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2011 C L C 1251

[Lahore]

Before Syed Kazim Raza Shamsi, J

SHEHZAD JAVED----Petitioner

Versus

JAMSHAID AKHTAR and others----Respondents

Writ Petition No.5256 of 2011, decided on 19th May 2011.

Punjab Rented Premises Act (VII of 2009)---

----Ss. 2(b), 2(l), 15, 22 & 28---Constitution of Pakistan, Art.199---Constitutional petition---Maintainability---Ejectment of tenant---Leave to defend by co-owner---Scope---During pendency of ejectment petition co-owner of premises was impleaded as respondent but his right of defence was closed by Rent Tribunal on the ground that no petition for leave to defend was filed by him---Plea raised by landlord was that constitutional petition was not maintainable against interlocutory order---Validity---Order of Rent Tribunal closing right to file leave to defend the petition had become final within the meaning of S.2(b) of Punjab Rented Premises Act, 2009, to the extent of co-owner---Although appeal could be preferred under S.28 of Punjab Rented Premises Act, 2009, by co-owner but that remedy of appeal was neither adequate nor efficacious, therefore, constitutional petition was maintainable before High Court---Rent Tribunal ignored the material fact that co-owner was claiming to be the landlord of tenant and both were having lease agreement---Co-owner could be joined as co-petitioner in ejectment matter---Co-owner could not be treated as co-tenant with tenant because he did not fulfil conditions of being tenant as enunciated in S.2(l) of Punjab Rented Premises Act, 2009, therefore, provisions of S.22 of Punjab Rented Premises Act, 2009, were not applicable, and he could not be directed to file leave to contest without there being its filing within ten days---Remedy of placing on record their protest or objections, Rent Tribunal might resort to general principles of civil law and required a written statement so that picture of other side could also be viewed for safely administering justice---Such remedy to co-owner was available in addition to any other remedy provided to him by law---Courts below had committed illegality in asking for leave application under S.22 of Punjab Rented Premises Act, 2009, from co-owner and thereafter penalizing him by closing his defence---High Court, in exercise of constitutional jurisdiction, set aside the orders passed by the courts below and case was remanded to Rent Tribunal for decision afresh after providing opportunity to co-owner to file written statement---Petition was allowed accordingly.

Ch. Muhammad Sadiq Sindhu for Petitioner.

ORDER

SYED KAZIM RAZA SHAMSI, J.--- This constitutional petition is directed against an order dated 8-2-2011 passed by Mr. Nadeem Hassan Waseer, Special Judge, Rent

Tribunal, Lahore whereby an application for review of the order dated 21-10-2010 was dismissed.

2. Facts of the case briefly stated are that one Jamshaid Akhtar filed an ejectment petition under section 15 Punjab Rented Premises Act, 2009 against Sheikh Asim Latif, on the ground of default in the payment of rent which was contested by the tenant by filing leave to defend the petition not denying in so many words the relationship of landlord and the tenant between the parties. Later on 23-4-2010 Khalida Rafique wife of late Javed Akhtar brother Jamshaid Akhtar, and the children of said Javed Akhtar made an application under Order 1, Rule 10, C.P.C. for impleading them as party in the ejectment petition on the ground that they had rented out the demised premises to Shaikh Asim. The application was contested by the respondent Jamshaid Akhtar and the learned Rent Tribunal vide order dated 18-9-2010 impleaded Mst. Khalida Rafique and others as respondents in the ejectment petition. The learned Rent Tribunal vide order dated 21-10-2010 closed the defence of newly-added respondents stating that they failed to file an application seeking leave to defend the petition within the statutory time. The petitioner filed review application before the learned Tribunal which was dismissed on 8-2-2011. In the instant petition vires of the above said orders have been called into question.

3. The learned counsel for respondent No.l who appeared in response to the notice of the court, while the other respondents did not turn up, submitted that the instant petition is not maintainable as it is directed against an interim order passed by the learned Rent Tribunal. The objection has been examined and it is found that the order of the court closing the right to file leave to defend the petition has become final within the meaning of section 2(b) of Ordinance ibid to the extent of the petitioner. Although an appeal could be preferred under section 28 of the Act by the petitioner, but in the opinion of this court the remedy of appeal was neither adequate nor efficacious. The constitutional petition is thus maintainable in this court. The Rent Tribunal has ignored the material fact that the present petitioner and respondent No.1 being co-owners are claiming to be the landlord of respondent No.2. The both are having lease agreements. In such like situation the present petitioner could be joined as co-petitioner in the ejectment matter. At this stage the learned counsel for the petitioner submitted that the present petitioner does not want to evict the respondent No.2 from the demised premises while respondent No.1 wished so. Now the question is whether co-owner impleaded as respondent in ejectment petition, along with the tenant can be treated as co-tenant and can be required under section 22 of Act to file leave to defend petition. If not then what is remedy for such person who has been impleaded as party in lis and wanted to place on record his point of view. The reply of this legal proposition is not much difficult as firstly petitioner can never be treated as co-tenant with respondent No.2 because they do not fulfil conditions of being tenant as enunciated in section 2(L) of the Act. If it is so then the provisions of section 22 of the Act are not applicable, and he cannot be directed to file leave to contest what to talk about time of ten days for filing application. Further about remedy for placing on record their protest or objections, the Tribunal may resort to general principles of civil law and require a written statement so that picture of other side could also be viewed for safely administering justice. This remedy to the petitioner is available in addition to any other remedy provided to him by law. In these circumstances, court below has committed illegality in asking for leave application

under section 22 from the present petitioner and thereafter penalizing him through the impugned orders. As such this petition is allowed by declaring the order dated 21-10-2010 and 8-2-2011 as null and void. The learned Special Judge Rent Lahore shall afford an opportunity to the writ petitioner to file the written statement whereafter he shall pass a proper order permissible by law. There shall be no order as to costs.
M.H./S-80/L Case remanded.

2011 C L C 1498
[Lahore]
Before Syed Kazim Raza Shamsi, J
RUKHSANA JABEEN----Petitioner
Versus
ADDITIONAL DISTRICT JUDGE, and others----Respondents

Writ Petitions Nos.7416 and 7417 of 2010, decided on 19th May, 2011.

(a) Constitution of Pakistan---
----Art. 199---Constitutional petition---Alternate remedy of appeal or revision, non-availing of---Effect---Bar on filing constitutional petition without availing alternate remedy could be ignored in exceptional cases in order to administer substantial justice between the parties.
Farzand Raza Naqvi and 5 others v. Muhammad Din and others 2004 SCMR 400 rel.

(b) West Pakistan Urban Rent Restriction Ordinance (VI of 1959)---
----Ss. 13 & 15(6)---Constitution of Pakistan, Art.199---Order of ejectment from shop passed by Rent Controller set aside by Appellate Authority---Constitutional petition filed by pardanasheen landlady instead of filing second appeal in the High Court---Maintainability---Such orders passed by courts below were neither void nor suffered from any jurisdictional defect---Petitioner being a pardansheen lady was not accustomed with legal procedure and working of court---Filing of constitutional petition instead of filing of appeal in High Court could be on the basis of mistaken advice to petitioner or her ignorance of court working and procedure to be adopted---Law gave preferential treatment to women folk---Non-entertaining of constitutional petition would have resulted in maintaining impugned order and petitioner had to face rigour of fresh litigation under new law and all her efforts to have justice from courts for last more than four years would have proved futile---High Court entertained constitutional petition in circumstances---Instances of special treatment given under law to women folk highlighted.
Farzand Raza Naqvi and 5 others v. Muhammad Din and others 2004 SCMR 400 rel.

(c) West Pakistan Urban Rent Restriction Ordinance (VI of 1959)---
----S. 13(2)---Tenancy agreement, expiry of---Effect---Tenant, in such a situation would become statutory tenant and could not be evicted from demised premises without due process of law---In absence of fresh agreement, tenancy would be governed by terms of expired agreement.

(d) West Pakistan Urban Rent Restriction Ordinance (VI of 1959)---

----S. 13---Punjab Rented Premises Ordinance (XXI of 2007), S.19---Ejectment petition---Law available at the time of institution of ejectment petition would govern the same.

Khurram Shehzad Malik for Petitioner.
Zaheer-ud-Din Chaudhry for Respondent.
Date of hearing: 19th May, 2011.

JUDGMENT

SYED KAZIM RAZA SHAMSI, J.--- Since both these constitutional petitions bearing Writ Petition No.7416 of 2010 and Writ Petition No.7417 of 2010 involved common questions of law and deal with the same property, therefore, are being disposed of by this single judgment.

2. Both these constitutional petitions are directed against an order dated 25-1-2010 passed by Ch. Shahid Naseer, learned Additional District Judge, Lahore whereby the appeals filed by the tenant Yaqoob Khan against his eviction order dated 10-7-2009 passed by Mrs. Samina Hayat, learned Rent Controller, Lahore from the two Shops Nos.2 and 3, were accepted and ejectment petitions were dismissed.

3. In the ejectment petitions filed on 8-12-2006 under section 13 of Punjab Urban Rent Restriction Ordinance, 1959 in respect of Shops No.2 and 3 situated in 10-Main Bazar, Garhi Shahu, Lahore filed on the grounds of default in the payment of rent, personal need and violation of terms of the agreement. The allegations were negated in written reply by respondent No.2. The resume of facts have been detailed in the judgments of two courts below. The learned Rent Controller, after framing issues on the disputed facts recorded respective evidence of the parties and vide order dated 10-7-2009 accepted the ejectment petitions on the grounds of default in the payment of rent and personal need. Two separate appeals were preferred against the eviction order by respondent No.2 before first appellate court which did not agree with the findings of learned Rent Controller, Lahore in respect of all the three grounds, consequently, accepted the appeals of the tenant and dismissed the ejectment petitions.

4. The landlord through the instant two constitutional petitions have called into question vires of the dismissal of the ejectment petitions.

5. It is contended by the learned counsel for the petitioner that the learned first appellate court has erred in dismissing the ejectment petitions which findings are based upon misreading of material evidence on the record. Learned counsel further challenged the legality of the impugned orders on various grounds as set out in the memorandum of constitutional petitions.

6. Conversely, the learned counsel for respondent No.2 has raised preliminary objection about the maintainability of the constitutional petitions submitting that the ejectment petitions were filed under the old law i.e. Punjab Urban Rent Restriction Ordinance, 1959, which provides remedy of appeal against the order of first appellate court but the petitioner has challenged the

vires of the orders through the constitutional petitions which are not maintainable. On merits, it is argued that the findings of the learned first appellate court are based upon sound appreciation of evidence, therefore, prayed for the dismissal of the petitions

7. I have considered the submissions made by the learned counsel for the parties and gone through the record minutely.

8. The objection taken by the learned counsel for respondent No.2 has been considered and found untenable. It is absolute rule that where alternate remedy in the form of appeal or revision is available, the constitutional petition is not maintainable without availing that remedy but in exceptional cases, this bar can be ignored to administer substantial justice between the parties as held in the judgment of apex Court recorded in the case of Farzand Raza Naqvi and 5 others v. Muhammad Din and others (2004 SCMR 400). It has been observed in the said judgment that if the order passed by a court suffers from a defect of jurisdiction or is void order, in such circumstances, the rule of availing remedy of appeal can be dispensed with. No doubt, the order passed by both the courts below are neither void nor suffer from any defect of jurisdiction but this court is influenced by fact that the petitioner in the instant cases is pardanasheen lady who usually are not accustomed with the legal procedure and the working of the court. The institution of the instant constitutional petitions instead of filing of appeals in this court could be on the basis of her ignorance of court working and procedure to be adopted for availing remedy or a mistaken advice. In such-like circumstances, when law ges B preferential treatment to the women folk, this court deems it appropriate to entertain these constitutional petitions. The instances of special treatment to folk can be examined in section 132, Civil Procedure Code, 1908 exempting women from appearance in courts; Proviso to section 497 Code of Criminal Procedure, 1898, wherein except for certain offences bail is to be granted to female as matter of right and Women Protection Act, 2006. Even in chain of judgments of superior courts, have given special treatment to illiterate Pardanasheen females, by cancelling documents on the ground that same were not read over to lady and she was not made to understand the contents of that document before affixing thumb-impression or signatures thereto. Thus, present petitioner is also entitled to same treatment and her petitions are entertainable.

9. The other reason to entertain these petitions is that if order of first appellate court is maintained as such, the petitioner has to face rigour of fresh litigation under new law and her all attempts to have justice from courts since 8-12-2006, would prove futile.

10. On merits, the examination of the judgment recorded by the learned first appellate court appears suffering from material legal infirmities. For instance, the court under Issue No.1 held that there is no justification for enhancement of rent from Rs.500/- to Rs.5000/- per month without any fresh agreement to this effect, that no fresh settlement or agreement was executed after the expiry of tenancy period and that the petitioner failed to establish the period of default in the payment of rent. There findings are whimsical and not supported by record. It has been provided in Ordinance (ibid) that after the expiry of rent agreement, a tenant becomes a statutory tenant and cannot be evicted from rented premises without due process of law. If no fresh agreement is executed between the parties, such tenancy shall be continued and governed by the terms of expired agreement. The first appellate court also failed to note or require whether respondent No.2 had even deposited the rent of Rs.400/-

which had been agreed upon between the parties since long. At this juncture, it is observed that in the year, 1990 an amendment was made in the rent laws whereby it was mandatory for tenant to increase rent to the extent of 25% after expiry of three years himself and if he failed to pay or tender the enhanced rent to the landlord, he was treated as defaulter in the payment of rent. The first appellate court has also ignored this legal proposition. Needless to say that the petitions for ejectment were filed in the year, 2006 when the fresh law in the form of Ordinance was not promulgated, thus, according to settled law, the ejectment petitions would be governed by law which was available- at the time of institution of the ejectment petitions.

11. In view of these legal questions which have not been determined by the learned first appellate court while dismissing the ejectment petitions, the impugned orders are declared as null and void. The petitions are accordingly allowed. The appeal filed by Yaqoob Khan respondent No.2 shall be deemed to be pending before the first appellate court which shall decide the same afresh after keeping in view the observation made in this order. The learned first appellate court shall decide both the appeals preferably before proceeding on special casual leave, under intimation of this court. The parties are left to bear their own costs.

S.A.K./R-28/L Case remanded.

2011 C L C 1534
[Lahore]
Before Syed Kazim Raza Shamsi, J
BABAP ENTERPRISES----Appellant
Versus
UNITED BANK LIMITED and others----Respondents

S.A.O. No.4 of 2010, heard on 10th June, 2011.

West Pakistan Urban Rent Restriction Ordinance (VI of 1959)---
----S. 13---Qanun-e-Shahadat (10 of 1984) Art.78---Ejectment of tenant by Bank---Filing of ejectment proceeding against a tenant by the Bank as not a matter covered by day to day routine business of the Branch of Bank and if any objection in such a case was raised about the competency of the officer of the Bank instituting ejectment proceeding against a tenant of the Bank, burden fell upon the Bank to establish that the ejectment proceeding was authorized by the Bank in that behalf---If the burden was not discharged then the ejectment petition was not maintainable---In the present case, examination of the statement of the person who instituted the ejectment petition did not show that he was authorized by the Bank by an instrument to lodge proceedings against its tenant; he did not tender original documents in this behalf, so that he could be subjected to cross-examination by the counsel of the tenant to check the validity of authorization---Ejectment petition, also did not mention that person filing the same had been duly authorized by the Bank in that behalf nor he had referred to any power-of-attorney executed in his favour in the petition---Such documents could not be exhibited in the statement of the counsel for the Bank but were

required to be tendered in the statement of person instituting the proceedings where its admissibility and relevancy was to be determined by the court as well, after providing opportunity of cross-examination of the witness---Tenant, to such extent, had been condemned unheard as all such exercise was done illegally at his back---Rent Controller, before keeping said documents on the file was duty bound to see that the documents were yet to be proved through evidence and could not be exhibited without formal proof---person instituting the petition, in circumstances, was not competent to file the same on behalf of the Bank as such, ejectment petition was not maintainable---All the proceedings taken therein were of no significance and were without jurisdiction.

Habib Bank Limited v. Zelins Limited and another 2000 SCMR 472 fol.
Messrs A.M. Industrial Corporation Limited v. Aijaz Mahmood and others 2006 SCMR 437; Maqbool Ahmad v. Pakistan Agricultural and others 2006 SCMR 470; Mian Muhammad Abdullah v. Sheikh Nawab Din 1971 SCMR 336; Irfanullah Shah v. Wahabdullah Shah 2003 YLR 1195; Akhtar Ali Qureshi v. Qari Amir Alam NLR 2006 Civil 492; Tariq Ali Sheikh v. Rent Controller Mr. Khalid Nawaz, Lahore and another 1998 CLC 460 and Reckitt and Colman of Pakistan Limited v. Saifuddin G. Lotia and others 2000 SCMR 1924 ref.

Akbar Ali Shad and Abid Saqi for Appellant.
Nisar Ahmad Nisar for Respondent.
Date of hearing: 10th June, 2011.

JUDGMENT

SYED KAZIM RAZA SHAMSI, J.--- This second appeal is directed against an order dated 11-1-2010 passed by Mr. Javed Akhtar, the learned Additional District Judge, Faisalabad, whereby he maintained the ejectment order dated 18-9-2008 passed by Muhammad Usman, the learned Rent Controller Faisalabad accepting the ejectment petition and ordering the eviction of the appellant from the demised premises.

2. Facts of the case briefly stated are that one Ashfaq Ahmed filed a petition against the respondent under section 13 of the Punjab Urban Rent Restriction Ordinance, 1959 on behalf of United Bank Limited on the ground of personal need of the Bank as well as default in the payment of rent. The application was contested by the respondent/tenant who controverted the allegation. The learned trial Court framed the issues in respect of wilful default in the payment of rent and proceeded to record the evidence of the parties. After appreciating the evidence the petition was accepted ordering the ejectment of the tenant/appellant. Feeling aggrieved by the said eviction order the same was assailed before the learned first appellate court, which also concurred with the findings of the learned Rent Controller and dismissed the appeal vide order impugned in the instant second appeal.

3. It is contended by the learned counsel for the appellant that Ashfaq Ahmad who filed an ejectment petition against the appellant was not duly authorized to institute the ejectment

petition. He submitted that after conclusion of oral evidence the counsel for the respondent in absence of the counsel for the appellant, on 16-6-2006 placed some documents of authorization on record which were exhibited by the court without affording an opportunity to the appellant to raise objection on the exhibition of those documents. He further contended that only those documents could be exhibited in the statement of the learned counsel, which are of unchallenged authenticity. He, further contended that the oral statement of AW.1 is not sufficient to prove the case of the ejectment. On merits, the learned counsel has assailed the findings of the learned courts below. He cited the cases Habib Bank Limited v. Zelins Limited and another (2000 SCMR 472), Messrs A.M. Industrial Corporation Limited v. Aijaz Mahmood and others (2006 SCMR 437), Maqbool Ahmad v. Pakistan Agricultural and others (2006 SCMR 470), Mian Muhammad Abdullah v. Sheikh Nawab Din (1971 SCMR 336), Irfanullah Shah v. Wahabdullah Shah 2003 YLR 1195, Akhtar Ali Qureshi v. Qari Amir Alam (NLR 2006 Civil 492), Tariq Ali Sheikh v. Rent Controller, Mr. Khalid Nawaz, Lahore and another 1998 CLC 460 and Reckitt and Colman of Pakistan Limited v. Saifuddin G. Lotia and others (2000 SCMR 1924).

4. Meeting with the objection of learned counsel for the appellant the counsel for the respondent submitted that the documents like power of attorney lease deed, site plan etc. can be exhibited in the statement of the counsel, as such, no illegality was committed by the learned courts below in placing on record the, documents in the statement of the counsel.

5. I have considered the submissions made by the learned counsel for the parties and examined the record. Keeping in view the objection of learned counsel for the appellant about competency of Ashfaque Ahmed to institute ejectment petition and its maintainability, I intend to discuss this objection. The record shows that the counsel for the appellant when came to know that the documents i.e. site plan of the shop in dispute, copy of attorney, copy of lease deed, original attorney and attornyship of Ashfaq Ahmad were placed on record in the statement of Sh. Abdus Sattar Advocate dated 16-6-2006, assailed the said exhibition through an application, which was declined by the learned Rent Controller. It appears that the order of Rent Controller was interim order, as such, no appeal was filed. However, this point was raised before the learned First Appellate Court, which did not give any finding on the same. After examining the ejectment petition it is found that one Ashfaq Ahmad perhaps had filed the ejectment petition in his personal capacity as he did not mention therein that he had been duly authorized by the Bank to institute the ejectment petition nor he had referred to any power of attorney executed in his favour in the ejectment petition. Similarly, the documents, which were exhibited in statement of the counsel for the respondent Bank, could not be exhibited in that form for the reason that these documents were to be tendered in the statement of AW.1, where its admissibility and relevancy was to be determined by the court as well after providing opportunity of cross-examination of the witness on the point by opponent counsel. To this extent, it seems that the appellant has been condemned unheard as all this exercise was done illegally at the "tack of the appellant. Further it was the duty of the learned Rent Controller before keeping those documents on the file to see that these documents are yet to be proved through evidence and cannot be exhibited without formal proof. The court failed to perform its duty. In the case of Habib Bank Limited (supra), the Hon'ble Supreme Court held that filing of ejectment proceedings against a tenant by the Bank was not a matter covered by day to day routine business of the Branch and that if any objection in such situation is raised about the

competency of the officer of the bank instituting ejectment proceedings against a tenant of the bank, burden fell upon the bank to establish that the ejectment proceeding was authorized by the bank in that behalf. It was further observed that if the burden is not discharged then the petition was not maintainable. In this scenario when the statement of AW.1 Ashfaq Ahmad is examined, it does not show that he was authorized by banking company by an instrument to lodge proceedings against its tenant; he did not tender in his statement original documents in this behalf, so that he could be subjected to cross-examination by the counsel to check the validity of authorization. In these circumstances, dictum of Hon'ble Supreme Court supra is fully applicable to the facts of the instant case. Ashfaq Ahmed was not competent to file the ejectment petition on behalf of the bank, as such, petition is not maintainable. All the proceedings taken therein are of no significance and are without jurisdiction.

6. For the foregoing reasons this appeal is accepted with costs by setting aside the order of the learned first appellate court as well as of the learned Rent Controller. Consequently, ejectment petition is dismissed with costs. However, the respondent after removing the defects may institute a fresh petition.

M.A.K./B-23/L Appeal allowed.

2011 C L C 1549

[Lahore]

Before Syed Kazim Raza Shamsi, J

BATA PAKISTAN LIMITED----Petitioner

Versus

ADDITIONAL DISTRICT JUDGE and others---Respondents

Writ Petition No.23539 of 2010, heard on 26th May, 2011.

Punjab Rented Premises Ordinance (XXI of 2007)---

----Ss. 15(a), 19 & 22---Ejectment petition---Expiry of period of written tenancy---Leave to defend, application for---Plea of tenant (a Public Limited Company) that tenancy was orally extended for another three years---Validity---Such company could not be presumed to have orally agreed to alleged extention---Original tenancy was in written form, thus, extention thereof should have been in same manner and could not be extended orally by any stretch of imagination---Such plea was repelled in circumstances.

PLD 2009 SC 789 ref.

Sher Zaman Khan for Petitioner.

Muhammad Saleem Chaudhary-I for Respondents.

Date of hearing: 26th May, 2011.

JUDGMENT

SYED KAZIM RAZA SHAMSI, J.--- This constitutional petition filed under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 is directed against an order dated 15-10-2010 passed by Mr. Muhammad Musharaf Hassan Sumra, the learned Additional District Judge, Lahore whereby an order dated 11-11-2009 passed by Mr. Zahid Hussain Bakhtiar, the learned Special Judge Rent Lahore, dismissing the application seeking leave to defend the ejectment petition was dismissed and the ejectment petition was accepted.

2. The facts, leading to the instant constitutional petition briefly stated, are that Atiq-ur-Rehman and 5 others instituted a petition under section 15 of the Punjab Urban Rented Premises Ordinance No. XXI of 2007 against M/s. Bata Pakistan Limited seeking its ejectment from the premises on the ground of the expiry of the written agreement and default in the payment of rent for the month of April and May, 2008. It has been averred in the petition that the shop in dispute was rented out to the respondent on the basis of an agreement executed on 1st April, 2005 for 3 years till 31-3-2008 at the rate of Rs.65,000 per month. It was a clause of an agreement that the period of 3 years could be extended further with the mutual consent of the parties. It is the stand of the ejectment petitioner that the rent agreement was never extended after 31-3-2008 and that the respondent did not pay the rent for the month of April and May, 2008, as such, it is liable to be ejected from the rented premises.

