and all injured witnesses including Muhammad Hussain deceased in their statements have attributed general role to the petitioner, therefore, case against him prima facie falls within the purview of subsection (2) of section 497, Cr.P.C. and is one of further inquiry into his guilt. Petitioner is behind the bars since 28.12.2016 and police official present in Court states that he has no previous criminal record. Learned counsel for the petitioner states at bar that there is no progress in the trial and not even a single witness has so far been recorded. I, therefore, admit the petitioner to bail subject to his furnishing bail bonds in the sum of Rs.2,00,000/- (Rupees two hundred thousand only) with two sureties each in the like amount to the satisfaction of the learned trial court.

6. It is, however, clarified that the observations made herein are just tentative in nature and strictly confined to the disposal of this bail petition.

WA/M-190/L Bail granted.

PLJ 2018 Lahore 824

***Present*: MUHAMMAD ANWAAR-UL-HAQ, J.**

AMIR MEHMOOD--Petitioner

versus

SOHAIL ZAFAR CHATTHA, DPO, etc.--Respondents

W.P. No. 36658 of 2016, decided on 13.4.2018.

Constitution of Pakistan, 1973--

----Art. 199--Criminal Procedure Code, (V of 1898), S. 561-A--Pakistan Penal Code, (XLV of 1860), S. 365-A--Constitutional petition--Quashment of F.I.R.--Investigation--Challenge to--Offence under Section 365-A, PPC has been deleted and Sections 342, 406, PPC have been added by Investigating Officer--*Prima-facie,* allegations contained in impugned-F.I.R. against petitioner and his co-accused other than abduction referred above, are also serious in nature and correctness or otherwise of same require trial by Court of competent jurisdiction, even allegation of *mala fide* of complainant-Respondent No. 5, if any or delay of few days in lodging of formal F.I.R. being questions of fact, require proof by producing evidence that exercise at this stage is neither permissible nor desirable--It is by now well settled that quashing of F.I.R. is an extraordinary relief that can only be granted if F.I.R. doesn't disclose commission of any offence, there is no probability of conviction of accused or there is any jurisdictional defect in registration of case--Petition was dismissed. [P. 826] A & B PLD 2013 SC 401, *ref.*

Mr. M. Sikandar Hayat, Advocate for Petitioner.

Mr. Sittar Sahil, Assistant Advocate-General with *Muhammad Arif* A.S.I.

Date of hearing: 13.4.2018.

ORDER

Amir Mehmood petitioner has invoked the jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 read with Section 561-A, Cr.P.C. seeking quashing of F.I.R. No. 390, dated 25.10.2016, registered under Section 365-A, PPC at Police Station Lorry Adda, District Gujrat.

2. Learned counsel for the petitioner referring case law "2015 SCMR 1575 and 2014 P Cr. L J 1305" contends that the impugned F.I.R. is totally false and is an abuse of process of the law; that the allegations contained in the F.I.R. are totally vague and during the investigation, Section 365-A, PPC has already been deleted and report under Section 173, Cr.P.C. has been submitted before the Court of competent jurisdiction under Sections 342, 406, PPC; that as per contents of the F.I.R. joint allegation against the petitioner and his six nominated co-accused that they misappropriated the amount given to them by the complainant for business purpose, on the face of it, does not attract the offence under Section 406, PPC and at the most complainant could file a suit for recovery or rendition of account; that civil litigation between the parties regarding the disputed amount is already pending before the Court of competent jurisdiction.

3. Learned Assistant Advocate-General contends that challan in the case has already been submitted before the learned trial Court; that quashing of an FIR is an extra-ordinary

relief and can only be granted in extra-ordinary circumstances. Placed reliance on the case law 2016 SCMR 842 and PLD 2013 Supreme Court 401.

4. Heard.

5. Initially, F.I.R. in this case was registered under Section 365-A, PPC and with further allegation against the petitioner and his co-accused for obtaining signatures of the complainant on a blank stamp paper in the following words:--

During the investigation, offence under Section 365-A, PPC has been deleted and Sections 342, 406, PPC have been added by the Investigating Officer. *Prima-facie,* allegations contained in the impugned-F.I.R. against the petitioner and his co-accused other than abduction referred above, are also serious in nature and correctness or otherwise of the same require trial by the Court of competent jurisdiction, even the allegation of *mala fide* of the complainant-Respondent No. 5, if any or delay of few days in lodging of formal F.I.R. being questions of fact, require proof by producing evidence that exercise at this stage is neither permissible nor desirable. It is by now well settled that quashing of F.I.R. is an extraordinary relief that can only be granted if the F.I.R. doesn't disclose commission of any offence, there is no probability of conviction of the accused or there is any jurisdictional defect in the registration of the case. All the contentions raised by learned counsel for the petitioner need investigation by the investigating agency and then by the learned trial Court. Case law referred above by learned counsel for the petitioner is quite distinguishable than the facts and circumstances of this case. I do not find any reason at this stage to interfere in the matter, hence, this writ petition being devoid of any force is dismissed.

(M.M.R.) Petition dismissed.