3. In the leave application filed under section 22 of the Ordinance it was alleged that the Punjab Rented Premises Ordinance, 2007 lived for three months whereafter it was never extended, as such, after the expiry of the Ordinance, Punjab Rent Restriction Ordinance, 1959 shall govern the proceedings of the petition. It was further asserted in the leave application that the period of three years with effect from 1-4-2008 was orally extended and that company did not commit any default in the payment of rent as the same was sent through money order.

4. In the second round of litigation the learned Special Judge Rent, did not find, these grounds as asserted in the leave application, sufficient to grant leave to defend the ejectment petition, as such, vide order dated 11-11-2009, dismissed and the tenant was directed to hand over the vacant possession of the demised premises to the ejectment petitioner. Feeling aggrieved by this decision an appeal was preferred before the learned First Appellate Court, which also concurred with the observation of the learned Special Judge Rent vide the impugned order and dismissed the appeal. In the instant constitutional petition the concurrent findings of fact recorded by both the courts below have been assailed.

5. The learned counsel for the petitioner has taken this court to the very existence of Punjab Rented Premises Ordinance, 2007 and submitted that the Ordinance ibid had been declared invalid by the apex Court in a reported judgment PLD 2009 SC 789 and granted the period of 90 days for re-enacting the law. He further submitted that till the re-enacting the new law the old law i.e. Punjab Urban Rent Restriction Ordinance, 1959 shall govern the proceedings in the instant petition and in this connection, he has taken the benefit of section 3 of General Clauses Act, 1956. He has also asserted that section 36 of the Punjab Rented Premises Act, 2009 is ultra vires to the provisions of Article

264 of the Constitution of Islamic Republic of Pakistan, 1973. On merits, the learned counsel for the petitioner submitted that the agreement last till 31-3-2008 was orally extended by both the parties and the petitioner is depositing the enhanced rent thereafter. Lastly it is submitted that the petitioner is running its business at a very busy place i.e. Chowk Yateemkhana Lahore for the last 42 years and has invested huge amount on the renovation of its business, therefore, if the court does not agree with the proposition urged in this petition, the period for three years may be granted for the vacation of the premises.

6. The learned counsel for the respondent in answer to the submissions made by the learned counsel for the petitioner argued that the legal implications as pointed out by the learned counsel for the petitioner in respect of the fate of the Ordinance, 2007 has been covered by section 36 of Punjab Rented Premises Act, 2009. The counsel is not ready to give the period of three years for the vacation of the rented premises. The learned counsel for the respondent, however, has supported the concurrent findings recorded by both the courts below.

7.Anxious thoughts have been given to the arguments of the learned counsel for the parties and the record has been gone through. So far as the existence of the Punjab Rented Premises Ordinance, 2007, is concerned; suffice it would to say that it is the matter of common knowledge that at the time of promulgation of the Ordinance, 2007 country was under state of emergency due to which the operation of Constitution of Islamic Republic of Pakistan, 1973 was held in abeyance. This situation was dealt with by the Apex Court in its judgment reported as PLD 2009 SC 789; that is why the period of 90 days was granted for reconsidering and re-enacting many Ordinances issued under the, proclamation of emergency. Moreover', section 36 of the Punjab Rented Premises Ordinance, 2009 has provided the protection to all the proceedings initiated under the Punjab Rented Premises Ordinance, 2007, thus, the submissions that old law would prevail and govern the instant case is in any manner not acceptable. The submissions of the counsel that period of three, years was further extended orally by the parties is equally has no force for the simple reason that the petitioner is a limited Company as asserted by the petitioner in Para 1 of this petition, as such, it cannot be presumed that public limited company had orally agreed to extend the period of lease for another three years. When the first lease was in written form then the extension should also be in the same manner and cannot be extended orally by any stretch of imagination. The default in the payment of rent for the month of April and May has also been established on record as the petitioner did not lace thereon any such proof that the rent for these two months had been paid or tendered in the manner prescribed by law to the land lord. In these circumstances both the courts below were justified in dismissing the application of the petitioner seeking leave to defend the ejectment petition.

8. For the foregoing reasons the writ petition bereft of the merit is dismissed. Since the petitioner is a public limited company running a store at a busy place, therefore, this court on equitable ground deems fit and essential to direct the petitioner to hand over the vacant possession of the premises within three months and shall pay the rent to the respondent during this period.
S.A.K.//B-22/L Petition dismissed.

2011 C L C 1610
[Lahore]
Before Syed Kazim Raza Shamsi, J
MUHAMMAD IRFAN----Petitioner
Versus
TARIQ MEHMOOD and others----Respondents

Writ Petition No.6720 of 2009, decided on 31st May, 2011.

West Pakistan Urban Rent Restriction Ordinance (VI of 1959)---

----S. 13---Civil Procedure Code (V of 1908), S.12(2)---Constitution of Pakistan, Art.199---Constitutional petition---Void order---Fraud and misrepresentation---Judgment, setting aside of---Petitioner claimed to be owner in possession of property in question and sought setting aside of eviction order alleging that it was a result of fraud and misrepresentation---Rent Controller dismissed the application under S.12(2), C.P.C. filed by the petitioner on the ground that provisions of Civil Procedure Code, 1908, were not applicable to proceedings before Rent Controller---Order passed by Rent Controller was maintained by Lower Appellate Court---Validity---Proceedings taken by Rent Controller, after recording statement of attorney of petitioner, became without lawful authority as the attorney had performed an act for which he was never authorized, thus order of ejectment was procured by practising fraud upon the Court---Though Civil Procedure Code, 1908, was not applicable to rent proceedings but fact remained that Rent Controller should follow equitable principles contained in Civil Procedure Code, 1908, for the reason that no wrong could be left un remedied---Every court or tribunal had inherent jurisdiction to rescind or recall a void order passed by itself---Order of eviction passed against petitioner was a void order as the same was procured fraudulently and by making misrepresentation---Every court or tribunal had the power to even suo motu recall or review an order obtained from the Court by fraud on general principle that fraud vitiated the most solemn proceedings and no party should be allowed to take advantage of his own fraud---High Court declared the order passed by both the Courts below as ineffective and void and the same was set aside---High Court directed Rent Controller to follow the rule laid down by superior courts and to proceed in accordance with law---Petition was allowed accordingly.

PLD 1991 SC 997 fol.

Ahmad Shahzad Farooq Rana for Petitioner.
Mian Muhammad Nawaz for Respondents.

ORDER

SYED KAZIM RAZA SHAMSI, J.--- This constitutional petition is directed against the order-dated 2-1-2008 passed by Mr. Zafar Hussain Bhatti, the learned Additional District Judge Sheikhupura, whereby he maintained an order dated 9-10-2008 passed by Miss. Monazza Shahzadi, the learned Civil Judge, Sheikhupura, in which, she dismissed the

application filed by the petitioner under section 12(2), C.P.C. on the ground that the Code of Civil Procedure 1908 is not applicable to the rent petition.

2. Facts of the case briefly stated are that the property in dispute was gifted to Mst. Rani Bibi, mother of the petitioner, Muhammad Irfan, after whose death the same was devolved upon Muhammad Irfan, the petitioner, Abdur Rehman, Muhammad Adnan, Mst. Robina Bibi, Mst. Shabana Bibi, Mst. Kanwal Bibi and Mst. Rehana Bibi vide mutation dated 6-1-2006. Thereafter one Tariq Mehmood claiming to be the owner of the said property, instituted an ejectment petition under section 13 of Punjab Urban Rent Restriction Ordinance, 1959 against Muhammad Irfan, Abdur Rehman and Muhammad Adnan, on the ground of default in the payment of rent. In the said petition one Akhtar Ali claiming to be the general attorney of the respondents, filed a consenting written statement, whereupon the court proceeded to pass an ejectment order and ultimately the respondents were ejected from the demised property. To camouflage illegal situation the petitioner Tariq Mehmood then filed a petition under section 3 of Illegal Dispossession Ordinance, 2005 alleging that after eviction from the demised premises he had illegally been dispossessed therefrom, which matter is pending in the cr7nrt of the learned Additional District Judge Sheikhupura.

3. At the time of execution. of warrant of possession the respondents of the ejectment petition came to know about the eviction order passed against them and preferred an application under section 12(2), C.P.C. alleging that the order of ejectment was fraudulently procured by the petitioner Tariq Mehmood and that they never authorized Akhtar Ali to appear in the court on their behalf and to make a consenting statement. The application was resisted by Tariq Mehmood and the court vide order dated 9-10-2008 dismissed the same on the ground that Civil Procedure Code is not applicable to the rent proceedings. Same findings came in appeal preferred against the said order. Hence, this writ petition.

4. The contentions raised by the learned counsel for the parties have been given due consideration and the record has been examined. It is noticed from the power of attorney executed in favour of Akhtar Ali by the present petitioner that the same does not contain any authority to appear in any case and to make statement on behalf of the executants. This being so, then Akhtar Ali, who appeared before the learned Rent Controller, made a consenting statement, the power exercised by the said Akhtar Ali was never granted to him. In this situation the proceedings taken by the learned Rent Controller after recording the statement of said Akhtar Ali became without lawful authority as the said attorney had performed an act for which he was never authorized. This leads to a conclusion that the order of ejectment was procured by practicing fraud upon the court. It is correct that the Code of Civil Procedure is not applicable to the rent proceedings but the fact remains that the learned Rent Controller should follow the equitable principle contained in the Code for the simple reason that no wrong can be left unremedied. It is also well-recognized principle of law that every court or tribunal has inherent jurisdiction to rescind or recall a void order passed by itself. The order of eviction passed in the instant case was a void order as the same was procured fraudulently and by making misrepresentation. It would also be according to the spirit of law which provided that every court or tribunal has the power to even suo motu recall or review an order obtained from the court by fraud on the general principle that fraud vitiates the most solemn proceedings and no party should be allowed to

take advantage of his own fraud. In holding this view I am supported by a judgment of the Apex Court recorded in the case reported as PLD 1991 SC 997, Following the dictum of the apex Court this court declares the order passed by both the courts as ineffective and void, as such, are set aside. The learned Rent Controller is directed to allow the rule laid down in the case (supra) and to proceed with the case in accordance with law. The writ petition is allowed with costs.

M.H./M-880/L Petition allowed.

2011 C L C 1771
[Lahore]
Before Syed Kazim Raza Shamsi, J
Mst. ZAHIDA AZAM----Appellant
Versus
SOHAIL RAFIQUE and others----Respondents

S.A.O. No.87 of 2010, heard on 15th July, 2011.

West Pakistan Urban Rent Restriction Ordinance (VI of 1959)--

----S. 13(6)---Arrears of rent---Determination---Rent Controller, jurisdiction of---Landlady asserted that rate of rent per month was Rs.46,948 while tenant claimed it to be 17,716 per month but Rent Controller assessed tentative rent as Rs.30,000 per month and the same was deposited by tenant---Rent Controller passed eviction order without determining the arrears and rate of rent, which order was maintained by Lower Appellate Court---On application of tenant, the Rent Controller ordered to return the excess amount deposited by him---Validity---Held, it was the duty of Rent Controller to determine arrears of rent even after decision of ejectment petition---Rent Controller did not become functus officio after disposal of ejectment petition---Rent Controller while granting withdrawal of excess rent did not hold any inquiry nor proceeded to determine arrears of rent, as such the order of Rent Controller was of no legal efficacy---Lower Appellate Court while dismissing the appeal of landlady did not take into consideration that the rate of rent was not finally decided by Rent Controller and the order of Lower Appellate Court needed modification to that extent---High Court modified the order of Lower Appellate Court to the extent that Rent Controller would determine the arrears of rent after holding proper inquiry into the matter and the case was remanded to Rent Controller---Appeal was allowed accordingly.

1974 SCMR 504 **rel.**

Muhammad Akram Khawaja for Appellant.
Shahid Shabbir for Respondents.
Date of hearing: 15th July, 2011.

JUDGMENT

SYED KAZIM RAZA SHAMSI, J.--- By filing an ejectment petition under section 13 of the Punjab Urban Rent Restriction Ordinance, 1959 the appellant prayed for the eviction of the tenant Sohail Rafique on two-fold grounds, one for default in the payment of rent and the other bona fide personal need. The rate of rent alleged in the petition was Rs.46,948 per month. Conversely, the tenant alleged that the rate of rent was Rs.17,716 and he also denied the default in the payment of rent and bona fide personal need of the landlady to have the property vacated. The result of this litigation was the order of ejectment, which was passed by Mr. Muhammad Moeen Khokhar, learned Rent Controller, Lahore vide judgment dated 26-1-2009. It was held that the tenant was not the defaulter in the payment of rent. However, the petition succeeded on the ground of personal need.

3. The landlady Mst. Zahida Azam as well as the tenant Sohail Rafique assailed the said order before the First Appellate Court. The stance of the landlady was that the Court had passed an order under section 13(6) of the Ordinance ibid assessing the tentative rent to be deposited but it did not determine the final rate of rent as well as the arrears accrued in her favour. On the other hand, thetenant's appeal was against his ejectment from the rented premises in which he alleged that the Rent Controller had wrongly determined the bona fide personal need of the landlady. Madam Bushra Zaman, learned Addl. District Judge, Lahore dismissed both appeals vide her judgment dated 16-1-2010.

3. The landlady being dissatisfied with such findings of the Appellate Court has preferred instant second rent appeal. There was another development in this matter, which had arisen when the tenant filed an application before the learned Rent Controller for withdrawal of the excess rent deposited by him in favour of the landlady. The application was contested by the landlady and the proceedings were terminated in affirmative in favour of the tenant recorded in order dated 6-1-2011 passed by Raja Jehanzaib Akhtar, learned Special Judge (Rent), Lahore. It was the ground for acceptance of tenant's application that this Court while deciding SAO No.55 of 2010 did not disturb the rate of rent. The landlady feeling aggrieved by the said order of the learned Rent Controller has challenged the same in the connected Writ Petition No.998 of 2011. There is commonality of the challenge of the orders of the Courts below, as such this Court intends to decide Second Rent Appeal No.87 of 2010 with Writ Petition No.998 of 2011.

4. It is contended by the learned counsel for the appellant that a Rent Controller was under bounded duty to determine finally the rate of rent, which it had fixed during the trial proceeding while passing an order under section 13(6) of the Ordinance ibid without which determination order of grant of withdrawal of excess rent deposited by the respondent could not be passed.

5. Learned counsel has adverted the attention of this Court to his application seeking withdrawal of excess rent appearing at page 31 (Annex-C) of the writ petition and submitted that according to break-up given in para 7 of the application an excess

amount of Rs.543,240 stood at his credit, as such the order passed by the learned Rent Controller was in accordance with law.

6. This Court does not find itself in agreement with the contention of the learned counsel for the respondent for the reason that the break-up given by the respondent in his application is disputed one and is to be determined by the learned Rent Controller after recording the evidence. For this purpose a reference is to be made to the original pleadings of the parties i.e. ejectment petition and the reply of the respondent. In the ejectment petition the petitioner had claimed the rate of rent as Rs.46,948 per month whereas the tenant had termed it as Rs.17,716 per month. The learned Rent Controller while keeping in view both rates of rent had determined the tentative rent of Rs.30,000 per month, which was to be deposited by the respondent in the Court. This observation is duly supported by the break-up given by the respondent in his application filed for the withdrawal of the excess rent. It is the duty of the learned Rent Controller to determine the arrears of rent even after the decision of the ejectment petition. It does not become functus officio after the disposal of the ejectment petition . In this connection guidance can be taken from the judgment of apex Courtreported as 1974 SCMR 504.

7. The crux of the whole discussion is that the learned Rent Controller while granting the withdrawal of the excess rent did not hold any inquiry nor proceed to determine the arrears of rent, as such the order dated 6-1-2011 is of no legal efficacy. Similarly, the learned Addl. District Judge while dismissing the appeal of the landlady did not take into consideration that the rate of rent was not finally decided by the learned Rent Controller, as such the order dated 16-1-2010 needs modification to this extent.

8. Accordingly, the SAO No.87 of 2010 is partly accepted and the order of the learned Addl. District Judge is modified to the extent that the learned Rent Controller shall determine the arrears of rent after holding proper inquiry into the matter. Similarly, the order dated 6-1-2011, subject-matter of writ petition, is declared as of no legal consequences and is set aside with the direction to the learned Rent Controller to hold an inquiry into the matter and determine the arrears of rent. The costs in the second rent appeal are allowed to the extent of court-fee affixed thereon.
M.H./Z-31/L Case remanded.

2011 C L C 1779

[Lahore]

Before Syed Kazim Raza Shamsi, J

ROBINA YASMEEN and others----Petitioners

Versus

Rana JAVED IQBAL and others----Respondents

Writ Petition No.6279 of 2011, heard on 5th July, 2011.

Punjab Rented Premises Act (VII of 2009)---

----Ss. 15 & 22---Constitution of Pakistan, Art.199---Constitutional petition---Maintainability---Interim order---Leave to defend, grant of---Extension of time---Non-filing of affidavit---Rent Tribunal granted leave to defend the case on the application filed by tenant beyond statutory period of ten days which was not accompanied by any affidavit---Plea raised by tenant was that constitutional petition was not maintainable against interim order---Validity---Although a Constitutional petition against an interim order passed by Special Court was not maintainable yet it was not an absolute rule, and facts of each case had to be considered before proceeding to determine question of maintainability of Constitutional petition---Rent Tribunal had proceeded against mandatory provision of law, which had to be checked at early stage instead of waiting for passing of a final order---If such practice of not checking interim orders at proper stage was not discarded that would lead to the wastage of public time and would also multiply the litigation between the parties---Petition having been filed beyond the period prescribed by law, the Court should have taken the notice of such fact before granting leave to contest the ejectment petition---None of the Courts had jurisdiction to extend the time beyond ten days for filing the leave application thus the Court had proceeded wholly against the mandatory provisions of S.22(2) of Punjab Rented Premises Act, 2009---Tenant did not file affidavit with his application for leave to defend and purpose for enacting such provision of law was to require a tenant to make out a ground for contesting the ejectment petition and if the Court deemed that the tenant had raised a plausible defence then the Court could allow the leave application, which would subsequently be treated as written statement---While not taking the proceedings in accordance with the spirit of S.22(3) of Punjab Rented Premises Act, 2009, the Rent Tribunal committed grave illegality which needed interference of High Court in its supervisory jurisdiction---High Court declared the order passed by Rent Tribunal as illegal having been passed without lawful authority and of no legal consequences and the same was set aside---High Court directed the Rent Tribunal to proceed to pass an order under S.22(6) of Punjab Rented Premises Act, 2009, as the leave application was not filed within the prescribed time---Petition was allowed accordingly.

2010 CLC 1590 **rel.**

Imtiaz Ahmad Chauhan for Petitioners.
Qadeer Ahmad Rana for Respondents.
Date of hearing: 5th July, 2011.

JUDGMENT

SYED KAZIM RAZA SHAMSI, J--- This constitutional petition is directed against an order dated 10-3-2011 passed by Mr. Muhammad Farhan Nabi, learned Special Judge (Rent), Lahore whereby he granted the leave to contest the ejectment petition.

2. In a petition filed under section 15 of the Punjab Rented Premises Act, 2009 the respondent filed an application under section 22(3) with the caption of written statement, which was granted by the learned Special Judge (Rent) holding that the

relationship of landlord and tenant is denied, as such the question raised could not be decided without recording the evidence of the parties. The ejectment petitioner/landlord being dissatisfied with the order has assailed the same in this petition.

3. It is contended by the learned counsel for the petitioner that the leave application was not in the form as prescribed by section 22(3) of the Act ibid; that the disputed leave application was filed beyond the period of limitation of 10 days, which fact has not been considered by the learned Special Judge (Rent); and that an act required by a law to be performed in a particular manner should be performed in such manner. Learned counsel for the respondent has submitted that the respondent is not the tenant under the petitioner, rather he is in occupation of the premises being an owner and that the constitutional petition against an interim order passed by a Rent Tribunal is not maintainable. He has cited the judgment reported as 2010 CLC 1590 to support his contention.

4. It is correct proposition of law that a constitutional petition against an interim order passed by the Special Courts is not maintainable but it is not absolute rule and the facts of the each case have to be considered before proceeding to determine question of maintainability of the writ petition. In the instant case the learned Special Judge (Rent) has proceeded against the mandatory provisions of law, which had to be checked at this early stage instead of waiting for passing of a final order. If this practice of not checking the interim orders at the proper stage is not discarded that would lead to the wastage of public time and would also multiply the litigation between the parties. In the case in hand as per order dated 23-12-2010 available at page 30 of this writ petition the respondent made first appearance before the Court by filing Vakalatnama while respondents Nos.2 and 3 were proceeded against ex parte. On that date the Court adjourned the case for 11-1-2011. According to the provisions of section 22(2) of the Act the respondent is required to file application under section 22(3) within 10 days of his first appearance in the Rent Tribunal. The 10 days as required by law ended on 2-1-2011. The respondent did not file the application on 2-1-2011 and also on 11-1-2011, the date fixed by the Court, rather he filed the petition on 19-1-2011 i.e. about 27 days after his first appearance in the Court. The petition was evidently filed beyond the period prescribed by law, therefore, the Court should have taken the notice of this fact before granting leave to contest the ejectment petition. None of the Court has jurisdiction to extend the time beyond 10 days for filing the leave application, thus the Court had proceeded wholly against the mandatory provisions of section 22(2) of the Act ibid. The learned Rent Controller further committed illegality in treating the written statement as leave application. Subsection (3) of section 22 of the Act provides a form of filing the application seeking leave to contest the ejectment petition with the requirement of filing affidavits along with the same. It is informed by the learned counsel for the petitioner that the respondent did not file any affidavit along with his petition. The purpose for enacting such provision of law appears to require a tenant to make out a ground for contesting the ejectment petition and if the Court deems that the tenant has raised a plausible defence then the Court could allow the leave application, which would subsequently be treated as written statement. While not taking the proceedings in accordance with the spirit of the section the learned Special Judge (Rent)

has committed grave illegality, which needs interference of this court in the supervisory jurisdiction.

5. For the foregoing, this petition is allowed by declaring the impugned order as illegal, having been passed without lawful authority and of no legal consequence, thus is set aside. The learned Special Judge (Rent), Lahore is directed to proceed to pass an order under section 22(6) of the Punjab Rent Premises Act, 2009 as the leave application was not filed within the prescribed time The parties shall appear before the learned Special Judge (Rent), Lahore on 20-7-2011.

M.H./R-41/L Petition allowed.

2011 C L C 1815

[Lahore]

Before Syed Kazim Raza Shamsi, J

Ch. MUHAMMAD KABIR----Petitioner

Versus

Mst. FARRAH DEEBA through L.Rs. and others----Respondents

Writ Petition No.13038 of 2010, heard on 28th June, 2011.

West Pakistan Urban Rent Restriction Ordinance (VI of 1959)---

----Ss. 13 & 15---Civil Procedure Code (V of 1908), S.12(2)---Constitution of Pakistan, Art.199---Constitutional petition---Ejectment---Application challenging the ejectment order on allegation of fraud and misrepresentation---Ejectment petition was accepted by Rent Controller on consenting statement of the tenant---Intervener filed application under S.12(2), C.P.C. challenging ejectment order, which application was dismissed by the Rent Controller and upheld by Appellate Court---After death of the intervener, his legal heirs filed fresh application under S.12(2), C.P.C.---Rent Controller dismissed said application being barred by law on the ground that in case of same subject-matter, against same decree, earlier application having finally been dismissed and proceedings had attained finality---Appellate Court, however, accepted said application on the ground that application was decided by the Rent Controller without framing issues and recording evidence of the parties and remanded the case for doing the needful---Validity---Order dismissing application filed under S.12(2), C.P.C., earlier passed having attained finality, same could not be re-opened subsequently by the successors-in-interest of the intervener---Decision of dismissal of previously filed application under S.12(2), C.P.C. by the intervener, and its maintainability was properly adjudged by the Rent Controller and subsequently the same was also dismissed against which a revision petition was filed, which was also dismissed---Orders passed by the court in the first round of litigation were final against the intervener and for all times to come against his successors-in-interest and could not be re-opened in the subsequent proceedings on the same grounds---Appellate Court had proceeded against the law while accepting appeal

and remanding the case to the court below for further proceedings, which was not maintainable---Decision of Appellate Court below was declared illegal and of no legal consequence---Judgment of Appellate Court was set aside and that of the Rent Controller restored, in circumstances.

Malik Muhammad Nadeem for Petitioner.

Mushtaq Ahmed Chaudhry for Respondents.

Date of hearing: 28th June, 2011.

JUDGMENT

SYED KAZIM RAZA SHAMSI, J.--- This constitutional petition is directed against a decision dated 22-5-2010 passed by Mr. Zafar Hussain Bhatti, learned Additional District Judge, Lahore whereby he accepted the appeal and set aside the order dated 8-3-2010 passed by Mr. Arif Mehmood, learned Rent Controller, Lahore whereby the learned Rent Controller had dismissed the application filed under section 12(2) of C.P.C. on behalf of the present respondents.

2. Muhammad Kabeer the landlord of Property No.1457/929 filed an ejectment petition under section 13 of the Punjab Urban Rent Restriction Ordinance, 1959 against one Manzoor Ahmed which was accepted by the learned Rent Controller on the consenting statement of the tenant. One Muhammad Suleman predecessor-in-interest of respondents Nos.1 to 9 filed an application under section 12(2), C.P.C. challenging the ejectment order dated 6-6-1989. In that application of Muhammad Suleman the court after framing issues dismissed the same on 19-12-2000 for want of evidence which order was assailed in the revision petition before the learned First Appellate Court and the revision petition was also dismissed on 20-10-2003.

3. Later on after the death of said Muhammad Suleman his legal heirs namely respondents Nos.1 to 9 again filed an application under section 12(2), C.P.C. challenging the legality of order dated 6-6-1989 which application was contested by the landlord. The learned Rent Controller after considering the submissions made by learned counsel for the parties dismissed the same holding that the fresh petition under section 12(2), C.P.C. was barred by law as on the same subject-matter and against same decree the first application of Muhammad Suleman was dismissed, which order was maintained in the revision petition, as such those proceedings attained finality.

4. The legal representatives of Muhammad Suleman then preferred an appeal before the learned First Appellate Court which proceeded to accept the same on the grounds that the application was decided by the learned Rent Controller without framing issues and recording evidence of the parties, thus, remanded the case to the court for doing the needful. The landlord being dissatisfied with the order has assailed the same in this constitutional petition.

5. The parties have been heard and the record has been perused.

6. The learned First Appellate Court has taken erroneous view that the application filed under section l2(2), C.P.C. in the instant case should be decided after recording evidence. The court has ignored the fact that the predecessor-in-interest of the respondents had also assailed the vires of the ejectment order dated 6-6-1989 by filing the same type of application which was dismissed upto the First Appellate Court, thus, that order had attained finality and the same cannot be reopened subsequently by the successors in interest of Muhammad Suleman. This fact was so apparent on the face of record which did not require any recording of evidence as it involved a legal question about the maintainability of the second petition on the same subject-matter. This court is conscious of the fact that the application under section 12(2), C.P.C. is to be treated like a civil suit and the court should frame issues and proceed to record evidence to determine the application. In various judgments of this Court as well as of the apex Court this has been so held, but in the instant case the position is different. It is not denied by respondents Nos.1 to 9 that they are not successors in interest of Muhammad Sulaman. The decision of dismissal of the previous application filed by Muhammad Suleman and its maintainability was properly adjudged by the then learned Rent Controller and subsequently the same was dismissed against which a revision petition was preferred before the learned First Appellate Court. Khawaja Muhammad Zafar Iqbal, learned Additional District Judge vide judgment dated 20-10-2003 dismissed that revision petition against which no further remedy was availed in any higher forum. Thus, the orders passed by the court in the first round of litigation were final against said Muhammad Suleman and for all times to come against his successors in interest. Accordingly the same cannot be reopened in the subsequent proceedings on the same grounds. This was an error apparent on the face of record which was not taken notice by the learned First Appellate Court in the impugned order. The contention of counsel for the respondent that after eighteen years the respondents came to know about the fraud committed, as such they have filed the petition, is of no avail to the respondents as it is not lawful excuse for reopening the matter after about two decades.

7. The learned First Appellate Court has totally proceeded against the law while accepting the appeal and remanding the case to the court below for further proceedings, as such is not maintainable.

8. For the foregoing reasons, this petition is allowed declaring decision of the First Appellate Court dated 22-5-2010 as illegal and of no legal consequence, resultantly, this judgment is set aside and that of the learned Rent Controller is restored.
H.B.T./M-225/L Petition allowed.

2011 C L C 1923

[Lahore]

Before Syed Kazim Raza Shamsi, J

KHALIDA PERVAIZ----Appellant

Versus

CITY EDUCATION BOARD through Chairman City Public School Katchary Road,

Sialkot and 7 others----Respondents

S.A.O. No.164 of 2004, decided on 29th June, 2011.

West Pakistan Urban Rent Restriction Ordinance (VI of 1959)---

----Ss. 13 & 15(6)---Appeal---Ejectment of tenant---Relationship of landlord and tenant---Determination---Ownership of premises was decided by Supreme Court in favour of respondents, therefore, ejectment application and appeal filed by appellants against occupant of the premises were concurrently dismissed by Rent Controller and Lower Appellate Court---Plea raised by appellants was that possession of the premises was not handed over to the respondents, therefore, till that time the occupant would be treated as his tenant---Validity---Respondents were holding title under the orders of Supreme Court and by acting upon those orders of Supreme Court, Settlement Authorities issued Permanent Transfer Order in their favour---Respondents were not only owners of property in dispute but were also landlords for such purpose while the occupant was holding possession of demised premises on behalf of respondents who were in symbolic possession of disputed property---Concurrent findings of both the Courts below were based upon sound appreciation of evidence on the record and no interference was required by High Court in the same---Petition was dismissed in circumstances.

Muhammad Ismail Qureshi through his legal heirs v. Gulab Din and others 1988 SCMR 1001 **rel.**

Ms. Aaliya Neelum for Appellant.

Mian Zahad-ur-Rehman and Mian Rafi-ud-Din for Respondents.

Date of hearing: 14th June, 2011.

JUDGMENT

SYED KAZIM RAZA SHAMSI, J.--- This second rent appeal is directed against an order dated 8-1-2004 passed by Mr. Tariq Mehmood Malik, learned Addl. District Judge, Sialkot, whereby he maintained the order dated 8-3-1994 passed by Mr. Khalid Mehmood Ranjha, learned Rent Controller, Sialkot, whereby he proceeded to dismiss the ejectment petition filed by Khalida Ismail and others.

2. Dr. Khalida Ismail and others filed an application under section 13 of the Punjab Urban Rent Restriction Ordinance, 1959 against the City Education Board on the ground of wilful default in the payment of rent. During the pendency of the ejectment petition respondents Nos.2 to 5, legal heirs of Muhammad Ismail Qureshi, were impleaded in the ejectment petition. The petition was contested by respondent No.1, City Education Board, and respondents Nos.2 to 5 by filing separate replies.

3. There are some important facts, which are to be noted before proceeding further. A Property bearing No.1/1299 (rented premises) was originally allotted to Mst. Kalsoom-un-Nisa in an earmarking scheme in the year 1959, who joined her real nephew Muhammad Ismail Qureshi through an association deed and surrendered her rights in his favour. Later on one Gulab Din, the occupant of a portion of the property, got issued the P.T.D. in respect of house in his favour from the Settlement Department and surrendered his rights in favour of Mian Muhammad Ismail, now represented through the ejectment petitioners. After the death of Muhammad Ismail Qureshi his legal heirs, respondents Nos.2 to 5 pursued the matter. The PTD issued in favour of Gulab Din and Mian Muhammad Ismail was cancelled by the Hon'ble Supreme Court in a judgment reported as "Muhammad Ismail Qureshi through his legal heirs v. Gulab Din and others" **(1988 SCMR 1001**). The judgment was delivered on 19-3-1988, whereby P.T.D. issued in favour of Muhammad Ismail Qureshi was restored in respect of the property now in dispute. Later on, as per record, the Settlement Department issued P.T.O. in favour of Muhammad Ismail Qureshi by implementing judgment of apex Court. As per record, Mian Muhammad Ismail had rented out the premises to City Education Board in the year 1981 during the pendency of the matter before the Hon'ble Supreme Court. In these circumstances, the legal heirs of Mian Muhammad Ismail had filed the ejectment petition against City Education Board.

4. Both these sets of the respondents i.e. City Education Board and legal heirs of Muhammad Ismail Qureshi in their respective replies highlighted the afore-noted facts of cancellation of the P.T.D, more particularly, respondent No.1 City Education Board denied the existence of relationship of landlord and tenant with the ejectment petitioners. It was asserted in the written replies that the Board is not the wilful defaulter in the payment of rent, which is depositing the rent regularly in the Court under the orders of the Court. The stance of respondents Nos.2 to 5 in their written reply is that after the cancellation of the P.T.D. issued in favour of Mian Muhammad Ismail through Gulab Din, the respondents have become the owners of the property in dispute and in this regard they had served notice under section 13-A of the Ordinance ibid upon respondent No.1 informing it about the change of the ownership and demanded the rent.

5. Learned Rent Controller, out of the pleadings of the parties, framed as many as six issues including the one regarding existence of relationship of landlord and tenant between the ejectment petitioners and respondent No.1. Both the parties led their respective oral as well documentary evidence on the issues.

6. Learned Rent Controller after analyzing the whole record and evidence produced by the parties reached at conclusion that the relationship of landlord and tenant did not exist between the ejectment petitioners and respondent No.1 after 19-3-1988, the date of

judgment of the Hon'ble Supreme Court as the ejectment petitioners did not remain as owner of the demised premises, thereafter as such had no locus standi to file the ejectment petition. The ejectment petition was ultimately dismissed.

7. Being dissatisfied with the findings of the learned Rent Controller, the same were assailed in the first appeal. Learned First Appellate Court also dismissed the appeal on the same premises as find favour with the learned Rent Controller, vide judgment impugned in the instant second appeal.

8. The parties have been heard at length and whole record has been examined with the assistance of the learned counsel for the parties. The core issue, that covers all other issues, is the existence of relationship of landlord and tenant between the appellants and respondent No.1. There is no denial of the fact that Mian Muhammad Ismail was the owner of the property, who held the said title till 19-3-1988. During this period he had rented out the premises to respondent No.1 in the capacity of landlord. Later on when Civil Appeal No.150 of 1975 was decided by the Hon'ble Supreme Court vide judgment dated 19-3-1988, Mian Muhammad Ismail or for that matter his legal heirs did not stand on the platform of the landlord. The title of the property changed hands and the legal heirs of Muhammad Ismail Qureshi were held to be entitled to the property in dispute. The Settlement Department, in view of this finding of the apex Court, had also issued P.T.O. in favour of respondents Nos.2 to 5. The contention of the learned counsel for the appellants that till date no P.T.D has been issued in favour of respondents Nos.2 to 5, thus the appellants would be deemed to be the landlord of the property, is untenable argument for the reason that the issuance of the P.T.D. in favour of respondents Nos.2 to 5 is merely a ministerial act to be performed by a department. This fact alone is not sufficient to hold that respondents Nos.2 to 5 are not the owners of the demised premises. For that purpose Provisional Transfer Order issued in favour of respondents Nos.2 to 5 holds good as a title deed whereunder they have been declared as owner of the property in dispute. The second contention of the learned counsel for the appellants that the possession of the property has not been handed over to respondents Nos.2 to 5, therefore, till that time respondent No.1 would be a tenant under the appellants is equally not a good argument, for that reason that respondents Nos.2 to 5 are holding a title under the orders of the apex Court and by acting upon those orders of the apex Court the Settlement Department has issued a P.T.O. in their favour, thus they are not only the owners of the property in dispute but are also the landlord for that purpose while respondent No.1 is holding the possession of the demised premises on behalf of respondents Nos.2 to 5, as such respondents Nos.2 to 5 are in symbolic possession of the disputed property. The third contention of the learned counsel for the appellants is that respondents Nos.2 to 5 are only entitled for allotment of the house along with its three times plinth area while the respondents are in possession of the more land, has no substance for the simple reason that this question is not within the jurisdiction of the Rent Controller to determine, as such this argument cannot be taken into consideration in the rent jurisdiction.

9. Learned Rent Controller has comprehensively, discussed all these points in its order, which are based upon the sound appreciation of the record, which determination has validly affirmed by the learned First Appellate Court.

10. The remaining issues framed by the learned Rent Controller are subservient of the core issue of relationship of landlord and tenant, which has been decided in negative by the learned Rent Controller and affirmed by the learned First Appellate Court, as such there is no need to discuss the findings of the Court on the other issues.

11. The upshot of the above discussion is that the concurrent findings recorded by both the Courts below are based upon sound appreciation of the evidence on the record as well as the case-law cited at the bar, as such no interference by this Court is required in the same. The appeal is accordingly dismissed with costs.
M.H./K-43/L Appeal dismissed.

2011 C L C 1999
[Lahore]
Before Syed Kazim Raza Shamsi, J
Rana MUHAMMAD ASHRAF----Petitioner
Versus
TANVEER KAUSAR and others----Respondents

Writ Petitions Nos.4309 and 9469 of 2009, decided on 24th June, 2011.

West Pakistan Family Courts Act (XXXV of 1964)-

----Ss. 5 & 17-A---Constitution of Pakistan, Art.199---Constitutional petition---Maintenance of minors---Annual increase---Family Court at the time of fixing monthly maintenance of minors imposed a condition of ten per cent annual increase in the maintenance---Validity---Levy of ten per cent increase in maintenance allowance by court was not supported by any statute---Provisions of West Pakistan Family Courts Act, 1964, did not provide levy of rate of enhancement while granting maintenance even to minors---Although S.17-A was added to West Pakistan Family Courts Act, 1964, which was subsequently further amended in the year, 2010, by directing courts to fix interim maintenance of minors at first date of hearing and in case of failure by father to provide the minors before 14th of each month, decree should follow forthwith but legislature did not add any levy of increase in maintenance annually---Legislature might add levy of rate of enhancement of maintenance allowance but this was intentionally not done---Without statutory sanction, Court had no jurisdiction to itself impose any condition of enhancement in the rate of maintenance---High Court set aside the levy of ten per cent per annum on the grant of maintenance allowance and decree passed by Family Court for maintenance allowance was accordingly modified---Petition was allowed accordingly.

Syed Samar Hussain Shah for Petitioner.
Syed Muhammad Shah for Respondent No.1.

ORDER

SYED KAZIM RAZA SHAMSI, J.--- By this order I intend to dispose of Writ Petition No.4309 of 2009 and Writ Petition No.9469 of 2009 due to commonality of the judgments assailed therein.

2. Both these constitutional petitions are directed against a consolidated judgment dated 12-2-2009 passed by Mr. Muhammad Zafar Abbas Sabzwari, learned Additional District Judge, Lahore whereby he maintained the decree dated 24-3-2008 passed by Madam Asma Tahseen, learned Judge Family Court, Lahore partially decreeing the suit for the recovery of dowry articles and the recovery of maintenance allowance fixed at the rate of Rs.7,000 per month for plaintiff No.2 and Rs.4,000 for plaintiff No.3. It was also observed by the learned Judge Family Court that the arrears of the maintenance allowance from August, 2002 to June, 2003 and September 2003 to October, 2004 would also be recoverable. The increase of 10 per cent per annum was also granted over the maintenance allowance.

3. Mst. Tanveer Kausar instituted a suit on her behalf and on behalf of her two minor children for the recovery of maintenance allowance and the dowry articles. The marriage between the spouses was performed on 26-10-1995 whereafter the relations between the parties became strained and she has to reside with her parents from 10-8-2002 to 1-6-2003. According to her dowry articles valuing Rs.3,88790 were also given to her at the time of her marriage. The relations between the parties became normal when she returned to her husband's house but thereafter the parties could not pull on for any longer. She alleged that the defendant is an officer in Pakistan Army and is earning monthly salary of Rs.30,000, as such he could pay the maintenance allowance at the rate of Rs.8680 and Rs.5,000 for plaintiffs Nos.2 and 3 respectively per month. She claimed her own dower of Rs.5,000.

4. This suit was contested by the defendant controverting the allegations that dowry of huge amount was brought by the plaintiff at the time of her marriage. It is also the defence of the defendant that the majority of the dowry articles were purchased by him much after the marriage. He also denied that his salary was Rs.30,000 and he could pay the amount of maintenance as claimed in the plaint.

5. The learned trial court out of the pleadings of the parties framed relevant issues and recorded the evidence of the parties. Thereafter the court reached at the conclusion that the majority of the articles mentioned by the plaintiff in her plaint were purchased by the defendant much after the marriage, therefore, it is not proved that those items were given to the plaintiff at the time of her marriage. However, the suit to the tune of Rs.500 the value of Diamond Supreme Foam was granted, the maintenance of Rs.7,000 and Rs.4,000 for the minors was also determined with the increase of 10 per cent annually. The court also determined the maintenance of the plaintiff for the periods mentioned by the plaintiff in her plaint.

6. Both the parties being dissatisfied with the findings of the court assailed the same in the appeals. The learned First Appellate Court concurred with the findings of the learned Judge Family Court and dismissed both the appeals. Again both the parties

feeling aggrieved by the judgment of the First Appellate Court have assailed the same in these petitions.

7. Parties have been heard at length and record has been examined.

8. The findings of the learned Judge Family Court agreed by the learned First Appellate Court in respect of the claim of the dowry are based upon sound appreciation of evidence on record. It was established through the receipts which were tendered in evidence by the plaintiff showing the purchase of items after the marriage of the parties for example Exh.P.20 shows that 21 Inch TV was purchased on 26-2-2006 while the marriage was solemnized between the parties on 26-10-1995 i.e. after about eleven years from the date of marriage. Similarly the other items were also shown to be purchased by the defendant latter in time. The purchase of articles much after the marriage shows that these items were never given to the lady at the time of her marriage, that is why the husband purchased the said items to meet with the need of those articles. The findings of the learned First Appellate Court on Issue No.1 as well as of learned Judge Family Court are based upon sound appreciation of evidence.

9. It is beyond imagination how the court of first instance determined the maintenance of the lady for period 10-8-2002 to 1-6-2003 and 17-9-2003 till date of filing of the suit particularly when there is no evidence on the record to show the reason for living apart by the parties. It is a matter of common knowledge that the army personnel usually are posted in the far off areas where it is not possible for them to take their families, may by, for this reason, the lady was not taken by the husband to the place of his posting. This fact finds support from the receipt Exh.P.20 which shows thatTV was purchased by the husband on 26-2-2006 obviously for the use of his family and not for his single use. Similarly the purchase of dowry articles Exhs.P.1 to 7 supports this view. In this view of the matter, the determination of the maintenance of the periods mentioned above appears to be unjustified.

10. The contention of learned counsel for the petitioner that the courts below have fixed the exorbitant amount of maintenance which the petitioner is unable to meet with in his available source is no ground for changing the rate of maintenance allowance. In the days of high prices in the view of this court, this amount is sufficient to meet with at least the part of the needs of the minors as the petitioner has to maintain his other family also as he has contracted second marriage and out of that wedlock two more children have born. However, the levy of 10 per cent increase in the maintenance allowance by the courts is not supported by any statute. The West Pakistan Family Court Act, 1964 does not provide the levy of the rate of enhancement while granting maintenance even to the minors. Although section 17-A was added which was subsequently further amended in the year 2010, by directing the courts to fix the interim maintenance of the minors at the first date of hearing and in case of failure by the father to provide the said minors before 14th of each month, decree should follow forthwith but the legislature did not add any levy of increase in maintenance annually. The legislatures may add the levy of rate of enhancement of the maintenance allowance but it appears that intentionally it was not done. Without statutory sanction, the courts have no jurisdiction to itself

impose any condition of enhancement in the rate of maintenance. Thus, the levy of 10 per cent per annum on the grant of maintenance allowance is set aside.

11. The upshot of the above discussion is that the petition filed by Mst. Tanveer Kausar i.e. Writ Petition No.9469 of 2009 having no merits is dismissed while the petition filed by Rana Muhammad Ashraf i.e. Writ Petition No.4309 of 2009 is allowed in the above terms partially modifying the decree of courts below regarding setting aside of the condition of levy of 10 per cent increase in the maintenance allowance dismissal of the suit filed for the recovery of dowry articles and maintaining the rate of maintenance allowance fixed by the courts below.
M.H./M-946/L Order accordingly.

2011 M L D 1810
[Lahore]
Before Syed Kazim Raza Shamsi, J
MUHAMMAD ARSHAD JAVED and 6 others ---Appellants
Versus
JAVED FAZIL---Respondent

S.A.O. No.128 of 2010, heard on 28th June, 2011.

West Pakistan Urban Rent Restriction Ordinance (VI of 1959)---

----Ss. 13(2)(i)(6) & 15---Ejectment petition---Default in payment of rent---Several rent receipts produced on record showed that name of the landlord was not correctly written thereon---Such receipts could not, in circumstances, be treated as legal tender of rent by the tenant to landlord and could not be taken into consideration---Courts below, had rightly accepted ejectment petition holding that the default in the payment of rent was proved.

Begum Capt. Mirza Ghulam Sarwar and another v. District Judge Jehlum and others 1987 SCMR 25; Saleem Ahmad v. Addl. District Judge and others 1992 CLC 1531; Muhammad Shabbir v. HajiGhulam Sabir 1987 CLC 1189; Mst. Bachi Bhai v. Ghulam Abbas PLD 1972 Kar. 278; Messrs Crescent Publicity Services v. S.M. Younas and others 1980 SCMR 779; Khadim Hussain v. Nisar Ahmad 2003 SCMR 1580; Haji Allah Ditta v. Mst. Shehzadi Balqees and another 1980 SCMR 41; Khawaja Ghulam Mustafa v. Mian Waqar Ahmad PLD 1980 SC 9; Malik Manzoor Ahmad v. Sardar Muhammad 1991 CLC 877 and Qari Abdul Rehman and 6 others v. Jamaluddin and another 2000 SCMR 226 **rel**.

Muhammad Umar Riaz for Appellant.
Muhammad Hanif Niazi for Respondent.

Date of hearing: 28th June, 2011.

JUDGMENT

SYED KAZIM RAZA SHAMSI, J.---This second rent appeal is directed against order dated 2-6-2010 passed by Ms. Shahida Saeed, learned Addl. District Judge, Lahore, whereby she maintained the ejectment order dated 19-11-2009 passed by Mr. Zahid Husasin Bukhtiar, learned Special Judge (Rent), Lahore.

2. The parties have come to the Court in the second round of litigation. In the first round of litigation Javaid Fazzil filed a petition under section 13 of the Punjab Urban Rent Restriction Ordinance, 1959 against the respondent seeking his ejectment from the Shop No.257, Ground Floor, Pakistan Cloth Market, Chowk Old Kotwali, Lahore on the ground of default in the payment of rent and sub-letting. The petition was resisted by the respondent resulting into dismissal of the ejectment petition on 16-9-2006 by Ms. Asma Tehseen, learned Rent Controller, Lahore. An appeal was preferred against that order, which was accepted by Bushra Zaman, Addl. District Judge, Lahore vide judgment dated 15-8-2008 and the case was remanded to the learned Rent Controller for decision on Issue No.1 in respect of default in the payment of rent afresh.

3. After remand the matter was taken up by Mr. Zahid Hussain Bukhtiar, learned Special Judge (Rent), Lahore, who vide his order dated 19-11-2009 accepted the ejectment petition holding that the default in the payment of rent was proved. The tenant/respondent feeling aggrieved by the acceptance of the ejectment petition challenged the same in the first appeal, which was also dismissed by thelearned First Appellate Court and the findings of the learned Rent Controller were affirmed in respect of the ejectment of the respon-dent.

4. The tenant Haji Bashir Ahmed, during the pendency of the case died and was represented by his legal heirs, who feeling aggrieved by the order of the Courts below have assailed the same in the instant second appeal.

5. Learned counsel for the appellant submitted that in some of the rent deposit receipts the name of the landlord was inadvertently not mentioned in the relevant column but the respondent had withdrawn the rent from the Treasury, as such the findings of default in the payment of rent recorded by both the Courts below are illegal. He further submitted that mere wrong mentioning of the name of the landlord in the rent deposit receipts does not constitute a wilful default, as such he is not liable to be ejected.

6. Learned counsel for the respondent has argued that the wrong mentioning of the name of the landlord in the rent deposit receipts is not the compliance of the order of the Rent Controller passed under section 13(6) of the Ordinance ibid, as such the appellant is liable to be ejected. He further contended that by withdrawing the rent form the Treasury it does not amount to waiving the right to contest the issue as the default stood proved against the tenant for the non-compliance of the order of the Rent Controller

passed under section 13(6) of the Ordinance ibid. Learned counsel for the respondent has relied upon the case-law in support of his contention.

7. I have given my anxious thoughts to the contentions of learned counsel for the parties and also examined the record with their assistance. The case law has also been examined minutely. In the case of Begum Capt. Mirza Ghulam Sarwar and another v. District Judge, Jhelum and others 1987 SCMR 25 it was held that the withdrawal of the rent deposited by the tenant does not amount to waive of landlord rights to move for striking off tenant's defence for non-compliance of order under section 13(6) of the Ordinance ibid. Same principle was laid down in the case of Saleem Ahmad v. Addl. District Judge and others (1992 CLC 1531), Muhammad Shabbir v. Haji Ghulam Sabir (1987 CLC 1189), Mst. Bachi Bhai v. Ghulam Abbas (PLD 1972 Karachi 278). On the point of single default the case of Messrs Crescent Publicity Services v. S.M. Younas and others (1980 SCMR 779), Khadim Hussain v. Nisar Ahmad 2003 SCMR 1580 are relevant. These judgments are relevant in the instant case to determine the fact that the rent for the month of January was deposited on 20-2-2003 as is evident from Exh.R.3. There is no escape for the appellant that he is a defaulter in the payment of rent in view of this receipt alone. Another factor, which prevailed upon the opinion of the learned Courts below are wrong mentioning of the name of the landlord in the challan form prepared for the purpose of deposit of rent in the Treasury. In the case in hand there are several rent receipts appended with this appeal, which show that the name of the landlord was not correctly written therein. In this situation, it cannot be treated as legal tender of the rent by the tenant to the landlord, as such the same cannot be taken into consideration. The case of Haji Allah Ditta v. Mst. Shehzadi Balqees and another (1980 SCMR 41), Khawaja Ghulam Mustafa v. Mian Waqar Ahmad (PLD 1980 SC 9), Malik Manzoor Ahmad v. Sardar Muhammad (1991 CLC 877) and Qari Abdul Rehman and 6 others v. Jamaluddin and another (2000 SCMR 226) are relevant on the fact of wrong mentioning of the name of the landlord in the challan form. Keeping in view this legal position on the record, this Court has no option except to concur with the findings of the Courts below holding the appellant as a defaulter in the payment of rent.

8. For the foregoing reasons, this appeal having no merits is dismissed with costs. The appellant is directed to hand over the vacant possession of the demised premises from 15 days from the date of this order.

H.B.T./M-224/L Appeal dismissed.

P L D 2011 Lahore 483

Before Syed Kazim Raza Shamsi, J

FARAZ AHMAD BHUTTA----Petitioner

Versus

ADDITIONAL DISTRICT JUDGE and others---Respondents

Writ Petition No.13754 of 2006, decided on 31st May, 2011.

(a) West Pakistan Urban Rent Restriction Ordinance (VI of 1959)---

----Ss. 2(c) & 13---Constitution of Pakistan, Art.199---Constitutional Petition---Ejectment petition---Power' of Rent Controller to conduct detailed inquiry into the fact of title of landlord---Scope---Expression "any person for the time being entitled to receive rent in respect of any building or rented land"---Word 'entitled' means the legal entitlement of the person, such person had to prove that he had legally been authorized to collect the rent or he was collecting the rent on his own account---Where the persons collecting the rent failed to produce any evidence showing that they were authorized by the landlords to collect rent on their behalf and had solely relied upon the sale-deed in their favour alienating the property (a waqf property) in their favour, Rent Controller, in such a situation, had to examine whether they were lawful owners and the property transferred in their favour was transferred by lawful means or that they had been legally authorized for the collection of the rent from the tenants---Rent Controller, though was not supposed to conduct detailed inquiry into the fact, but in order to satisfy itself, Rent Controller had to examine such facts before assuming jurisdiction under the law---Where relationship of landlord and tenant did not exist between the parties and findings of lower forums were based on sound appreciation of evidence, record and law as well, did not call for any interference by High Court, constitutional petition was dismissed.

Khalid Javed and others v. Qazi Masood-ur-Rehman, Additional District and Sessions Judge, Sialkot and 2 others PLD 1988 Lah. 541 ref.

(b) Islamic law---

----Waqf---Creation---Test---Waqf is a permanent dedication by a person professing the Muslim faith, of any property, recognized by Islamic law as religious, pious or charitable---Wagif has to Make a permanent waqf without limiting the period and waqf should be for religious, pious and charitable purposes and could be in favour of settlor's family, children and descendants.

Muhammadan Law by D.F. Mulla, , Ss.173, 174 & 178 ref.

(c) Islamic law---

----Waqf---Intention of waqif---Doctrine of cypress---Applicability---Creation of waqf by inter vivos or testamentary---Scope---Alienation of property---Prohibition---Powers of Mutwalli to sell or mortgage the waqf property---Principles.

Muhammadan Law by D.F. Mulla, Ss.184, 185, 186, 189, 193, 207 & 208 ref.

(d) Islamic law---

----Waqf---Charitable purpose of the waqf was explicit from the wordings of waqf deed which clearly established the intention of the waqif and prohibition from the alienation in future-Contention of the waqif that waqf was cancelled through a registered document, therefore, it would be deemed that property was never bequeathed by waqif through waqf

deed had no legs to stand---When the property did not vest in the waqif and the possession had been delivered to Allah, then he was left with no authority to cancel the same---Waqf could not be revoked.

Ch. Khursheed Ahmad for Petitioner.

Mahmood Ahmad Bhatti for Respondent.

Date of hearing: 27th May, 2011.

JUDGMENT

SYED KAZIM RAZA SHAMSI, J.--This petition filed under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 is directed against an order' dated 5-10-2006 passed by late Mr. Tariq Mehmood Iqbal Khan the then learned Additional District Judge, Sialkot whereby he maintained an eviction order dated 5-7-2005 passed by Malik Muhammad Rizwan Arif, Rent Controller, Sialkot whereby the ejectment petition was dismissed.

2. The facts of the case as are evident from the pleadings of the parties briefly stated are that Faraz Ahmad Bhutta filed an ejectment petition under section 13 of the Punjab Urban Rent Restriction Ordinance, 1959 against Mst. Sughran Begum alleging therein that property as described in para 1 of the ejectment petition was purchased by him and his brothers by way of registered sale-deed dated 22-3-2002 from Haji Nawab-ud-Din and Muhammad Sharif sons of late Haji Shahab Din. After purchase of the said property, they served a notice under section 13-A of the Ordinance (ibid) informing the respondent about change of the ownership and demanded the monthly rent at the rate of Rs.8,000 per month. The respondent did neither pay nor tender the monthly rent w.e.f. 22-3-2002 thus is the defaulter in the payment of rent. It was prayed that order of ejectment may be passed against the respondent.

3. The petition was resisted by the respondent asserting that the relationship of landlord and tenant did not exist between the parties for the reason that the property in dispute was a "Waqf-al-aulad" which could not be sold out as such, the purchase of the property by the petitioners was illegal. The respondent admitted that she was/a tenant of Haji Nawab-ud-Din and till date she was regularly paying' the rent to him.

4. Facing with this situation, the learned Rent Controller framed issue of relationship of landlord and tenant and proceeded to record oral as well as documentary evidence. The resume of evidence has been provided in the judgment of learned Rent Controller at page 3 paras 6 and 7. Thereafter the learned Rent Controller reached at the conclusion that the property was a Waqf property created by Shahab-ud-Din for charitable purposes as such, was not liable to be alienated in favour of the petitioner, consequently, the petition was dismissed.

5. An appeal of the said dismissal of ejectment petition came up before the learned Additional District Judge who also concurred with the findings of the learned Rent Controller and dismissed the appeal. It is pertinent to mention here that during the pendency of the appeal, the petitioner landlord filed an application seeking permission to place on file

the revocation of Waqf deed dated 26-11-1946 which application was also turned down by the learned Additional District Judge vide order dated 5-10-2006 holding that the document was not placed on the record previously and the document placed now on the file was unattested copy and further that Waqf of the property made by late Shahab-ud-Din was permanent dedication which cannot be withdrawn even by the waqif at the later stage. The petitioner feeling aggrieved by these orders has assailed the same in the instant constitutional petition.

6. While opening the arguments Ch. Khurshid Ahmad, learned Senior counsel contended that his case is based upon three propositions (i) the admission of respondent No.3 about the existence of tenancy (ii) about existence of Waqf and admissibility of revocation-deed and lastly the Waqf of the property was not implemented after its creation. He also termed the sole judgment on the point recorded in the case of Khalid Javed and others v. Qazi Masood-ur-Rehrnan, Additional District and Sessions Judge, Sialkot and 2 others (PLD 1988 Lahore 541) as against the principles of Muhammadan Law. He further argued that the Rent Controller has no jurisdiction to look into the question of title of the landlord. The Rent Controller is only to examine and determine if a person filing ejectment petition is landlord or not. Elaborating his propositions, the learned counsel contended that respondent No.3 in her statement had admitted that she was a tenant of Haji Nawab-ud-Din and others and is paying rent regularly, thus, now she was estopped to deny the relationship of landlord with the petitioner. About second contention, he submitted that Waqf-deed was never implemented and subsequently it was revoked by the waqif himself, therefore, Nawab-ud-Din and others were entitled to alienate the property in favour of the petitioner. He termed the order of learned Additional District Judge refusing to accept the application for additional evidence, as an erroneous order.

7. Learned counsel appearing on behalf of respondent No.3 has categorically placed reliance upon the judgment (supra) as well as upon the principles of Muhammadan Law arguing that once a waqf is created then the waqif has no jurisdiction and authority to revoke it for the reason that it is a permanent dedication made by a waqif for charitable purposes in' favour of Allah Almighty whereafter he cannot be termed as an owner of Waqf property.

8. The submissions made by learned counsel for the parties have duly been appreciated by examining the record of the case as well as the case-law.

9. So far as the first contention of the learned counsel for the petitioner that a Rent Controller cannot look into the title of the landlord is concerned, this Court does not find itself in agreement with such contention. In section 2(c) of the Ordinance (ibid) the definition of landlord has been given which says that any person for the time being entitled to receive rent in respect of any building or rented land. The word "entitled" means the legal entitlement of a person; such person has to prove that he has legally', been authorized to collect the rent or he is collecting the rent on his own account. In the instant case, the petitioner did not produce any evidence showing that they were authorized by Haji Nawab-ud-Din and others to collect rent on their behalf from the tenants of the property. The petitioner has solely relied upon the sale-deed executed by Haji Nawab-ud Din and others in their favour alienating the property in favour of the petitioners. So the learned Rent

Tribunal in this situation has to examine whether the petitioners are lawful owners and the property transferred in their favour was transferred by lawfull means or that they have been legally authorized for the collection of the rent from the tenants, No doubt, the learned Rent Controller is not supposed to conduct detailed inquiry into the fact, but in order to satisfy itself, Rent Controller has to examine these facts before assuming jurisdiction under Rent Laws. Both the courts below while examining these factual positions have rightly held that the petitioners are not the lawful transferee of the property in dispute for the reason that Shahab-ud Din had created the Waqf of the property prohibiting the alienation.

10. In order to examine the creation of Waqf, the principle laid down by D.F. Mulla in this respect are to be considered. According to section 173 of Muhammadan Law, a Waqf is a permanent dedication by a person professing the Muslim faith of any property, recognized by the Muslim Law as religious, pious or charitable. Section 174 of the Muhammadan Law directs a waqf to make a permanent waqif without limiting the period while the object of the Waqf has been described in 178 mentioning that it should be for religious, pious and writable purposes and Waqf could be in favour of settlor's family, children and descendants.

11. Doctrine of press has been laid down in section 181 and the creation of Waqf by inter vivos or testamentary has been provided in sections 184 and 185. To complete a testamentary waqf, section 186 provides the procedure. Section 189 of Muhammadan Law clearly provides that testamentary waqf can be revoked any time before the death of the waqif meaning thereby the other waqif's are not revocable. Further section 193 provides that Waqf property cannot be alienated t except in the case mentioned in sections 207 and 208 which sections provide the powers of Mutawali to sell or mortgage of the Waqf property with the 'permission of the court or if such power has been given expressly in the Waqf deed. The purpose of mentioning all these sections is to ascertain the intention of late Haji Shahab-ud Din from Waqf deed available at page 88. of this constitutional petition which was also produced before the trial Court and was marked as Exh.R.233. If this deed is kept in view, created as far as back on 2-1-1931 and further deed executed in 1935 by said Shahab-ud-Din, shows that it was made as a permanent dedication for charitable and pious purposes mentioned therein and subsequently restraining the successive Mutawalis' from alienation of the whole property or any part thereof. It was mentioned at page 13 of the waqf-deed that:-

In clause 5 of the said deed at page 15, the right to sell the property was prohibited in the following words:--

It is further elaborated in clause 8 that

The charitable purpose is also explicit from the wording of this waqf deed i.e. the waqif wanted to establish a school for the children. This is besides other charitable purpose which he intended to establish in his life time. The reading of these different clauses of the waqf-deed clearly established the intention of the waqif and prohibition from the alienation in future. The submission of the learned counsel for the petitioner that on 26-11-1946, said Shahab-ud-Din himself cancelled the Waqf through a registered document, therefore, it would be deemed that property was never bequeathed by Shahab-ud-Din through waqf-

deed; This submission of the counsel in view of the afore-noted wording has no legs to stand for the reason that when the property did not vest in the waqif and the possession has been delivered to Allah Almighty then he has left with no authority to cancel it. The waqf-deed is found to be very comprehensive document which was allegedly revoked by the waqif through instruments appearing at page 166 of this petition, in which the waqif cancel the waqf-deed in the shallow words:--

This is very funny statement made by the waqif. When it is compared with the original waqf-deed, it appears to be very casual and shallow statement because the waqf-deed was executed by Shahab-ud-Din with the help of his special attorney Malik Jalal-ud Din, B.A., LL.B. Pleader, Sialkot thus, the excuse that in 1946 he got a legal advice that the document executed previously did not fulfil the requirements of Waqf appears to be an attempt to wriggle out the waqf-deed for which the waqif had no authority at all.

12. So far as the question of placing on record the cancellation deed is concerned, the learned Additional District Judge had rightly refused to take this document on the file for the reason that it was never placed before the learned trial court and when it was placed before the learned appellate court that was the photocopy without completing any legal formalities. The other reason given by the learned Additional District Judge for not accepting such document was that the Waqf cannot be revoked. These findings are duly supported by law, cannot be termed as erroneous.

13. Now again reverting to the contention of the learned counsel for the petitioner, the judgment available on the subject is the case of Khalid Javed (supra) which covers the instant case from all sides and it was observed in the said judgment that the Rent Controller has jurisdiction to examine the question of title of the landlord and for that purpose it has to satisfy itself by examining if pre-condition of law in this respect have been fulfilled. It was so directed in this judgment that in such like cases, the landlord should be directed to get clear his title from the court of plenary jurisdiction and then to avail the remedies provided by the Rent Laws. This case law provides guidelines to the court as to what order is to be passed in such like situation. It is established in is case that relationship of landlord and tenant did not exist between the parties as such, other contentions raised by the learned counsel for the petitioner are not needed to attend. The arguments that respondent No.3 had admitted the tenancy of Haji Nawab-ud-Din, thus by fiction of law she is the tenant of the present petitioner and is estopped from denying the title of the landlord, in the light of afore-noted observation has become a is sham arguments and cannot be accepted.

14. The upshot of the above discussion is that both the learned courts below have rightly held that relationship of landlord and tenant did not exist between the parties which findings are based on sound appreciation of evidence, record and the law as well, and do not call for any interference by this court in this constitutional jurisdiction. This petition fails and is dismissed accordingly.

M.A.K./F-19/L Petition dismissed.

P L D 2011 Lahore 615
Before Syed Kazim Raza Shamsi, J
Syed MUMTAZ HUSSAIN---Petitioner
Versus
Mst. NAZIMA NAQVI and others---Respondents

Writ Petition No.4502 of 2010, decided on 6th July, 2011.

West Pakistan Urban Rent Restriction Ordinance (VI of 1959)---

---Ss. 2(c) & 13---Constitution of Pakistan, Art.199---Constitutional petition---Ejectment of tenant---Relationship of landlord and tenant-Parties were brother and sister inter se and disputed premises was owned by their deceased father---Father of parties in his life time rented out the premises---Petitioner was attorney of his father and had been receiving rent from the tenant on behalf of his father---Respondent (sister) claimed that their father gifted the premises to her thus she had become the owner---Prior to receipt of any notice of change of ownership, the tenant de-hired the premises and handed over the possession to petitioner---Respondent filed ejectment application against her brother (petitioner) and tenant on the ground of wilful default---Rent Controller allowed ejectment application and passed eviction order, which was maintained by Lower Appellate Court---Validity---Petitioner could never be treated as a tenant in the house in question as he was receiving rent from the tenant on behalf of his father and he fell within the definition of "landlord" as provided in S.2(c) of West Pakistan Urban Rent Restriction Ordinance, 1959--Petitioner, being a family member of the deceased owner, was in occupation of the demised premises, as such could 'not be treated as a tenant in the house---No evidence was available on record that either the tenant or petitioner paid any rent to respondent, after termination of lease agreement, as such relationship of landlord and tenant did not exist between the parties---Necessary ingredients of execution of gift in favour of respondent lady were not completed as delivery of possession of the house had not taken place--Eviction orders passed by both the Courts below suffered from misreading and non-reading of material evidence available on record and judgments recorded by both the Courts below were not sustainable in the eyes of law---High Court in exercise of constitutional jurisdiction, declared eviction orders as illegal and of no legal consequences and the same were set aside---Petition was allowed accordingly.

2010 SCMR 446; 2009 YLR 2379 and 1949; 2009 CLC 34; 2009 YLR 1736 and 2007 MLD 732 rel.

Ch. Inayat Ullah for Petitioner.

Mian Hameed Ullah Khan for Respondents.

ORDER

SYED KAZIM RAZA SHAMSI, J---By this single order intend to dispose of Writ Petition No.4502 of 2010 and Writ Petition No.5087 of 2010 due to commonality of the facts and the subject matter of the-case.

2. Both these petitions are directed against a consolidated judgment dated 1-2-2010 passed by Mr.Abid Rizwan Abid, learned Additional District Judge, Lahore whereby he maintained the order of ejectment dated 13-10-2006 passed by Mr.. Muhammad Riaz Bhatti, learned Rent Controller, Lahore.

3. The facts of the case briefly stated are that Syed Mumtaz Hussain son of Syed Mukhtar Hussain was an employee of Atomic Energy Minerals Centre, Lahore. As per terms and conditions of service he was allowed to hire a house according to his entitlement. For this purpose, a lease agreement was executed on 20-12-1993 between Syed Mumtaz Hussain and his employer Atomic Energy Minerals Centre, Lahore, by virtue of which house No.24-A situated at Ahmed Buksh Road, New Shad Bagh Lahore was taken on lease. The said agreement was made on behalf of Syed Mukhtar Hussain as is evident from_ the lease agreement mentioning him as landlord while his son Syed Mumtaz Hussain was recorded as Attorney of Syed Mukhtar Hussain. Syed Mukhtar Hussain executed a Special Power of Attorney in favour of his son Syed Mumtaz Hussain authorizing him to collect rent from the lessee i.e. Atomic Energy Minerals Centre.

4. Later on, as per record said Syed Mukhtar Hussain, the owner of the property as well as the landlord gifted the said property to his daughter Mst. Nazima Naqvi by way of registered Gift Deed dated 15-1-2001. Syed Mukhtar Hussain also rescinded the special power of attorney executed in favour of Syed Mumtaz Hussain and informed the Atomic Energy Minerals Department about change of ownership of leased property. The department vide letter dated 1-6-2001 terminated the lease and de- hired the house in question.

5. Mst. Nazima Naqvi after acquiring the title of ownership of the property sent a legal notice of change of ownership to the Atomic Energy Minerals Centre, Lahore but prior to that the house had been de-hired and the lease was terminated. The de fecto possession of the house was delivered to Syed Mumtaz Hussain by lessee department who was in the occupation of the house being son and family member of Syed Mukhtar Hussain.

6. Mst. Nazima Naqvi then filed an ejectment petition against Atomic Energy Minerals Centre, Lahore and Syed Mumtaz Hussain, her brother under section 13 of the Punjab Urban Rent Restriction Ordinance, 1959 asserting that she became the owner of the disputed property on 15-1-2001; a legal notice of which was given to the respondent Department as well as to respondent No.2 demanding the rent @ Rs.4178 per month. It was alleged in the ejectment petition that respondent No.1 has neither vacated the premises nor paid the rent as such they are wilful defaulter from February, 2001 till the date of institution of the ejectment petition.

7. Respondent No.1 the department through an application requested the court for striking off its name from the array of respondents on the ground that possession of the house had already been delivered to the landlord on 1-6-2001 as such it is neither proper nor necessary party to the ejectment petition.

8. Respondent No 2 Syed Mumtaz Hussain took up the defence that the lease agreement dated 15-10-1993 was extended after every three years and lastly it was extended from 14-

10-2000 to 13-10-2003 at the rate of monthly rent of Rs.4278 as such the petition was premature and no maintainable. It was also contended that the house in dispute was hired by Atomic Energy Minerals Centre, Lahore for the benefit of respondent No.2 where he was in possession, firstly under the lease agreement and thereafter as the family member of his father. The legality of the gift executed in favour of Mst. Nazima Naqvi was also challenged on the ground of lack of delivery of possession to donee. In these circumstances, he denied the relationship of landlord and tenant.

9. The learned trial court out of the pleadings of the parties framed three issues in respect of relationship, default in the payment of rent and the personal need of the landlord. The court whereafter framed two additional issues also and recorded the evidence of the parties. It was concluded, after appreciation of evidence that the relationship of landlord and tenant existed between the parties as such determined the liability of the rent from December 2003 to onward @ Rs.4278 against respondent. The ejectment petition was accordingly accepted.

10. Being dis-satisfied with the judgment of the learned Rent Controller, the Atomic Energy Minerals Centre, Lahore as well as Syed Mumtaz Hussain filed an appeal before the learned first appellate court whose findings were not different than the one recorded by the learned Rent Controller and the appeals were dismissed.

11. Both the appellants before the learned first appellate court feeling aggrieved by the said judgment have assailed the same in these two separate writ petitions.

12. Arguments of the learned counsel for the parties have been heard and record perused.

13. The examination of the impugned judgment as well as the factual position as noticed leads to the fact that relationship of landlord and tenant was terminated between the Atomic. Energy Minerals Centre, Lahore and Syed Mukhtar Hussain which fact he (Syed Mukhtar Hussain) himself had admitted in his revocation deed of power of attorney executed in favour of Syed Mumtaz Hussain registered on 27-1-2004. It was narrated in the said deed that House No.24-A, situated at Ahmed Buksh Road, New Shad Bagh Lahore was leased out/acquired by Atomic Energy Minerals Centre, Lahore where his son Syed Mumtaz Hussain was employed as a Driller, who was residing in the said house. He further admitted that for the purposes of collection of rent he had authorized his son through a special power of attorney and that he vide registered Gift Deed dated 15-1-2001 had gifted the said house to his daughter Mst.Nazima Naqvi. It was further narrated in the said deed that Atomic Energy Minerals Centre, Lahore was also informed about the gift deed and cancellation of the Special Power of Attorney executed in favour of Syed Mumtaz Hussain whereupon the Department vide letter No.Admn-6(167)93 dated 1-6-2001 had de-hired the said house. This assertion in the deed explicitly shows that there was no lease in existence on 1-6-2001 as such the Department was never the lessee of said Syed Mumtaz Hussain thereafter.. The claim lodged by the respondent Mst.Nazima Naqvi against the Department was totally frivolous and could not be entertained in 'the ejectment petition. The department had validly informed the learned Rent Controller that the possession of the property in question has been returned after termination of lease agreement to the landlord and they were no more the lessee of the property.

14. Learned counsel for the respondent at this stage submitted that although the possession of the property is not with the Department but yet the arrears of the rent are to be determined payable by the said department. The argument of the learned counsel is untenable for the reason that once the lease was terminated on 1-6-2001, thereafter, no rent was left to be determined by the Court. Moreover, the rent was being received by Syed Mumtaz Hussain and if any claim is to be lodged for that purpose, Syed Mumtaz Hussain could be held liable.

15. As far as, the status of Syed Mumtaz Hussain in the demised premises is concerned, in the opinion of this Court, he could never be treated as a tenant in the said house for the reason that firstly he was receiving rent from his department on behalf of his father thus falls within the definition of landlord as provided in section 2(c) of the Ordinance, ibid and secondly he being a family member of Syed Mukhtar Hussain was in occupation of the demised premises, as such he could never be treated as a tenant in the house. There is no evidence on the record that either the department or Syed Mumtaz Hussain paid any rent to the respondent lady after termination of the lease agreement as such the relationship of landlord and tenant did not exist between the parties. In this connection cases reported as 2010 SCMR 446, 2009 YLR 2379 and 1949, 2009. CLC 34, 2009 YLR 1736 and 2007 MLD 732 are relevant. The execution of the gift in favour of Mst.Nazima Naqvi although is not the subject matter of this case but it can be pointed out that the necessary ingredients of the said gift were not completed as delivery of possession of the house had not taken place.

16. Lastly, the learned counsel for the respondent has himself placed on the file a document showing that Syed Mumtaz Hussain the petitioner had taken his share from Mst.Nazima Naqvi and abandoned the house on 9-4-2010. This further proves the fact that till 9-4-2010 the possession of the house was not with Mst.Nazima Naqvi. Learned counsel for the respondent further submitted that there is a concurrent finding of fact recorded by both the learned courts below in respect of existence of relationship of landlord and tenant between the parties which cannot be looked into while exercising the constitutional jurisdiction. The proposition placed by the learned counsel does not appeal to judicial mind as in the instant case both the learned courts below have proceeded against settled law in allowing ejectment of petitioner by misreading the material available on the record for reaching at such conclusion as such in such like situation interference in the said orders is an exception to the general rule that concurrent findings of fact are usually not disturbed in the constitutional petition.

17. The upshot of the whole discussion is that the orders passed by both the learned courts below suffer from misreading and non-reading of material evidence available on the record as such the judgments recorded by them are not sustainable in the eyes of law. Accordingly, both these petitions are allowed declaring the impugned orders being illegal and of no legal consequences as such are set aside. The ejectment petition filed by respondent No.1 is dismissed. The documents retained on the last date of hearing for the perusal of this Court have been returned to the learned counsel for the respondent.

M.H./M-260/L Order accordingly.

P L D 2011 Lahore 620

Before Muhammad Khalid Mehmood Khan and Syed Kazim Raza Shamsi, JJ

SHAHID SIDDIQUE---Appellant

Versus

SHARJA NATIONAL TRAVELS AND TOURIST AGENCY---Respondent

R.F.A. No.243 of 2005, heard on 28th June, 2011.

Civil Procedure Code (V of 1908)---

---Ss.13, 44-A, O.IX, X.13 & O.XXXIV--- Transfer of Property Act (IV of 1882), S.58---Ex parte decree---Foreign decree---Reliance---Mortgaged property, sale of----Trial Court proceeded ex parte against defendant and passed preliminary decree on the basis of decree passed in a foreign country and allowed sale of property for which there was an agreement to create a mortgage--- Validity---Nothing was available on file to show that United Arab Emirates was reciprocating territory within the meaning of Explanation 2 to S.44-A, C.P.C.---Fact of reciprocating territory was to be notified by Federal Government in official gazette declaring reciprocating territory as such---In absence of any such notification, a foreign judgment could not be treated as a conclusive in the matter within the meaning of S.13, C.P.C.---Judgment passed by court in Dubai and the decree granted there, unless same was established by way of separate suit in terms of S.13, C. P. C., could not be executed in Pakistan---Trial Court also committed another illegality while decreeing the suit by presuming the agreement to create mortgage which was in fact a mortgage deed---Such agreement manifested that it was an executory document which did not attain the form of mortgage deed---Only mortgages created in forms provided under S.58 and onwards of Transfer of Property Act, 1882, were enforceable through court---High Court set aside judgment and decree passed by Trial Court and case was remanded for deciding the same afresh after providing opportunity to defendant to contest the same on merits---Appeal was allowed in circumstances.

Tahir Naeem for Appellant.

Nemo for Respondent No.1.

Date of hearing: 28th June, 2011.

JUDGMENT

SYED KAZIM RAZA SHAMSI, J. This regular first appeal is directed against a judgment and decree dated 23-4-2005 passed by Mr. Arshad Hussain, learned Civil Judge, Lahore whereby he passed a preliminary decree against defendant No.1 of the suit with the direction to pay the suit amount along with mark up at the prevalent bank rate from the date of institution i.e. 2-10-2003 till the realization of the decretal amount. The suit to the extent of respondents Nos.2, 3 and 4 was dismissed.

2. Sharjah National Travels and Tourist Agency incorporated under the laws of United Arab Emirates having its registered office at 4-Mozang Road, Lahore, instituted a suit for the

recovery of Dhs.2,93,338 or equivalent to Pakistani currency along with 9% per annum interest, by the sale of mortgaged property mentioned in para.6 of the plaint. It was further averred /that defendants Nos.2, 3, and 4 were pro forma defendants, against whom no relief was claimed and that defendant No.1 Shahid Siddique is the real brother of defendant No.4 Irfan Ashiq. According to the claim of the plaintiff, an amount of Dhs.4,45,000/- became due towards defendant No.1 during the business dealing in respect of which amount, four cheques were issued by defendant No.4 in favour of the plaintiff. The cheques were not encashed due to insufficient funds when defendant No.1 offered to liquidate the liability and furnishing of guarantee till the payment of the amount due. As per plaint, to liquidate liability created by dishonouring four cheques issued by defendant No.4, defendant No.1 created an equitable mortgage by depositing the title documents and issued the post-dated cheques. It is further averred in the plaint that defendant No.1 made partial payment of due amount and further issued post-dated cheques for balance amount of Dhs.2,26,500/-which were to be cleared within two years time. It is in the plaint that defendant No.1 in order to secure the re-payment of amount, executed an agreement on 28-10-1998 to create mortgage. When the cheques issued by defendant No.1, were dishonoured, the plaintiff instituted the instant suit, praying for decree of 2,93,33. Dirhanu or for an amount equivalent in Pakistani currency.

3. The defendants did not appear in the court despite the substituted service, as such, they were proceeded ex parte. The court then recorded the ex parte statement of Muhammad Shabbir Khan P.W. special attorney of the plaintiff who tendered certified copy of "Mukhtar Nama", proceedings and decree of the court at Dubai along with copy of mortgaged-deed (which in fact is an agreement to create mortgage Exh. P.13) and affidavit of defendant No.1. Subsequently defendant No.1 appeared in the court and filed an application for setting aside the ex parte order along with application seeking rejection of the plaint.

4. In the application, it was averred by defendant No.1 that he had not executed any mortgage deed and his signatures were, obtained at U.A.E. on certain documents by the plaintiff by exerting undue influence. Further submitted that the property had already been sold to one Kh. Abdul Wasee who alienated the same in favour of Mst. Anwaar, thus, it is the stand of defendant No.1 that the property cannot be sold for the recovery of mortgage money.

5. The applications were resisted by the plaintiff of the suit whereafter the court proceeded to dismiss the application filed under Order IX, rule 7, C.P.C. The court further proceeded to dismiss the application of defendant No.1 filed under Order VII, rule 11, C.P.C.

6. Later on, the court vide judgment and decree dated 23-4-2005 held that the suit was filed under Order XXXIV, C.P.C. in respect of a mortgaged property holding that mortgagee can either sue for foreclosure or for sale of mortgaged property while the plaintiff opted for second option as such, decreed the suit in the above terms.

7. We have considered the submissions made by the learned counsel for the appellant.

8. The first question which cropped up for determination is whether the decree granted by the Court at Dubai can be executed in Pakistan without having been adjudged through a separate suit. The answer of this query is provided in section 44-A of Code of Civil Procedure, 1908, which provides that the decree of those courts having reciprocating territory could be executed in Pakistan. There is nothing on the file to show that the Kingdom of U.A.E. is the reciprocating territory within the meaning of explanation 2 of section 44-A of the Code. This fact of reciprocating territory is to be notified by the Federal Government in the official Gazette declaring the reciprocating territory as such. In the instant case, in absence of any such notification, a foreign judgment cannot be treated as a conclusive in the matter, within the meaning of section 13 of Code. In view of this legal proposition, we are constrained to hold that the judgment passed by the court at Dubai and the decree granted there as per Ex.P.3 to Ex.P.9 unless same are established by way of separate suit in terms of section 13 of the Code of Civil Procedure cannot be executed in Pakistan.

9. The learned trial court has also committed another illegality while decreeing the suit by presuming that the agreement to create mortgage is in fact a mortgage. The document is available on the record as Ex.P.13 which clearly manifests that it was an executory document which did not attain the form of mortgage deed. Only mortgage created in forms provided under section 58 and onwards of Transfer of Property Act, 1882, are enforceable through court. The perusal of the judgment of the learned trial court shows that it was in great hurry to decide the matter expeditiously as it failed to note down the legal aspect of the case. Accordingly the judgment delivered by the learned trial court has no sanctity in the eyes of law which is liable to be set aside.

10. Accordingly, the appeal in the above terms is accepted by setting aside the impugned judgment and decree dated 23-4-2005. The case is remanded to the learned trial court for deciding the same afresh after providing opportunity to the appellant to contest the same on merits. The case shall be tried by learned Senior Civil Judge, Lahore himself. The parties shall appear before the learned Senior Civil Judge, Lahore on 19-7-2011.

M.H./S-106/L Case remanded.

2011 Y L R 2977

[Lahore]

Before Syed Kazim Raza Shamsi, J

WAHEED UZ ZAMAN KHAN---Petitioner

Versus

Syed HASSAN RAZA BUKHARI and others---Respondents

Writ Petition No.12080 of 2009, heard 23rd June, 2011.

(a) West Pakistan Urban Rent Rest riction Ordinance (VI of 1959)---

----S.13---Specific Relief Act (I of 1877), S.12---Ejectment---Agreement to sell---Effect---Tenant remains a tenant even if he succeeds in procuring an agreement to sell with his landlord till the time that agreement is resulted into a final document of title---Mere agreement to sell does not create any right or title---After execution of agreement to sell by landlord, tenant does not become owner of the property.

Haji Jumma Khan v. Haji Zarin Khan PLD 1999 SC 1101 fol.

(b) West Pakistan Rent Restriction Ordinance (VI of 1959)---

---S.13---Constitution of Pakistan, Art.199--Constitutional petition---Ejectment of tenant---Agreement to sell---Rent Controller allowed ejectment application filed by landlord but Lower Appellate Court relying on agreement to sell in favour of tenant held that no relationship of landlord and tenant existed between the parties, resultantly ejectment application filed by landlord was dismissed---Validity---Lower Appellate Court while taking a converse view than the view of Rent Controller did not appreciate legal position and had just relied upon the term 'possession' mentioned in the agreement to sell, to dismiss ejectment petition---Lower Appellate Court also could not make distinction between possession as tenant and possession of a person as owner over property in dispute---Lower Appellate Court should have been mindful of the fact that tenant might become an owner of property in dispute if he could have succeeded in getting title of document executed in his favour, which could be a sale-deed---Till the time of execution of sale-deed, status of tenant was of a tenant in possession of rented premises---Findings of Lower Appellate Court on the issue of possession was based upon mis appreciation of law and non-reading of material facts borne out of the record, as such were liable to be set aside---High Court declared the order passed by Lower Appellate Court as illegal and of no legal consequence and set aside the same and restored eviction order passed by Rent Controller---Petition was allowed in circumstances.

Haji Jumma Khan v. Haji Zarin Khan PLD 1999 SC 1101 and Iqbal and 6 others v. Mst. Rabia Bibi and another PLD 1991 SC 242 fol.

Messrs Rehman Cotton Factory v. Messrs Nichimen Co. Ltd. PLD 1976 SC 781; Mian Abdul Rashid v. Province of Punjab through District Controller, Okara and another PLD 2003 Lah. 389; Ch. Noor Hussain v. Ch. Allah Bakhsh and others 1984 SCMR 446 and Muhammad Islam Khan v. Cantonment Board, Kohat 1982 SCMR 1056 distinguished.

Shafqat Mehmood for Petitioners.

Rafique Javed Butt for Respondents.

"Date of hearing: 23rd June. 2011.

JUDGMENT

SYED KAZIM RAZA SHAMSI, J.---This constitutional petition is directed against an order dated 24-2-2009 passed by Khawaja Zafar Iqbal, Addl. District Judge, Lahore, whereby he accepted the appeal and dismissed the ejectment petition.

The facts of the case briefly stated are that Waheed uz Zaman, the petitioner was owner of House No.7 situated at Out Fall Road, Sanat Nagar, Lahore, who filed an ejectment petition against his tenant Hassan Raza on the various grounds. The ejectment petition was contested by the tenant and during the pendency of the ejectment petition the landlord entered into a compromise with his tenant and executed an agreement to sell dated 26-5-2000. It was recorded in the agreement that the rented premises were sold for a consideration of Rs.750,000 to Hassan Raza, who had paid a sum of Rs.200,000 as earnest money. It was also agreed that within 150 days from 26-5-2000 the property would be transferred in the name of the tenant. It is the contention of the petitioner that after the execution of the agreement to sell the tenant Hassan Raza started delaying the registration of the sale-deed in his own name although he was reminded for the performance of his part of the agreement. When the tenant failed to get the sale-deed registered in his favour the landlord constrained to file second ejectment petition on the ground of bona fide personal need.

3. The tenant Hassan Raza contested the application by taking the stand that by virtue of agreement dated 26-5-2000 he is the owner of the property in dispute, as such the relationship of landlord and tenant did not exist between the parties.

4. The sole issue in respect of the relationship of the parties was framed by the Rent Controller, who after recording the evidence of the parties concluded that the respondent was a tenant in the premises, thus accepted the ejectment petition. The respondent being dissatisfied with the findings of the learned Rent Controller preferred an appeal before the learned First Appellate Court. After appreciating the record the learned Appellate Court concluded that the findings of the Rent Controller in respect of existence of relationship of landlord and tenant between the parties were erroneous, as such set aside the same by accepting the appeal and dismissed the ejectment petition.

5. I have considered the submissions made by the learned counsel for the parties and perused the record. Both learned counsel have cited various judgments in support of their contentions. It is noticed from the record that after refusal of the respondent to perform his part of the agreement the petitioner has to file the ejectment petition against him it is also noticed that the respondent did not try to get the sale-deed executed in his favour nor he instituted any suit for specific performance of the agreement which he filed after three years of the filing of second ejectment petition against him. This fact of the institution of the suit after three years of the filing of the ejectment petition speaks a lot about the malice of the respondent, who in the ' garb of the agreement to sell wanted to usurp the valuable property of the petitioner. It is also observed that the suit was withdrawn by the respondent on the very next day when his appeal was accepted by the learned First Appellate Court and the ejectment petition was dismissed.

6. The next question for determination, after observing the conduct and behaviour of the respondent, is about the position of the respondent over the disputed property.

Admittedly before' the execution of the agreement to sell the respondent was a tenant in the property against whom an ejectment petition was tiled by the petitioner, which was resulted into compromise and an agreement to sell took birth out of that compromise. Second ejectment petition was filed by the petitioner on 30-6-2001 meaning thereby that the 'respondent did not honour the agreement during 26-5-2000 to 30-6-2001 thus attempted to prolong his holding over the disputed property. It is settled principle of law that a renant remains a tenant even if he succeeds in procuring an agreement to sell with his landlord till the time that agreement is resulted into a final document of title. It is also a valid proposition of law that mere agreement to sell does not create any right or title, thus it cannot be said that after the execution of the agreement to sell by the respondent in favour of the petitioner he (respondent) became the owner of the property in dispute. In the case of "Haji Jumma Khan v. Haji Zarin Khan" (PLD 1999 SC 1101) their Lordships were pleased to hold that till the time the tenant was able to establish his claim for specific performance on the basis of a sale agreement landlord would continue to enjoy the status of being owner or landlord of the premises. The relationship between the parties till such time would be regulated by the terms of earlier tenancy, as such the tenant could not legitimately resist maintainability of ejectment petition pending against him on the ground of sale agreement. In the case of "Iqbal and 6 others v. Mst. Rabia Bibi and another" (PLD 1991 SC 242) their Lordships were pleased to hold that ejectment application could not be stayed or stalled on the plea that the tenant in possession was holding agreement to sell and pendency of suit for specific performance of agreement would be no ground to avoid eviction of the tenant by the Rent Controller.

7. Learned counsel for the respondent while relying upon the cases of "Messrs Rehman Cotton Factory v. Messrs Nichimen Co. Ltd." (PLD 1976 SC 781), "Mian Abdul Rashid v. Province of Punjab through District Controller, Okara and another" (PLD 2003 Lahore 389), "Ch. Noor Hussain v. Ch. Allah Bakhsh and others" (1984 SCMR 446) and "Muhammad Islam Khan v. Cantonment Board, Kohat" (1982 SCMR 1056) contended that the respondent is in possession of the property in part performance of the agreement to sell, as such would be entitled to retain the possession as an owner till the time the agreement becomes executed in its nature. This contention of the learned counsel for the petitioner/respondent has been meted out by the aforementioned two judgments of the Apex Court, as such case law referred to by the learned counsel for the respondent is not directly applicable to the facts of the instant case in stricto senu.

8. Learned First Appellate Court while taking the converse view than the view of the learned Rent Controller did not appreciate this legal position of the case and has just relied upon the term 'possession' mentioned in the agreement to sell to dismiss the ejectment petition. The Court also could not make distinction between the possession as a tenant and possession of a person as an owner over the property in dispute. The Court should be mindful of the fact that the respondent may become an owner of the property in dispute if he succeeds in getting the document of title executed in his favour, which in the instant case could be a sale-deed. Till the time of execution of sale-deed the status of the respondent would of a tenant in possession of the rented

premises. Respectfully following the ratio of the cases of "Haji Jumma Khan" and "Iqbal" (supra), it is held that the findings of the learned First Appellate Court on the issue is based upon misappreciation of law and non-reading of material facts borne out of the record, as such are liable to be set aside.

9. For the foregoing reasons, this petition is allowed by declaring the order dated 24-2-2009 passed by Khawaja Zafar Iqbal, Addl. District Judge, Lahore as illegal and of no legal consequences and is set aside, accordingly, the order dated 2-3-21006 passed by Ms. Asima Tehseen, learned Rent Controller, Lahore is restored.

M.H./W-13/L Petition allowed.

2011 Y L R 3020

[Lahore]

Before Syed Kazim Raza Shamsi, J

NISAR AHMAD and others---Petitioners

Versus

MANZOOR HUSSAIN and others---Respondents

Writ Petitions Nos.5810 to 5814 of 2010, heard on 7th July, 2011.

Punjab Rented Premises Ordinance (XXI of 2007)---

----Ss. 8 & 9---Constitution of Pakistan, Art. 199---Constitutional petition--Ejectment of tenant---Unregistered tenancy agreement---Effect---Ejectment applica tions filed by landlords were allowed by Rent Tribunal as no leave was granted to tenants---Lower Appellate Court remanded the cases to Rent Tribunal for taking proceedings under sections 8 and 9 of Punjab Rented Premises Ordinance, 2007, as landlords did not get tenancy agreements registered with Registrar of Rent Tribunal---Plea raised by landlords was that at the time of institution of ejectment petitions, the tenancies had expired, as such the provision of section 8 of Punjab Rented Premises Ordinance, 2007, was not applicable---Validity---At the time of promulgation of Punjab Rented Premises Ordinance, 2007, the tenancies were in existence---Was mandatory for landlord to bring the existing tenancies in conformity with the requirement of section 8 of Punjab Rented Premises Ordinance, 2007---Court was not to see as to 'when ejectment petitions were filed rather it was to be examined that whether at the time of promulgation of law any tenancy was in existence---Lower Appellate Court should not have remanded cases to Rent Tribunal only for compliance of section 9 of Punjab Rented Premises Ordinance, 2007, rather the Court had jurisdiction to itself direct landlord to deposit fine of 10% as provided in law---In case of non-compliance of such direction, the Lower Appellate Court could proceed against the landlords---Remand orders passed by Lower Appellate Court were unjustified, as the act directed to be performed by Rent Tribunal could also be done by Lower Appellate Court itself---High Court in exercise of Constitutional jurisdiction remanded the cases to Lower Appellate Court for deciding appeals on merits---Petition was allowed accordingly.

Syed Salman Gillani v. Additional District Judge and others Writ Petition No.3678 of 2009; Muhammad Usman and others v. A.D.J. Lahore and others Writ Petition No.19643 of 2009; Majid Khan through Special Attorney and 2 others v. Mst. Naseem Bibi and 9 others PLD 2010 Lahore 389 and Muhammad Zaman v. Akram Hussain and others 2011 CLC 755 ref.

Anwaar Akhtar for Petitioners.
Malik Mushtaq Ahmad for Respondent No.1.
Date of hearing: 7th July, 2011.

JUDGMENT

SYED KAZIM RAZA SHAMSI, J.---By way of this judgment, I proceed to dispose of Writ Petition Nos.5810 of 2010, 5811 of 2010, 5812. of 2010, 5813 of 2010 and 5814 of 2010 as the same have been filed by one landlord against his five tenants. Besides the judgments of the court below are identical.

2. All these constitutional petitions are directed against an order dated 16-3-2010 passed by Mian Muhammad Anwar, learned Additional District Judge, Sialkot whereby he while accepting the appeals of the tenants remanded the case to the learned Special Judge Rent, Sialkot for having the compliance of sections 8, 9, 19 and 21 of the Punjab Rented Premises Ordinance, 2007.

3. Nisar Ahmad and another filed five ejectment petitions against their tenants Manzoor Ahmad, Tariq Mehmood, Muhammad Ashfaq etc., Muhammad Asif Butt etc. and Ghulam Rasool etc. on the grounds of default in the payment of rent and expiry of the agreement.

4. In the ejectment petitions, it was contended that there was an oral tenancy between the parties. The respondents were holding possession of the disputed shops at the monthly rent of Rs.1,600 per month per shop. The terms of oral agreement had expired. The respondents in "punchayat" promised to vacate the premises on 1-1-2009 but the needful was not done by them. The ejectment petitions were filed on 28-1-2009 before the learned Rent Controller.

5. In written reply, which was subsequently treated as leave application, it was contended by the respondents that the property did not fall within the municipal limits as such, the Rent Laws are not applicable. It was denied that they were defaulters in the payment of rent.

6. The learned Special Judge Rent dismissed the leave applications and after passing the final order directed the respondents to vacate the premises. The findings of the learned Rent Tribunal were assailed in appeals by the respondents which were accepted by the learned Additional District Judge, Sialkot by way of the judgment impugned in these writ petitions. The learned appellate court while holding that the tenancy agreement was not brought in conformity with the provisions of section 8 of Punjab Rented Premises Ordinance, 2007 .as

such, the landlord was liable to pay the fine of 10% and remanded the case to the learned Rent Tribunal for taking proceedings under sections 8 and 9 of the Ordinance.

7. These constitutional petitions are directed against the said remand order of the learned first appellate court.

8. It is contended by the learned counsel for the petitioners that at the time of the institution of the ejectment petitions i.e. 28-1-2009 there was no tenancy existed as such, section 8 of the Ordinance is not applicable and the direction given by the learned first appellate court is against the law. Learned counsel further contended that section 8 of the Ordinance is not applicable to the expired tenancy. In this connection, the learned counsel has cited unreported judgment dated 26-2-2009 recorded in Writ Petition No.3678 of 2009 tilted Syed Salman Gillani v. Additional District Judge and others judgment dated 10-2-2010 passed in Writ Petition No.19643 of 2009 titled Muhammad Usman and others v. A.D.J. Lahore and others Majid Khan through Special Attorney and 2 others v. Mst. Naseem Bibi and 9 others (PLD 2010 Lahore 389) and Muhammad Zaman v. Akram Hussain and others (2011 CLC 755).

9. Learned counsel for the respondents while supporting the order of the learned first appellate court submitted that the court had rightly remanded the case to the trial court for having the compliance of mandatory provisions of law.

10. Parties heard and record perused.

11. The contention of the learned' counsel for the petitioners that at the time of institution of the ejectment petitions, the tenancy had expired as such, section 8 of the Ordinance was not applicable (sic) incorrect proposition. Admittedly, at the time of promulgation of the Punjab Rented Premises Ordinance, 2007 i.e. 16-11-2007, the tenancy of the petitioners was in existence. According to the provision of section 8, it was mandatory for the petitioners to bring the existing tenancy in conformity with the requirement of that section. It is not to be seen as to when the ejectment petitions were filed rather it is to be examined that at the time of promulgation of Law any tenancy was in existence. As per record, the petitioners themselves admitted that their tenancy expired on 28-1-2009 much after the promulgation of the Ordinance. So the petitioners under section 8 of the Ordinance, which provides the legislative expediency contained in the words "as soon as possible", was bound to comply with the direction of that section by approaching Registrar of Rent Tribunal. The outer limit for bringing the agreement in line with the said provision was fixed as two years, thus, in the given circumstances, the petitioners were bound to bring their agreement in accordance with the provision of Ordinance "as soon as possible". The contention of the learned counsel about expired tenancy and non-application of section 8 of the Ordinance in this scenario is repelled.

12. This court has noticed that the learned appellate court should not remand the case to the learned Rent Tribunal only for the compliance of sections 9 of the Ordinance rather the court had the jurisdiction to itself direct the petitioners to deposit the fine of 10% as provided in section 9 of the Ordinance. In case of non-compliance of such direction of the

court, the learned appellate court may proceed against the landlord. I am, therefore, of the view that the remand order is totally unjustified as the act directed to be performed by the trial court could also be done by the appellate court itself.

13. The constitutional petitions in the afore-noted circumstances are thus allowed. The impugned orders of the learned appellate court are set aside. The cases are sent back to the learned Additional District Judge, Sialkot for re-deciding the appeals on their merit. The court shall also direct the present petitioners, the respondents in the appeals to` deposit the fine of 10% as enunciated in section 9 of the Ordinance (ibid) and for this purpose shall afford a reasonable time to the respondents for compliance. The parties shall appear before the appellate court on 20-7-2011.

M.H./N-58/L Case remanded.

2011 YLR 3089

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi, J

MAZHAR SAEED and another---Petitioners

Versus

A.D.J. and 11 others---Respondents

Writ Petition No.15972 of 1999, decided on 24th August, 2011.

(a) West Pakistan Urban Rent Restriction Ordinance (VI of 1959)---

----S. 2(c) & (i)---Right of legal heirs of landlord to receive rent---Scope---Legal` heirs on opening of succession of deceased landlord would automatically fall within definition of landlord and become entitled to receive rent---Legal heirs would not be required to establish their such right, rather mere assertion by them to be legal heirs of deceased landlord would be sufficient.

(b) West Pakistan Urban Rent Restriction Ordinance (VI of 1959)---

----S. 13---Ejectment proceedings---Denial of relationship of landlord and tenant between parties---Burden of proof---Initial onus would lie upon landlord to prove existence of such relationship through convincing and cogent' evidence---Person in occupation of an immovable property would be bound to establish his capacity in which he was occupying same.

(c) West Pakistan Urban Rent Restriction Ordinance (VI of 1959)---

----S. 13---Transfer of Property Act (IV of 1882), S. 53-A---Ejectment petition by legal heirs of deceased landlords---Default in payment of rent, ground of---Denial of relationship of landlord and tenant between parties as tenant claimed to be in possession of premises in part performance of sale agreement executed by deceased landlords admitting them to be

joint owners thereof---Validity---Tenant had not denied payment of rent to deceased landlords---Right to receive rent had devolved automatically upon legal heirs on opening of succession of deceased landlords---Tenant had not denied that ejectment petitioners were not legal heirs of deceased landlords---Legal heirs after death of original landlords had sent legal notice to tenant demanding from him rent of demised premises---Such notice was not received back undelivered, thus, presumption would be that same had been delivered to tenant---Tenant had an opportunity to reply said notice by taking plea in respect of alleged sale agreement, but his failure to do so would amount to admission of facts stated therein, thus, he was stopped by his conduct to deny title of landlords---Person in occupation of an immovable property had to establish his capacity in which he was occupying the same---Tenant's plea specifically taken in written statement was to the effect that he was occupying property in his own rights and in part performance of sale agreement without stating therein and establishing as to with whom 'he had agreed to purchase demised premises, when and in whose presence its price was paid---Non-?mentioning of all such details in written statement would be sufficient to repel such plea of tenant---Tenant had failed to prove tentatively ingredients of alleged sale agreement---Courts below had rightly appreciated evidence on record and found tenant to have defaulted in payment of rent---High Court dismissed constitutional petition in circumstances.

Mst. Wakeelan Begum v. Addl. District Judge, Gujranwala and 2 others 2006 CLC 1886; Muhammad Yousaf v. Rana Muhammad Shafi and others 2005 YLR 1627; Haji Faqir Muhammad v. Hazra Tulah 1989 CLC 252; Shahzadi Begum v. Suleman Khan. and 3 others 1993 CLC 1753; Mrs. Kaneez Raza v. Ansar Ali and another 1987 MLD 191; Beejal Mal v. Punaji 1987 CLC 1134; Muhammad Naeem v. Abdul Wahid and others 1999 MLD 1342; Suleman Mashkoor v. Abdul Ghafoor and others 2002 CLC 143; Mst. Roshan Bi and 6 others v. Munawar Hussain Gil 1987 MLD 3263; Afzal Ali V. Azhar Iqbal 1997 MLD 2262; Haji Suleman v. Haji Amin Sakoor Tumbi and another 1982 CLC 1453; Syed Shabbir Hussain Shah and others v. Asghar Hussain Shah and others 2007 SCMR 1884; Lal Khan v. The State 2006 SCMR 1846; Nazim Ali v. Rashid Qamar and 2 others 2006 CLC 289; Gul Begum v. Muhammad Riaz and another 2006 MLD 480; Ibadullah and others v. Sher Afzal 2006 CLC 666; Mst. Fatima Bibi v. Mst. Kaneez Fatima Bibi 2005 YLR 3089; Munir Ahmad and 6 others v. Muhammad Saddique 2005 MLD 364; Ziauddin Siddiqui v. Mrs. Rana Sultana and another 1990 CLC 645; Sardar M. Iqbal v. The State and another 2003 YLR 147; Mudassar Ahmad v. The State 2000 PSC 905(sic); Abdul Ghani and others v. Border Area Committee and others 1988 MLD 1538; Messrs Eastern Express Co., Ltd. v. Messrs Western India Skin Exporters PLD 1958 (W.P) Karachi 355; Muhammad Hayat v. Wazirzada and others PLD 1990 Pesh. 45; Abdul Rasheed v: Maqbool Ahmed and others 2011 SCMR 320; Syed Chan Peer Shah v. Muhammad Shafi and 2 others 2010 MLD 302; Abbas Ali Khan v. Mst. Farhat Iqbal and 2 others 2009 SCMR 1077; Miss Shaista Shams v. Mst. Seema Begum through constituted Attorney and 2 others PLD 2008 Kar. 424; Mst. Ishrat Khan v. Rauf Ahmad Sheikh and. others 2000 MLD 181 and Wazeeruddin v. Khalid Masood 1989 CLC 106 ref.

Manzoor Hussain Khan v. Mst. Asia Begum and 21 others 1990 CLC 1014; Mst. Nur Jehan Begum through Legal Representatives v. Syed Mujtaba Ali Naqvi 1991 SCMR 2300 rel.

(d) General Clauses Act (X of 1897)---

----S. 27---West Pakistan General Clauses Act (VI of 1956), S. 26---Notice/Letter sent through registered post---Proof---Presumption of truth would attach to postal receipt that notice/letter sent thereby had been delivered to its addressee---Such presumption could be rebutted, if envelope was received back undelivered.

(e) Legal Notice---

----Failure of addressee to reply to legal notice---Effect---Such failure would amount to admission of facts stated in such notice---Principles.

(f) Possession---

----Person in occupation of immovable property would be bound to establish his capacity in which he was occupying the same.

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

----Art. 119---Specific plea or fact asserted by a party in pleadings---Burden of proof---Pleadings---Such party would be bound to prove positively such plea or fact by producing convincing and cogent evidence, whereafter opposite party could be required to disprove same---Opposite party could never be directed to prove negative fact as same would amount to putting horse before cart---Principles.

Manzoor Hussain Khan v. Mst. Asia Begum and 21 others 1990 CLC 1014; Mst. Nur Jehan Begum through Legal Representatives v. Syed Mujtaba Ali Naqvi 1991 SCMR 2300 rel.

(h) West Pakistan Urban Rent Restriction Ordinance (IV of 1959)---

----Ss.13 & 15---Constitution of Pakistan, Art. 199---Constitutional petition---Maintainability---Ejectment of tenant---Denial of relationship of landlord and tenant between parites---Ejectment order passed by Rent Controller upheld by Appellate Authority---High Court could not sit as a court of appeal to decide such question on merits afresh by reappraising evidence---Constitutional petition was not maintainable, in circumstances.

Muhammad Amin Sheikh for Petitioners.
Ghulam Haider Al-Ghazali for Respondents.
Date of hearing: 16th August, 2011.

JUDGMENT

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---This constitutional petition is directed against an order dated 21-7-1999 passed by Ch. Shaukat Ali Khan, learned Addl. District Judge, Lahore whereby lie maintained the order dated 4-7-1998 passed by Sardar

Ahmad Khan Maiken, learned Rent Controller, Lahore, whereby he passed ejectment order against the present petitioners.

2. The facts sheet of the case as borne out of the record is that on 27-2-1994 Faheem Naseem and 7 others being sons, daughter and widow of late Muhammad Naseem and Muhammad Yameen and Salah ud Din being successors-in-interest of Seth Abdul Samad and Sheikh Shamas-ud-Din, sought the eviction of Mazhar Saeed and Anwar Saeed from the premises (not disputed) by filing an application under section 13 of the Punjab Urban Rent Restriction Ordinance, 1959 alleging that the respondents were inducted in the property as tenant in the year 1983-1984 by their predecessors at the monthly rent of Rs.1500, which the respondents paid uptil 1-1-1993 whereafter they (tenants) defaulted in the payment of the rent. It is also alleged that a notice raising the demand for the payment of the monthly rent as well as arrears, was sent to the respondents through registered post, which remained un-replied.

3. The ejectment petition was contested by the respondents alleging that the relationship of landlord and tenant did not exist between the parties as they are in occupation of the property in dispute in part performance of an agreement to sell. The respondents, however, admitted that late Muhammad Naseem, Seth Abdul Samad and Shamas?-ud-Din were joint owners of the property in dispute.

4. The learned Rent Controller framed solitary issue in respect of the relationship of landlord and tenant and vide judgment dated 4-7-1998 accepted the ejectment petition and ordered the eviction of the respondents from the rented premises holding that the respondents could not establish any agreement to sell as narrated in their written reply, therefore, their possession over the property was as of tenant. Similar view was expressed in the appeal, preferred by the petitioners before the First Appellate Court, which vide order dated 21-7-1999 was dismissed.

5. This writ petition was decided by this Court vide order dated 20-6-2006 whereby the ejectment petition was dismissed by accepting the constitutional petition. The landlord had assailed. judgment of this Court through Civil Appeal No.1491 of 2006 and the apex Court vide judgment dated 28-12-2010 with the consent of the parties accepted the same and remanded the case to this Court for decision afresh.

6. Before proceedings on the merits of the case, it would be appropriate to state that both the learned counsel for the parties Messrs Muhammad Amin Sheikh and Ghulam Haider Al-Ghazali, Advocates also burdened this file by submitting the synopsis of the case-law in support of their respective contentions.

7. Learned counsel for the petitioners firstly raised point that the respondents failed to establish through evidence that the petitioners were occupying the rented premises as a tenant. He further contended that the solitary statement of the one of the respondents is quite insufficient to discharge the onus to prove the relationship of the parties as landlord and tenant. In this connection, learned counsel has cited the cases of Mst. Wakeelan Begum v. Additional District Judge, Gujranwala and 2 others (2006 CLC 1886), Muhammad

Yousaf v. Rana Muhammad Shafi and others (2005 YLR 1627), Haji Faqir Muhammad v. Hazra Tulah (1989 CLC 252), Shahzadi Begum v. Suleman Khan and 3 others (1993 CLC 1753), Mrs. Kaneez Raza v. Ansar Ali and another (1987 MLD 191), Beejal Mal v. Punaji 1987 CLC 1134, Muhammad Naeem v. Abdul Wahid and others 1999 MLD 1342, Suleman Mashkoor v. Abdul Ghafoor and others (2002 CLC 143), Mst. Roshan Bi and 6 others v. Munawar Hussain Gil (1987 MLD 3263), Afzal Ali v. Azhar Iqbal (1997 MLD 2262) and Haji Suleman v. Haji Amin Sakoor Tumbi and another (1982 CLC 1453) .

8. The second submission of the learned counsel for the petitioner's is in respect of the application of Article 129(j) of Qanun-e-Shahadat Order, 1984 by stating that the best evidence has been withheld by the respondents, therefore, the presumption is that that evidence was not going to support the case of the respondents that is why the same was withheld. In this connection, learned counsel has referred to the fact narrated by the respondents in para 2 of their ejectment petition where it is mentioned that the present petitioners were paying rent against the receipts to the respondents. According to the learned counsel no such receipts were tendered in the evidence, as such the respondents failed to establish that the petitioners were their tenants. In this connection reliance has been placed upon the cases of Syed Shabbir Hussain Shah and others v. Asghar Hussain Shah and others (2007 SCMR 1884), Lal Khan v. The State (2006 SCMR 1846), Nazim Ali v. Rashid Qamar and 2 others (2006 CLC 289), Gul Begum v. Muhammad Riaz and another (2006 MLD 480), Ibadullah and others v. Sher Afzal (2006 CLC 666), Mst. Fatima Bibi v. Mst. Kaneez Fatima Bibi (2005 YLR 3089), Munir Ahmad and 6 others v. Muhammad Saddique????????? (2005 MLD 364), Ziauddin Siddiqui v. Mrs. Rana Sultana and another (1990 CLC 645), Sardar M. Iqbal v. The State and another (2003 YLR 147), Mudassar Ahmad v. The State (2000 PSC 905)(sic), Abdul Ghani and others v. Border Area Committee and others (1988 MLD 1538), Messrs Eastern Express Co., Ltd. v. Messrs Western India Skin Exporters (PLD 1958 (W.P) Karachi 355), Manzoor Hussain Khan v. Mst. Asia Begum and 21 others? (1990 CLC 1014), Mst. Nur Jehan Begum through Legal Representatives v. Syed Mujtaba Ali Naqvi (1991 SCMR 2300) and Muhammad Hayat v. Wazirzada and others (PLD 1990 Peshawar 45).

9. On the other hand, Mr. Ghulam Haider Al-Ghazali, Advocate, learned counsel for the respondents, while relying upon the cases of Abdul Rasheed v. Maqbool Ahmed and others (2011 SCMR 320), Syed Chan Peer Shah v. Muhammad Shafi and 2 others (2010 MLD 302), Abbas Ali Khan v. Mst. Farhat Iqbal and 2 others (2009 SCMR 1077), Miss Shaista Shams v. Mst. Seema Begum through constituted Attorney and 2 others (PLD 2008 Karachi 424); Mst. Ishrat, Khan v. Raiff Ahmad Sheikh and others 2000 MLD 181 and Wazeeruddin v. Khalid Masood (1989 CLC 106) contended that mere agreement to sell, so mentioned in written reply, does not create any right or title in favour of petitioners unless sale deed is executed or suit for specific performance is decreed in their favour. He further contended that a notice was sent to the petitioners had been received as per statement of RW.2 but was remained un-replied, thus tantamount to admission of relationship of landlord and tenant. To support this contention, learned counsel has cited the case of Barindra Kumar Ghose and another v. Emperor (7 Indian Cases 359). He has also raised the objection in respect of maintain-ability of this constitutional petition by submitting that the High Court cannot sit as Court of appeal to decide whether the evidence of the parties was

sufficient for upholding the conclusion of the Courts below and the High Court is not obliged to go into the merits of the case de novo and to reappraise and assess the evidence on the question whether relationship of landlord and tenant exists between the parties. In this connection, learned counsel has cited the cases of Messrs Muhammadia Medical Hall Khan Arm Dealers through Khurshid Alam v.
Mahmood ul Hassan and 3 others (NLR 1982 SCJ 23) Saifullah Khan alias Buddan Khan v. Addl. District Judge, Kasur (2000 CLC 1951) and Syed Chan Peer Shah v. Muhammad Shafi and 2 others (2010 MLD 302).

10. Parties heard and record perused.

11. The cases cited by counsel for petitioners, have been examined and it is found that principles laid down therein were so settled on the basis of facts which are distinguishable than facts of instant case. In these cases, ejectment petitions were not filed by legal heirs of persons under whom the petitioners of these cases were having title and had right to sue. In this case, admittedly, the respondents are legal heirs of joint owners of the property, and as proved on record, the respondents were paying rent to them (predecessors), thus right to receive rent devolved automatically, upon respondents, when succession of late owners opened. Accordingly, these cited cases are not helpful to the petitioners. The cases referred to in respect of second argument i.e. application of Article 129 of the Qanun-e-Shahadat Order, 1984 are going to be discussed in ensuing paragraph of this judgment.

12. There is no cavil to the first proposition put forward by the learned counsel for the petitioners that initial onus to establish the relationship of landlord and tenant is always upon the landlord, who has to prove the same through convincing and cogent evidence that particular person is tenant in property. In the present case it is not denied by the petitioners that the respondents are not the legal heirs of late Muhammad Naseem, Seth Abdul Samad and Sheikh Shams-ud-Din through whom the respondents being their successors-in-interests had derived the title of the owners. In such like cases when it is admitted that the respondents are legal heirs and it is not denied in so many words that no rent was paid to late owners of the property, it is not required to establish that they (legal heirs) were also authorized to receive rent from the tenants of the premises as they automatically fall within the definition of landlord as defined in section 2(c) of the Ordinance (ibid). It is sufficient for successors to say that they are the legal heirs of their predecessors and are entitled to receive the rent. The respondents in this respect had also sent a legal notice through registered post, the receipt of which is available on the file as Exh.A.3. It is needless to say that the postal receipt enjoys the presumption of truth that the letter sent through it had been delivered to the addressee. This presumption can only be rebutted if that envelope is received back undelivered, which is not the case here, thus it goes to establish that the legal notice sent by the respondents was received as admitted by RW.2. After receiving notice the petitioners had ample opportunity to reply the said notice by taking pleas in respect of alleged agreement to sell, which f they raised in their written reply but they failed in this respect. Failure to reply the notice on the part of the petitioners, amounts to admission of the facts narrated in notice, therefore, the petitioners are now estopped by their conduct to deny the title 3 of landlord.

13. It is also very important to note that it is the person who is in occupation of immovable property to establish the capacity in which he is occupying the property in dispute. The petitioners nowhere in their written reply have taken any specific plea about their title under which they are in occupation of the rented premises. A few lines in a very vague and ambiguous manner have been narrated in the written reply, like the One which is available at page-32 of this petition wherein it is mentioned apparently half-heartedly "that the respondents are occupying the property in their own rights and in part performance of the agreement to sell." Similar assertion is found in para 2 of the written reply that the petitioners are in occupation of the demised premises in part performance of some agreement to sell. From the perusal of these assertions as well as the statements of RW.1 and RW.2, it is not established as to with whom the petitioners had agreed to purchase the property when that agreement was executed, when sale consideration was paid and in whose presence act was performed. All these facts necessarily are to be mentioned in the written reply so that the other party should not be taken by surprise but no such details are available in the written reply of the petitioners. This fact of non-mentioning of particulars of an agreement to sell in written reply is sufficient to repel the contention of the petitioners that they are in occupation of the property in their own rights and in part performance of an agreement to sell. Further, it is a salutary principle of law that he who takes a specific plea or asserts a fact, is bound to prove the same by producing convincing and cogent evidence. The opposite party can never be directed to prove the negative fact as it would amount to putting the horse before the cart. It was the petitioners who had taken a specific plea that they were in possession of the rented premises under some agreement to sell and to prove the same positively, thereafter the respondents could be burdened to disprove the specific allegation of the petitioners. The petitioners could never establish tentatively necessary ingredients of alleged agreement. The evidence, in this respect, is quite insufficient to believe existence of agreement to sell in favour of the petitioners. On this point of raising of plea by a person and to prove it, the cases of Mst. Nur Jehan Begum and Manzoor Hussain Khan (Supra) are helpful.

14. There is also substance in the submission of the learned counsel for the respondents that this Court cannot sit as a Court of appeal to decide the question of relationship of landlord and tenant between the parties on the basis of reappraisal of the evidence and to decide the case on merits de novo. It is found that the" Courts below after properly appreciating the evidence available with them had rightly concluded that the petitioners are the tenant under the respondents who defaulted in the payment of the rent and were liable to be evicted from the rented premises. This Court concurs with findings of fact recorded by the Courts below.

15. In the circumstances discussed above, this petition having no merits is dismissed.

S.A.K./M-320/L Petition dismissed.

PLJ 2011 Lahore 637

Present: Syed Kazim Raza Shamsi, J.

MUHAMMAD AZAM BAJWA--Appellant

versus

WALI ULLAH GHAZANVI and another—Respondents

S.A.O. No. 01 of 2011, heard on 24.5.2011.

Punjab Urban Rent Restriction Ordinance, 1959 (VI of 1959)--

----Ss. 13(6) & 5-A--Ejectment petition--Direction to deposit of rent--Appellant failed to comply with order by not depositing the increased rent u/S. 5-A of Ordinance, 1959--According to provision of S. 5-A tenant was required to increase the rent automatically at rate of 25% after lapse of every three years--Appellant did not increase the rent nor paid same to respondent when his order of eviction was recorded as period of three years had lapsed--On failure of tenant to comply with direction of Rent Controller recorded u/S. 13-A, the Court has to proceed forth with and record the final order immediately--Appellant was allowed two months time for handing over the vacant possession of rented premises to respondent--Appeal was dismissed. [P. 639] A, B & C

Haji Abdul Waheed Butt, Advocate for Appellant.

M/s. Rai Shahid Saleem and Muhammad Hamad Munir, Advocates for Respondents.

Date of hearing: 24.5.2011.

Judgment

This second rent appeal is directed against the order dated 26.11.2010 passed by Mr. Aziz Ullah, learned Additional District Judge, Lahore whereby the order of eviction passed against the appellant on 19.5.2010 by Raja Jahanzaib Akhtar, learned Special Judge Rent, Lahore was maintained.

2. The respondent instituted petition under Section 13 of the Punjab Urban Rent Restriction Ordinance, 1959 on various grounds which was contested and the learned Rent Controller on 13.10.2006 passed an order under Section 13(6) of the said Ordinance (ibid) directing the respondent to deposit the rent from January, 2005 to onward at the rate of Rs. 10,373/- per month and also past rent from January, 2005 to September, 2006 total amount of Rs. 1,96,087/- before the next date of hearing and further directed that under Section 5-A of the said Ordinance, the automatic increase in the payment of rent at the rate of Rs. 25/- shall be paid in accordance with law. Later on, the appellant failed to comply with the direction of the learned Rent Controller who proceeded to pass an eviction order on 19.5.2010 which order was maintained by the learned first appellate Court vide impugned order. Both the orders have been assailed in the instant appeal.

3. Learned counsel for the appellant contended that the respondent had amended his ejectment petition with the permission of the Court by which whole complexion of the ejectment petition was changed but no right to file the amended reply was granted to the appellant; that an Issue No. 1 regarding default was framed by the trial Court thus, the eviction of the appellant without recording evidence on the said issue could not be passed

and that both the Courts below did not apply their judicial mind to the facts and circumstances of the case.

4. In rebuttal, the learned counsel for the respondent stated that the appellant failed to comply with the orders of the learned Rent Controller dated 13.10.2006 by not depositing the increased rent under Section 5-A of the Ordinance as directed in the said order as well as the rent for the period from January, 2005 to January, 2008 was also not properly complied with, as such, the orders of eviction recorded by the learned Rent Tribunal and maintained by the learned first appellant Court are proper and in accordance with law.

5. The submissions made by the learned counsel for the parties have been considered and record has been examined.

6. It is not a question of amendment of the ejectment petition and refusal to grant opportunity to file amended reply. It is a matter of the compliance of the order of the Court dated 13.10.2006. The learned Rent Controller had candidly directed the appellant to deposit arrears of rent amounting to Rs. 1,96,087/- for the period of January, 2005 to onwards and also to pay the increased rent under Section 5-A of the Ordinance (ibid). The appellant did not comply with the direction and thus, face the eviction order According to the provision of Section 5-A added through Ordinance VIII of 1990, the tenant was required to increase the rent automatically at the rate of 25 % after lapse of every three years. The appellant did not increase the rent nor paid the same to the respondent till 19.5.2010 when his order of eviction was recorded as period of three years had lapse in January, 2008 (fresh period of three years has also elapsed in January, 2011) where-after as per direction of the Rent Controller it has to be increased at the rate of 25 % and is to be paid to the respondent. According to the language used in Section 13-A of the Ordinance, on failure of the tenant to comply with the direction of the Rent Controller recorded under said section, the Court has to proceed forthwith and record the order immediately. In view of this legal position, the Court had rightly proceeded forthwith on noticing that the order dated 13.10.2006 was not complied with in its letter and spirit which order does not suffer from any illegality. Similarly, the learned first appellate Court did not commit any illegality by maintaining the order of the learned Rent Controller. The orders are accordingly maintained as such.

7. For the foregoing reasons, the appeal is dismissed having no merit with costs. The appellant is allowed two months time for handing over the vacant possession of the rented premises to the respondents.
(R.A.) Appeal dismissed.

2012 C L C 1223

[Lahore]

Before Syed Kazim Raza Shamsi, J

Mrs. YASMIN RAZI-UD-DIN and another----Appellants

Versus

Mst. TEHMINA----Respondent

Second Appeal from Order No.82 of 2003, heard on 16th May, 2011.

West Pakistan Urban Rent Restriction Ordinance (VI of 1959)---

----S. 13---Civil Procedure Code (V of 1908), S.11---Ejectment of tenant on grounds of nuisance and use of premises for purposes other than that for which it was leased---Denial of relationship of landlord and tenant by tenant---Res judicata---First ejectment petition of appellant (landlady) was dismissed for want of evidence whereafter second and third ejectment petitions were dismissed due to bar created by principle of res judicata---Contention of appellant was that grounds taken in subsequent petitions were not those taken in the first ejectment petition , therefore S. 14 of the Ordinance does not apply and that denial of relationship by tenant was an evasive plea---Validity---Appellant was duty bound to establish relationship of landlord and tenant first, for giving jurisdiction to Rent Controller to proceed further in the matter---In the present case, appellant failed to do so despite numerous opportunities---Appellant had to establish the relationship, whereafter he may have asserted other grounds available to him, therefore, subsequent ejectment petitions filed by appellant could not be considered and entertained---Argument that Rent Controller had passed order to deposit monthly rent under section 13(6) of the Ordinance but itself had reviewed the same having no power to do so; was untenable for the reason that where no specific jurisdiction was granted by special statute then general principles come into play---Authority having jurisdiction to pass an order also enjoyed powers to recall the same---No benefit of order passed by the Rent Controller under S.13(6) could be extended to landlady as the tenant had denied the relationship of landlord and tenant---Contention that section 14 of the Ordinance did not apply to the present case was not correct as same went against the principle of finality of judgment as enunciated in S.14 of the Ordinance as well as S.11, C.P.C.---Courts below rightly dismissed application of landlady as she had failed to establish relationship of landlord and tenant---No interference was called for in the concurrent findings of courts below, and accordingly, appeal was dismissed.

Muhammad Yousaf v. Khalifa Asghar Hussain 1980 SCMR 886; Rab Nawaz v. Haji Muhammad Iqbal and 2 others 2003 SCMR 1476; Ghulam Rasool v. Mian Khurshid Ahmad 2000 SCMR 632; Gulistan and others v. Muhammad Akram 1983 CLC 2808; Saifuddin and another v. Senior Civil Judge/Rent Controller-VIII Karachi (South) and 7 others 2007 SCMR 128; Aadil Nadeem Rizvi v. Gohar Siddique and others 2004 SCMR 738; Khalid Ghouri v. Mrs. Tazeen Chaudhary 2000 SCMR 1209; Ahmad Ali alias Ahmad v. Nasar-ud Din and another PLD 2009 SC 453; Safeer Travels Pvt.) Ltd. v. Muhammad Khalid Shafi through legal heirs PLD 2007 SC 504; M.H. Mussadaq v. Muhammad Zafar Iqbal and another 2004 SCMR 1453; Fazalur Rahman v. Mst. Sarwari Begum and others 1986 SCMR 1156; Abdul Qayyum Paracha v. Ghulam Hussain and others 1985 SCMR

580; Begum Cap. Mirza Ghulam Sarwar and another v. District Judge; Jhelum 1987 SCMR 25 and Muzaffar Ali v. Muhammad Shafi PLD 1981 SC 94distinguished.

Sh. Muhammad Umer for Appellants.

Nemo for Respondent.

Date of hearing: 16th May, 2011.

JUDGMENT

SYED KAZIM RAZA SHAMSI, J.--- This second rent appeal is directed against the order dated 30-5-2003 recorded by Mr. Abid Hussain, learned Additional District Judge, Lahore whereby the order of learned Rent Controller dated 6-4-2002 dismissing the ejectment petition was maintained.

2. Briefly the facts of the case are that the appellant Mst. Yasmin Razi-ud Din on 27-6-1994 filed an ejectment petition against Mst. Tehmina, the respondent, on the ground of nuisance and the use of rented premises for the purposes other than the same was rented out. The petition was contested by the tenant denying the relationship of landlord and tenant and the learned Judge framed the issue "Whether the relationship of landlord and tenant exists between the parties? OPA" and called the appellant to adduce evidence. As per order dated 8-5-1996 numerous opportunities were granted to the appellant to prove the issue but she failed to adduce any evidence whereupon her application was dismissed for want of evidence. No appeal against the said order was filed by the landlord rather a second ejectment petition was filed which was dismissed by the learned Rent Controller on the ground that previous petition was dismissed which creates a bar of res judicata. The appeal filed against the said dismissal order also met the same fate. Thereafter, the landlord filed 3rd ejectment petition against the tenant which was dismissed by Mr. Naeem Abbas, learned Rent Controller, Lahore on 6-4-2002 on the same ground that fresh application was hit by principle of res judicata. The appeal filed against the said dismissal order also met with the same fate vide impugned order against which the instant appeal has been filed.

3. The respondent of the case was proceeded ex parte vide order dated 9-3-2009. The Ex parte arguments of the learned counsel for the appellant has been heard.

4. It is contended by learned counsel for the appellant that the decisions of the learned first appellate court as well as of the Rent Controller are erroneous because the Rent Controller had passed an order under section 13(6) of West Pakistan Urban Rent Restriction Ordinance, 1959 which he reviewed itself vide order dated 6-4-2002. He submitted that the courts below failed to note that the denial of the tenant about the relationship was an evasive denial and could not be considered. Adverting to the application of section 14 of the Ordinance (ibid), the learned counsel submitted that the first petition was dismissed in which the grounds which were taken in the instant petition were not taken as such the dismissal of the petition is against the law. Learned counsel has relied on various judgments of the Apex Court as well as these courts including Muhammad Yousaf v. Khalifa Asghar Hussain (1980 SCMR 886), Rab Nawaz v. Haji Muhammad Iqbal and 2 others (2003 SCMR 1476), Ghulam Rasool v. Mian Khurshid Ahmad (2000 SCMR 632, Gulistan and

others v. Muhammad Akram 1983 CLC 2808, Saifuddin and another v. Senior Civil Judge/Rent Controller-VIII Karachi (South) and 7 others 2007 SCMR 128, Aadil Nadeem Rizvi v. Gohar Siddique and others (2004 SCMR 738), Khalid Ghouri v. Mrs. Tazeen Chaudhary (2000 SCMR 1209), Ahmad Ali alias Ahmad v. Nasar-ud Din and another (PLD 2009 SC 453), Safeer Travels (Pvt.) Ltd. v. Muhammad Khalid Shafi through legal heirs (PLD 2007 SC 504), M.H. Mussadaq v. Muhammad Zafar Iqbal and another (2004 SCMR 1453), Fazalur Rahman v. Mst. Sarwari Begum and others (1986 SCMR 1156), Abdul Qayyum Paracha v. Ghulam Hussain and others (1985 SCMR 580), Begum Cap. Mirza Ghulam Sarwar and another v. District Judge, Jhelum (1987 SCMR 25) and Muzaffar Ali v. Muhammad Shafi (PLD 1981 SC 94).

5. The law cited at bar has been examined and it is found that the cases referred to by the learned counsel for the appellant are distinguishable with the facts of the instant appeal. In the instant appeal, in the first petition which was dismissed by the learned Rent Controller for want of evidence, the tenant denied the relationship of landlord and tenant between the parties. It was the duty of the appellant to establish the relationship first for giving jurisdiction to the Rent Controller to proceed further in the matter but despite having numerous opportunities, the appellant failed to prove the issue. Obviously, the court had to proceed to non-suit the appellant for want of evidence. The appellant also kept mum for a considerable period by not challenging the said order before any appellate forum. Although the second and third petitions were not filed on the same cause of action which was mentioned in the first petition but the important question is that in the first petition when the relationship of landlord and tenant denied then the landlord has to establish the same whereafter he may assert the other grounds available to him under the relevant law. The appellant had lost opportunities to get clear the relationship on various occasions, therefore, the subsequent application filed by the appellant could not be considered and entertainable. The contention that the Rent Controller had passed order to deposit monthly rent under section 13(6) of the Ordinance (ibid) but itself reviewed the same having no power to do so as untenable for the reason that where no specific jurisdiction is granted by special statute then general principles come into play. An authority having jurisdiction to pass an order also enjoys powers to recall the same. Even otherwise, no benefit of order passed by the learned Rent Controller under section 13(6) could be extended to appellant as the tenant had denied the relationship of landlord and tenant. It is also not correct proposition of law that section 14 of the Ordinance is not applicable to the instant case as the case was not decided by the first court on merit. This contention goes against the principle of finality of the judgment as enunciated in section 14 of the Ordinance (ibid) as well as section 11 of the Code of Civil Procedure, 1908. In this view of the legal position, the courts below have rightly dismissed the application of the appellant as she failed to establish the relationship of landlord and tenant against the respondent. No interference is called for in the concurrent findings recorded by both the courts below.

6. For what has been discussed above, this appeal fails and is dismissed accordingly. The appellant may avail the legal remedies, available to him under the law, if so advised. There is no order as to costs.

K.M.Z./Y-7/L Appeal dismissed.

2012CLC261

[Lahore]

Before Syed Muhammad Kazim Roza Shamsi, J

ABDUL KARIM----Petitioner

Versus

SHAKEEL AHMAD and others----Respondents

Writ Petition No.21238 of 2010, decided on 29th November, 2011.

Punjab Rented Premises Act (VII of 2009)---

----Ss. 15, 19 & 22(2)---West Pakistan General Clauses Act (VI of 1956), Ss.8 & 9---Constitution of Pakistan, Art.199---Constitutional petition---Ejectment application---Application for leave to defend---Said application was dismissed by the Rent Controller followed by order of ejectment---Appeal filed by the tenant against the ejectment order was allowed by the Appellate Court and the case was remanded to Special Judge Rent for decision afresh---Rent Controller on the post remand proceedings, allowed the leave application permitting the tenant to contest the ejectment petition---Counsel for landlord had contended that leave application having been filed by the tenant with a delay of one day, Rent Controller was not justified in granting the permission to tenant to contest the ejectment petition---In the present case provisions of Limitation Act, 1908 had not been made applicable to the matter for the reason that special law had itself provided the timeframe for conducting proceedings thereunder and for availing further remedies---Section 8 of West Pakistan General Clauses Act, 1956 had provided the exclusion of the first day in calculating the period of limitation---Said provision, more particularly was applicable to the statutes to which the Limitation Act, 1908 was not applicable---If the time of 10 days prescribed for filing leave application was counted according to the provisions of S.8 of West Pakistan General Clauses Act, 1956, application filed by the tenant was well within time---Application filed by the tenant for contesting the ejectment petition, was within the statutory period in view of that beneficial interpretation of S.8 of West Pakistan General Clauses Act, 1956.

Muzammil Akhtar Shabbir for Petitioner.
M. Waheed Hassan for Respondents.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.--- This constitutional petition is directed against an order dated 16-9-2010 passed by learned Special Judge Rent, Lahore whereby leave application to contest ejectment petition was allowed in favour of the respondent.

2. Briefly stated the facts of the case are that the Abdul Kareem petitioner instituted an ejectment petition against Shakeel Ahmad etc., from the rented premises on the grounds

mentioned in the ejectment petition in which proceedings the respondent appeared in the court on 5-9-2008 and the court adjourned the case to 15-9-2008 for filing leave application. On the said date, the leave application was filed and court vide order dated 16-1-2009 dismissed same followed by order of ejectment. The appeal preferred against the eviction order was allowed by the learned first appellate court vide judgment dated 17-9-2010 and the case was remanded to learned Special Judge Rent, Lahore for decision afresh. Subsequently, in the post remand proceedings the learned Rent Controller vide impugned order allowed the leave application permitting respondent to contest the ejectment petition as the respondent had raised plausible defence of denial of tenancy.

3. The learned counsel for the petitioner submitted that the leave application was filed with a delay of one day as such the learned trial court committed illegality in granting the permission to contest the eviction petition. He elaborated his arguments by submitting that on 5-9-2008 the court directed the respondent to file application, which was filed on 15-9-2008 thus it was barred by one day as the said application was to be filed within ten days starting from 5-9-2008 to 15-9-2008 and the first day while counting the 10 days was not to be excluded from the calculation.. In this respect he has relied upon the meaning of word "within" as defined in the Oxford Dictionary. He has also referred. to section 22(2) of the Punjab Rented Premises Act, 2009.

4. On the other hand, the learned counsel for the respondent while relying upon the provisions of section 12 of Limitation Act, 1908 argued that first day is to be excluded from the calculation for counting the time of 10 days and in .this manner the leave application filed by the respondent is within 10-days from the date of his first appearance in the court.

5. I have considered the submissions made by the learned counsel for the parties and perused the record. The submission of the learned counsel for the respondent in view of the provisions of section 9 of West Pakistan General Clauses Act, 1956 is untenable for the reasons that the proviso to the Section of Act (Supra) excludes the application of the Limitation Act, 1908 where the provisions of said Act, 1908, are made applicable. In the instant case the provisions of Limitation Act, 1908 have not been made applicable to in rent matters for the reason that rent law itself provides the timeframe for conducting proceedings there-under and for availing further remedies.

6. The submission of learned counsel for the petitioner is equally not convincing in view of section 8 of West Pakistan General Clauses Act, 1956 which provides the exclusion of the first day in calculating the period of limitation. This provision more particularly is A applicable to the statutes to which the Limitation Act, 1908 is not applicable. If the time of 10-days prescribed for filing leave application is counted according to the provisions of section 8 then the application filed by the respondent on 15-9-2008 is well within time. The word "within" has been used in different other special statutes also; the interpretation for calculating time period shall be governed by provisions of General Clauses Act, 1956. Keeping in view this beneficial interpretation of section 8, of Act

(supra) this Court is of the view that the application filed by the respondent for contesting the ejectment petition was within the statutory period.

7. In view of the above, the petition having no merits is dismissed.

H.B.T./A-224/L Petition dismissed.

2012 C L C 321
[Lahore]
Before Syed Muhammad Kazim Raza Shamsi, J
GHULAM MUHAMMAD----Petitioner
Versus
PARVEEN AKHTAR and others----Respondents

Writ Petition No.7229 of 2006, heard on 25th November, 2011.

West Pakistan Family Courts Act (XXXV of 1964)---

----S. 5, Sched. & S.14---Constitution of Pakistan, Art.199---Constitutional petition---Suit for dissolution of marriage, maintenance allowance and grant of share in property---Jurisdiction of Family Court---Claim of plaintiff (wife) in her suit for dissolution of marriage and maintenance was that defendant (husband) at the time of Nikah agreed to transfer 1/3rd share in a plot in her name, but he had failed to abide by said term of Nikah---Defendant denied claim of the plaintiff and contended that Entry in. Column No.17 of Nikah Nama was fabricated and interpolated subsequently---Family Court decreed the suit and Appellate Court maintained findings of the Family Court, observing that Family Court had jurisdiction to entertain the suit in respect of claim of share in plot as it was personal property of the plaintiff---Averment contained in the plaint had manifested that there was a promise of the defendant to bequeath 1/3rd share in the plot to the plaintiff---Said promise remained unfulfilled and plaintiff was yet to acquire ownership of the share in the plot claimed in the suit---Such promise did not constitute personal belonging of the plaintiff for attracting S.5 and Schedule of West Pakistan Family Court Act, 1964--- Forum for determination of such right, in circumstances, was not the Family Court, but the courts enjoying plenary jurisdiction---Courts below had misinterpreted the law as contained in S.5 of West Pakistan Family Courts Act, 1964 holding that the claim of the plaintiff was actionable before the Family Court---Judgment and decree recorded by the courts below were declared as illegal, without lawful authority and of no legal consequences and were set aside---Suit of the plaintiff to the extent of claim of 1/3rd share in plot in question, was dismissed, in circumstances.

Muhammad Akram v. Mst. Hajira Bibi PLD 2007 Lah,. 515 and Syed Mukhtar Hussain Shah v. Mst. Saba Imtiaz and others PLD 2011 SC 260 rel

Nasrullah v. District Judge PLD 2004 Lah. 588 distinguished.

Ch. Abdul Majeed for Petitioner.
Nemo for Respondent No.1.
Date of hearing: 25th November, 2011.

JUDGMENT

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.--- This constitutional petition is directed against the judgment dated 19-5-2006 passed by the learned Additional District Judge, Faisalabad, whereby an appeal. preferred against decree dated 22-9-2005 for grant of I/3rd share in Plot No.363/D, Sultani Chowk, Ghulam Muhammad Abad, Faisalabad was dismissed.

2. It was the claim of Mst. Parveen Akhtar in her suit for dissolution of marriage and maintenance allowance that defendant at the time of Nikah had agreed to transfer 1/3rd share in Plot No.363/D, Sultani Chowk, Ghulam Muhammad Abad, Faisalabad in her name which term of Nikah, he did not abide by till the date of institution of the suit. She thus claimed decree of enforcement of such term coupled with decree of dissolution of marriage and maintenance allowance.

3. The suit was contested by the defendant denying the claim and alleging that the entry in Column No.17 of Nikahnama was fabricated and interpolated subsequently while at the time of Nikah, this condition was never agreed upon between the parties nor any such entry in the relevant column was made in his presence.

4. The learned Family Court after framing necessary issues arising out of the pleadings of the parties concluded that Nikahnama Exh.P.l being admitted and registered document contained averment of giving 1/3rd share in the plot thus held the plaintiff entitled for the transfer of that share in her name. The suit was thus decreed in same terms. In appeal, findings were maintained by the learned appellate court by further observing that the Family Court had jurisdiction to entertain the suit in respect of claim of share in the plot as. it was the personal oronert[y] of the bride.

5. None appeared on behalf of the respondent at the call of the case, as such, .petition is being decided on the basis of material available on record. Argument of the learned counsel for the petitioner heard.

6. Learned counsel for the petitioner has mainly pressed the decrees of courts in respect of enforcement of entry contained in Column No.17 of Nikahnama and submitted that this court in the case of Muhammad Akram v. Mst. Hajira Bibi (PLD 2007 Lahore 515) has authoritatively observed that only the claim of personal belongings and property of the bride could be entertained by a Family Court and the condition contained in Column No.17 of the Nikahnama, is yet to be determined thus, the learned appellate court has misapplied the cited judgment. He further submitted that the courts below have misapplied the judgment of the case of Nasrullah v. District Judge (PLD 2004 Lahore 588).

7. I have considered the submissions made by the learned counsel for the petitioner and perused the record.

8. The case-law cited at the bar has minutely been examined. The case of Nasrullah referred to by learned counsel bestows jurisdiction upon a Family Court to entertain suit like one in hand while in case of Muhammad Akram, this court has taken different view by holding that conditions contained in Column No.17 of Nikahnama does not make property mentioned therein as personal property and belongings of a bride thus, such condition is not enforceable through a family suit. These two different views of this court have been settled by apex court by a judgment recorded in the case of Syed Mukhtar Hussain Shah v. Mst. Saba Imtiaz and others (PLD 2011 Supreme Court 260). The august court has approved the ratio of the case of Muhammad Akram (supra) and view taken in case of Nasrullah has been dissented. The ratio of the reported judgment of the Supreme Court is that only those cases could be entertained by a Family Court which are based upon the claim of personal property or the belongings of the bride which have been given to her at the time of her marriage or subsequently she has acquired during, the subsistence of her marriage and property mentioned in clause of Nikahnama since did not acquire status of final acquisition, thus such claim is outside scope of family suit. This rule when applied to facts of F instant case, it is found that learned appellate court has misdirected itself in holding that claim of respondent for enforcing her claim contained in Column No.17 of Nikahnama, is matter covered by section 5 and schedule of Family Courts Act, 1964, to which finding this court does not find itself in agreement. The averment contained in the plaint of the respondent necessarily manifests that allegedly there was a promise of the present petitioner to bequeath 1/3rd share in the plot to the respondent which promise remained unfulfilled thus, its enforcement was sought through a family suit filed in Family Court. This institution of claim is evidence of fact that respondent is yet to acquire ownership thus share in plot claimed in suit, did not constitute personal belongings of bride, for attracting section 5 and schedule of West Pakistan Family Court Act, 1964. The forum for determination of such right in such circumstances is. not the Family Court created under special statute; rather same right could be get determined from courts enjoying plenary jurisdiction.

9. For what has been discussed above, I am of the firm view that the Family Court has no jurisdiction to entertain the claim lodged before it by the respondent. The courts below have misinterpreted the law as contained in section 5 of the Act (supra) as well as the case-law by holding that the claim of the respondent was actionable before the Family Court hence, the judgments rendered by the courts below are without lawful authority.

10. In view of the above, the judgment and decree recorded by the courts below are declared as illegal, without lawful authority and of no legal consequences thus, are set aside. The suit of the respondent to the extent of claim of 1/3rd share in Plot No.363/D, Sultani Chowk, Ghulam Muhammadabad, Faisalabad is dismissed.

H.B.T./G-60/L Petition allowed.

2012 C L C 895

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi, J

Sh. SALEEM-UD-DIN and others----Petitioners

versus

FEROZE DIN and others----Respondents

Writ Petition No.16282 of 2011, heard on 10th October, 2011.

(a) Punjab Rented Premises Act (VII of 2009)---

----Ss. 15 & 22---Constitution of Pakistan, Art.199---Constitutional petition---Application seeking leave to contest ejectment petition---Limitation---Tenant entered into proceedings by filing application for file inspection along with 'Wakalatnama' of his counsel about 22 days prior to the date case was fixed for appearance of tenant---Landlord had contended that limitation of 10 days for filing application for leave to contest ejectment petition, would commence from the date when he filed the application for file inspection---Validity---Law governing the matter did not acknowledge any step taken by a party to join the proceedings prior to the date fixed in the notice---Such intention of law was evident from the plain reading of S.22(2) of Punjab Rented Premises Act, 2009---In the present case tenant though had joined the proceedings with the Rent Tribunal by filing an application seeking permission to inspect the case-file, but, since the law did not provide specifically that the limitation of 10 days would start from the date of joining the proceedings, contention of counsel for the landlord, was untenable---Application and Wakalatnama filed by the tenant prior to the date fixed in the case, could not be taken into consideration for fixing the time for filing the application under S.22 of Punjab Rented Premises Act, 2009.

(b) Words and phrases---

----"Appearance", defined and explained.

(c) Administration of justice---

----When an act was to be performed as provided by the law, then it should be performed in such a manner.

(d) Interpretation of statutes---

----Law should be liberally and beneficially construed where two interpretations were possible.

Kh. Saeed-uz-Zafar for Petitioners.
Naseem Ahmad Khan for Respondent.
Date of hearing: 10th October, 2011.

JUDGMENT

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.--- Through this constitutional petition the petitioner-landlord has assailed order dated 5-7-2011 passed by Rana Khalid Mehmood Khan, learned Special Judge (Rent), Lahore whereby he allowed the petition of the tenant seeking leave to contest the ejectment petition filed by the landlord against him.

2. The main grievance of the petitioner is that the application filed under section 22 of the Punjab Rented Premises Act, 2009 was beyond the period of 10 days as prescribed therein as such further proceedings in the case could not be taken by the learned Rent Tribunal. The base of this contention is that the Court fixed the case for the appearance of the tenant as 3-5-2011 but the tenant-respondent had entered into proceedings on 11-4-2011 by filing an application for file inspection along with 'Wakalatnama' of Mr. Naseem Ahmad Khan, Advocate. Therefore, in the view of the petitioner the limitation of 10 days for filing the application commenced from the date when the respondent had taken steps towards further proceedings of the case.

3. Learned counsel submitted that in the notice received by him it was specifically mentioned that next date fixed in the case was 3-5-2011 and the respondent was directed to file application within 10 days from the date so fixed as such the application filed on 11-5-2011 was well within time.

4. The parties heard at length and contentions of the learned counsel for the parties have been examined in the light of section 22 of the Act ibid. For the purpose of discussion as to what amounts "appearance' used in subsection (2) of section 22 of the Act, it is imperative to reproduce subsection (2) hereunder:---

"(2) Subject to this Act, a respondent shall file an application for leave to contest within 10 days of his first `appearance' in the Rent Tribunal."

The plain reading of the subsection shows that the leave application is to be filed within 10 days by respondent from the first appearance in the Court. The plain dictionary meaning of word "appearance" as provided in Concise Oxford English Dictionary 10th Edition are:---

(a) the way that some one or something appears;

(b) an act of performing in a public event; and

(c) an act of arriving or becoming visible."

These meanings of the word "appearance" explained in the dictionary provides that "something should be visible". The visibility of a party is only possible when it is physically present at a place where it should be or required to be present. So from the word "appearance" used in subsection (2) of section 22 (ibid) it can be said that the physical first appearance of a party before the Court is essential wherefrom time of 10 days would start. This intention of the law is further evident from the notice issued under the said enactment which provides that leave application is to be filed within 10 days from the date mentioned in the notice. Law governing the matter does not acknowledge any step taken by a party to

join the proceedings prior to the date fixed in the notice, at least this intention of law is evident form the plain reading of subsection (2) of section 22 (ibid). In the instant case although the respondent had joined the proceedings with the learned Rent Tribunal by filing an application seeking permission to inspect the case file coupled with 'Wakalatnarna' of the learned counsel but since the law does not provide specifically that the limitation of 10 days can be started from the date of joining the proceedings as such the contention of the learned counsel for the petitioner is untenable. It is principle of law that when an act is to be performed as provided by the law then it should be performed in such a manner. Had the intention of law been the acknowledging the proceedings taken by a person prior to appearance in the Court, it may have mentioned the same in the relevant provision in so many words like the provision of section 34 of the Arbitration Act, 1940. It is particularly noticed in the said provision that a party at any time before filing the written statement or taking any other steps in the proceedings may apply to the judicial authority for staying the proceedings. The purpose of mentioning of this provision of Arbitration Act is that whenever a law wants to protect the other proceedings in a case it explicitly enacts the same in the provisions of the enactment governing the matter. This is not case in the instant proceedings initiated under the Act, 2009 as such the application and 'Wakalatnama' filed by the respondent prior to the date fixed in the case cannot be taken into consideration for fixing the time filing the petition under section 22 of the Act (ibid). It is also golden principle that law should be liberally and beneficially construed where two interpretations are possible. In this eventuality learned counsel for the petitioner is misconceived when he wanted to start the limitation of 10 days from the date on which the respondent had filed an application before the Court seeking permission to inspect the case file.

5. In view of the above, this petition having no merits is dismissed.

H.B.T./S-158/L Petition dismissed.

2012 M L D 108
[Lahore]
Before Syed Muhammad Kazim Raza Shamsi, J
Haji MUHAMMAD SAEED---Petitioner
Versus
ADDITIONAL DISTRICT JUDGE---Respondent

Writ Petition No.5740 of 2011, heard on 26th September, 2011.

Punjab Rented Premises Act (VII of 2009)----

----Ss. 5, 10 & 15---Specific Relief Act (I of 1877), S. 12---Constitution of Pakistan, Art. 199---Constitutional petition---Ejectment of tenant---Execution of sale agreement by landlord in favour of tenant after entering into tenancy agreement---Tenant's application for grant of leave to defend ejectment petition on ground of pendency of his civil suit for specific performance of sale agreement---Order of Rent Tribunal dismissing leave application and passing ejectment order upheld by Appellate authority-

--Validity---Without revoking tenancy agreement in manner provided under Punjab Rented Premises Act, 2009, sale agreement would have no bar and effect upon un-denied tenancy agreement and would not affect relationship of landlord and tenant between the parties---Tenant had not moved Rent Tribunal in writing for revoking tenancy, thus, he could not take benefit of sale agreement yet to be proved before competent civil court---Ejectment proceedings could not be stayed till decision of such suit---Tenant had to surrender possession of demised premises to landlord, and if tenant later on succeeded in obtaining decree in such suit, then he might pray for restoration of its possession---High Court dismissed constitutional petition, in circumstances.

Shahid Zaheer Syed for Petitioner.
Sh. Naveed Shaharyar for Respondent No.3.
Date of hearing: 26th September, 2011.

JUDGMENT

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---This constitutional petition is directed against the judgment dated 28-2-2011 passed by Raja Safdar Iqbal, learned Additional District Judge, Chiniot whereby he maintained an order of ejectment dated 27-11-2010 passed by Mr. Muhammad Arif Khan Niazi, learned Rent Controller, Chiniot.

2. Respondent No.3 Kashif Mughal filed an application under section 15 of the Punjab Rented Premises Act, 2009 for the ejectment of Haji Muhammad Saeed from the premises on the grounds that the latter defaulted in the payment of rent since July, 2009 and that the shop in dispute was required for his personal use and occupation. The tenant filed petition seeking leave to contest the ejectment petition stating that the rent deed was executed on 23-2-2007 between the parties but subsequently the father of the petitioner executed an agreement to sell on 12-8-2009 for the sale of the property in dispute after receiving the earnest money of Rs.50,00,000. On the refusal of the father of the petitioner to execute sale-deed, a suit for specific performance was filed as such, he prayed for leave to contest the petition on the ground that the suit for specific performance is pending before the court of competent jurisdiction.

3. The learned Rent Controller after examining the contentions raised by the parties observed that the induction of the tenant in the property in dispute is under tenancy agreement as such mere institution of the suit for specific performance cannot come into the way of any ejectment. Consequently, the petition was allowed and the tenant was ordered to be ejected from the property in dispute. The order was maintained in appeal by the learned first appellate court vide order impugned in this petition.

4. Learned counsel for the petitioner while relying upon the various judgments of the apex Court submitted that till the decision of the suit for specific performance of an agreement to sell, the learned Rent Controller is bound to stay the proceedings in the ejectment petition. He has cited various judgments on the point.

5. On the other hand, learned counsel for respondent No.3 while relying upon the other judgments of the apex Court observed that mere agreement to sell does not create any right or title of the party and the mere institution of suit for specific performance is no bar for passing an ejectment order as landlord cannot be deprived of the fruit of his own property.

6. After hearing both the learned counsel for the parties and perusing the record this court is of the view that the agreement to sell allegedly executed between the parties has no bar and effect upon the tenancy agreement which the petitioner did not deny even during the course of arguments before this court. This question of precedence of agreement to sell over a tenancy agreement has been resolved by section 10 of the Punjab Rented Premises Act, 2009 which reads as under:--

"Section 10. **Effect of other agreement.---An agreement to sell or any other agreement entered into between the landlord and the tenant, after the execution of a tenancy agreement, in respect of premises and for a matter other than a matter provided under the tenancy agreement, shall not affect the relationship of landlord and tenant unless the tenancy is revoked through a written agreement entered before the Rent Registrar in accordance with the provisions of section 5."**

7. The bare perusal of this section shows that the agreement to sell executed by the parties after the execution of tenancy agreement shall have no effect on the later and it shall also not affect the relationship of landlord and tenant unless the tenancy is revoked in the manner provided under the Act. Admittedly, the petitioner did not move before the Rent Registrar for revocation of the tenancy in writing as such, he cannot take the benefit of agreement to sell which is yet to be proved in the proper proceedings before the court of competent jurisdiction. In view of this legal bar, the plea of the petitioner that the learned Rent Controller should stay the proceedings on the ejectment petition till the decision of the civil suit cannot be accepted. The petitioner has to surrender the possession to the respondent and in case he succeeded in obtaining the decree of possession through specific performance of an agreement to sell, he may pray for restoration of possession from the defendant of that case, until such time, the petitioner has to surrender the possession of the demised premises to the landlord. The courts below while passing the ejectment orders did not commit any jurisdictional error as such, the findings do not call for any interference by this court.

8. For the foregoing reasons, this petition having no merit is dismissed.

S.A.K./M-314/L Petition dismissed.

2012 M L D 1150

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi, J

SAFDAR HUSSAIN---Petitioner

versus

EX-OFFICIO JUSTICE OF PEACE and 2 others---Respondents

Writ Petition No.8244 of 2012, decided on 4th April, 2012.

Criminal Procedure Code (V of 1898)---

----Ss. 22-A & 22-B---Constitution of Pakistan, Art.199---Constitutional petition---Duties of Justice of Peace---Scope---Petitioner had challenged the legality of order passed by Ex-officio Justice of Peace whereby S.H.O. concerned was directed to record the statement of the applicant to proceed in accordance with law, if any cognizable offence was made out---Duty of S.H.O. was not to determine, whether any cognizable case was made out or not, but it was the duty of Justice of Peace to look into the contents of the application filed under Ss.22-A and 22-B, Cr.P.C.; and if he found that any cognizable case was made out then he should issue clear direction to the S.H.O. concerned for registration of the case---Order of Justice of Peace, was set aside, with direction to redecide the application; and if from the contents of the application any cognizable case was made out, he should issue direction to S.H.O. for registration of the case.

Muhammad Musthaq v. Additional Sessions Judge, Lahore and others 2008 YLR 2301 and Rana Inamullah Khan v. S.H.O. and others 2007 YLR 2406 **rel**.

Muhammad Shoaib Khokhar for Petitioner.

Wali Muhammad Khan, Assistant Advocate-General Punjab on court's call.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Through this Constitution petition, the petitioner has challenged the legality of an order dated 27-3-2012, passed by the learned Additional Sessions Judge/ Ex-Officio Justice of Peace, Lahore whereby S.H.O. concerned was directed to record the statement of respondent No.3 and to proceed in accordance with law, if any cognizable offence is made out from the contents of the application of the said respondent.

2. Abid Saleem, respondent No.3, by filing application under sections 22-A/B, Cr.P.C. secured the above said order against the petitioner.

3. This direction of the learned Justice of Peace appears to be illegal in view of the judgments of this Court reported as "Muhammad Musthaq v. Additional Sessions Judge, Lahore and others" (2008 YLR 2301) and "Rana Inamullah Khan v. S.H.O. and others" (2007 YLR 2406). It is not the duty of the S.H.O. to determine whether any cognizable

case is made out or not, rather it is the duty of the learned Justice Peace to look into the contents of the application and if he finds that any cognizable case is made out then he should issue clear direction to the S.H.O. concerned for registration of the case.

4. In view of the above, the order of learned Justice of Peace is set aside and he is directed to re-decide the application of the respondent and if from the contents of the application any cognizable case is made out, he should issue direction to the S.H.O. concerned for registration of the case. The petition is disposed of accordingly.

H.B.T./S-54/L Order accordingly.

2012 M L D 1894

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi, J

IMRAN alias SUNNY---Petitioner

Versus

THE STATE and others---Respondents

Criminal Miscellaneous No.6011-B of 2012, decided on 1st August, 2012.

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

----Ss. 497 & 164---Bail---Judicial confession, retraction of---Admissibility of such confession at bail stage---Scope---Judicial confession even if retracted cannot be discussed at bail stage and the Trial Court is the competent forum to determine admissibility and veracity of such piece of evidence.
Farooq Mengal v. The State through A.G Sindh Karachi 2007 SCMR 404 and Raja Muhammad Irshad v. Muhammad Bashir Goraya and others 2006 SCMR 1292 rel.

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

----Ss. 497 & 164---Penal Code (XLV of 1860), Ss. 302/201/337-J/ 148/149---Qatl-e-amd, causing disappearance of evidence of offence, causing hurt by means of a poison, rioting armed with deadly weapons, unlawful assembly---Bail, refusal of---Judicial confession, retraction of---Admissibility of such confession at bail stage---Scope---Accused was alleged to have murdered the deceased lady---Accused had recorded his statement (confession) before the Magistrate stating that he had illicit relations with the deceased lady, who blackmailed him and extorted money and gold ornaments from him and being fed up, he administered sleeping pills to her and committed her murder---Accused subsequently retracted from said statement (confession)---Contentions of the accused were that accused had retracted from his self-inculpatory statement, therefore, same could not be relied upon to convict him---Validity---Statement of accused was available on the record which showed that he voluntarily made self-inculpatory statement admitting that he was the person who killed the deceased---Question of retracted judicial confession could not be addressed at bail stage---Ample incriminating evidence was available on record to connect

the accused with the commission of the offence---Bail application was dismissed in circumstances.

Mir Zaman and 5 others v. The State and others 2012 SCMR 580; Muhammad Shafi v. Muhammad Raza and another 2008 SCMR 329; Aala Muhammad and another v. The State 2008 SCMR 649; Malik Jehanair Khan and others v. Sardar Ali and 2 others 2007 SCMR 1404; Shahid Hussain alias Multani v. The State and others 2011 SCMR 1673 and Abid Ali alias Ali v. The State 2011 SCMR 161 distinguished.

Farooq Mengal v. The State through A.G Sindh Karachi 2007 SCMR 404 and Raja Muhammad Irshad v. Muhammad Bashir Goraya and others 2006 SCMR 1292 rel.

Ch. Muhammad Zunair Fareed for Petitioner.

Ch. Rizwan Hayat for the Complainant.

Muhammad Ishaq, D.P.G. With Saad Ahmad, S.I. for the State.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Imran alias Sunny petitioner seeks his release on bail in case F.I.R. No.220 of 2011 dated 10-7-2011, registered under sections 302/201/337-J, 148/149, P.P.C. with Police Station City Renala Khurd, District Okara.

2. The criminal machinery was set into motion on the statement of the Mudassar Nadeem, who reported that on 4-7-2011, his sister Mst. Saima went to visit her "Khala" Mst. Halima Bibi at Renala Khurd and on 9-7-2011 at about 4 p.m. she went out of the house to fetch medicine but she did not return home and on 10-7-2011, her dead body was found in a sack lying in the under construction shops of Hussain Arcade Anwaar Shaheed Colony. On this report, the formal F.I.R. was lodged.

3. It is contended by learned counsel for the petitioner that initially the petitioner is not named in the F.I.R. who has been booked therein on the basis of supplementary statement of the complainant recorded on 11-7-2011; that the petitioner has been involved in the case on the basis of suspicion and that P.Ws. who had seen the deceased in the company of the petitioner were not locally resident, therefore, their statements cannot be relied upon to inculpate the petitioner; that no source of identification has been provided on the record in respect of the petitioner in connecting him with the commission of the crime; that witnesses who had seen on 9-7-2011 the deceased in the company of the petitioner did not inform the complainant of the case till 11-7-2011 the said fact, therefore, the case against the petitioner is highly doubtful and that the co- accused Shahzad having the similar role has been admitted to bail, therefore, the petitioner is also entitled for the same treatment; that after three months of the nomination an inculpatory statement under section 164, Cr.P.C. was recorded at the instance of the petitioner which subsequently was retracted, therefore, same cannot be relied upon to convict the petitioner and that the petitioner is facing incarceration since 29-10-2011, whose trial has not yet been concluded. Learned counsel for the petitioner has relied upon cases reported as Mir Zaman and 5 others v. The State and others(2012 SCMR 580), Muhammad Shafi v. Muhammad Raza and another (2008 SCMR

329), Aala Muhammad and another v. The State (2008 SCMR 649), Malik Jehanair Khan and others v. Sardar Ali and 2 others (2007 SCMR 1404), Shahid Hussain alias Multani v. The State and others (2011 SCMR 1673) and Abid Ali alias Ali v. The State (2011 SCMR 161).

4. The petition has been opposed by learned D.P.-G. assisted by counsel for the complainant who argued that the petitioner with his own free will had made statement on oath before the learned Judicial Magistrate on 29-10-2011 confessing that he had liaison with the deceased and murdered her on her blackmailing, with the help of his co- accused by administering sleeping pills to her. Learned counsel for the complainant has cited case-law reported as Farooq Mengal v. The State through A.G Sindh Karachi (2007 SCMR 404) and Raja Muhammad Irshad v. Muhammad Bashir Goraya and others (2006 SCMR 1292) in support of his contentions.

5. I have considered the contentions made by learned counsel for the parties and perused the record as well as case-law cited at the bar. The cases-law upon which the counsel for the petitioner has relied upon relate to the retracted judicial confession made in the case, which were decided by the trial courts finally and appeals were preferred in the apex Court. Only the case of Shahid Hussain alias Multani cited (supra) relates to the grant of post arrest bail but in that case the judicial confession was not made by the accused of that case. That case was based upon extra judicial confession of the accused of robbery. Similarly, the case of Abid Ali alias Ali is not related to the facts of the instant case in which the apex Court had made observations about the supplementary statement made by the complainant after registration of the F.I.R. With due reverence the cases cited by counsel are distinguishable from the facts of the case in hand. On the other hand, the cases cited by counsel for the complainant lead to the conclusion that the judicial confession even if retracted cannot be discussed at the bail stage and the trial court is competent forum to determine admissibility and veracity of such piece of evidence.

6. Admittedly, the case in hand is one which does not have any direct evidence regarding the murder of Mst. Saima but there is one piece of evidence available on the record i.e. in the form of statement made by the petitioner before the Magistrate 1st Class Renala Khurd. In his statement he has categorically admitted his illicit relations with the deceased lady; that she blackmailed him and extorted money and gold ornaments and being fed up, he planned to get rid off her and in this connection he along with his co-accused administered sleeping pills in the milk whereafter she was done to death and her dead body was thrown in the Academy. Subsequently, he with the help of his father removed the dead body from the Academy and after packing it in the bag thrown the same near Plaza Anwaar Sahheed Colony, Renala Khurd. From the examination of this statement, it is clear that the petitioner made voluntarily self-inculpatory statement admitting that he was the person who killed the young girl. So far as question of retracted of judicial confession is concerned, that question cannot be addressed at the bail stage. In this connection the cases of Farooq Mengal and Raja Muhammad Irshad (supra) provide proper guideline. There is ample incriminating evidence available on the record to connect the accused with the commission of the offence thus it is not a fit case for grant of bail to the petitioner. In the light of the afore referred

judgments of the apex Court, I am not persuaded to extend the concession of bail to the petitioner. Accordingly this petition being bereft of merits is dismissed.
MWA/I-30/L Petition dismissed.

2012 M L D 1958
[Lahore]
Before Syed Muhammad Kazim Raza Shamsi, J
MUSHTAQ---Petitioner
Versus
THE STATE and another---Respondents

Criminal Miscellaneous No.1041-B of 2012, decided on 29th May, 2012.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), S.365-B---Kidnapping, abducting or inducing woman to compel for marriage etc.---Bail, grant of---Plea raised by the counsel for accused was that alleged abductee had contracted marriage with accused, which was performed in the presence of the witnesses by a Nikah Khawan---Police, during investigation, had reached at a conclusion that the abduction of the alleged victim was not established from the record---Victim of the case, had not approached any Family Court seeking jactitation of marriage---Matter of existence of Nikah between accused and the victim, was yet to be probed by the Trial Court---Case being fit for, grant of bail, accused was admitted to bail, in circumstances.

Muhammad Yousaf Zubair for Petitioner.
Malik Riaz Ahmad Saghla, Deputy Prosecutor General along with Habib, A.S.-I. with record. .

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Mushtaq, petitioner through the instant criminal miscellaneous petition seeks his release on bail in case arising out of F.I.R. No.12, dated 10-1-2012, registered under section 365-B, P.P.C. with Police Station Makhdoom Rasheed District Multan, for abducting Mst. Sumaira Bibi and raping her.

2. Parties heard. Record perused.

3. As per plea raised by the learned counsel for the petitioner Mst. Sumaira Bibi had contracted marriage with the petitioner which was performed in the presence of the witnesses by a Nikah Khawan. During investigation, the police reached at a conclusion that the abduction of the victim Mst. Sumaira Bibi is not established from the record as the witnesses of Nikah have filed their affidavits and made statements about existence of Nikah between the spouses. The victim of the case till-date has not approached any

Family Court seeking jactitation of marriage. The matter of existence of Nikah between the petitioner and the victim is yet to be probed by the learned trial court. In the circumstances, it is a fit case for grant of bail to the petitioner.

4. In view of the above, this petition is allowed and the petitioner Mushtaq is admitted 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.

HBT/M-243/L Bail granted.

2012 M L D 459

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi, J

MUHAMMAD AFZAL---Petitioner

Versus

ADDITIONAL DISTRICT JUDGE, SARGODHA and another---Respondents

Writ Petition No.15304 of 2009, decided on 17th May, 2011.

West Pakistan Urban Rent Restriction Ordinance (VI of 1959)---

----S.13---Constitution of Pakistan Art. 199---Constitutional petition---Ejectment of tenant on ground of default in payment of rent---Denial of relationship of landlord and tenant---Rent Controller dismissed ejectment petition on the ground that no relationship of landlord and tenant existed between the parties---Appellate Court set aside order of Rent Controller and found that relationship of landlord and tenant existed between the parties---Validity---Landlord had to discharge burden of proof initially by leading evidence about his relationship whereafter the tenant was bound to rebut such evidence placed on record---In the present case, respondent (landlord) had established that he was the owner of the house and had given the same on rent---Petitioner (tenant) failed to establish his status in the demised premises by leading convincing and cogent evidence---Order of Appellate Court was maintained---Constitutional petition was dismissed, in circumstances.

1984 CLC 2908; 1991 SCMR 1376 and 2006 CLC 1886 rel.

Sarfraz Khan Gondal for Petitioner.
Malik Muhammad Imtiaz Mohal for Respondents.

ORDER

SYED KAZIM RAZA SHAMSI, J.---This constitutional petition is directed against an order dated 26-6-2009 passed by Mr. Muhammad Mohsin Raza Khan, Additional District Judge, Sargodha, whereby the application seeking ejectment filed by respondent No.2 was accepted.

2. Facts leading to the instant petition briefly stated are that Muhammad Younis/respondent No.2 sought eviction of Muhammad Afzal, the present petitioner, from the house measuring 4. marlas situated at Azhar Park Sargodha, on the ground of default in the payment of rent. The petition was contested by the tenant denying the relationship of landlord and the tenant whereupon a major issue of the relationship was framed by the learned Rent Controller. After examining the oral as well as documentary evidence of the parties the learned Rent Controller reached at the conclusion that the relationship of landlord and the tenant does not exist between the parties, consequently dismissed the petition but the order of the learned Rent Controller was set aside by the learned First Appellate Court vide the impugned order dated 26-6-2009 and accepted the ejectment petition.

3. It is contended by the learned counsel for the petitioner that the learned First Appellate Court has ignored the facts that the petitioner is the owner of the property in dispute and is not a tenant, as such, the impugned order suffers from material illegality. In this behalf the learned counsel has placed reliance upon 1984 CLC 2908, 1991 SCMR 1376 and 2006 CLC 1886. Learned counsel for the respondents in rebuttal states that the petitioner did not establish his ownership of demised premises, therefore, the learned First Appellate Court had rightly accepted the ejectment petition.

4. I have considered the submissions made by the learned counsel for the parties and examined the case-law cited at the bar. It is settled law that the landlord has to discharge the burden of proof initially by leading evidence about his relationship where after the tenant is bound to rebut the such evidence placed on the record. In the instant case respondent No.2 through Exh.P-1 as well as through statement of AW-2 established that he was the owner of the house in dispute and had given on rent the said house to the present petitioner on monthly rent. The petitioner had also claimed the title of the disputed property by stating that he had purchased the said house through an agreement from one Iftikhar Ahmad but neither he placed on file any such agreement nor he had produced the said Iftikhar Ahmad in the witness box to prove his stance. Rather in the cross-examination upon the AW-2 made on behalf of the petitioner it is established that the petitioner is a tenant under respondent No.2 becatise AW-2 in his cross-examination candidly stated that the petitioner approached him for having on rent the house of respondent No.2 upon which the house was rented out to the present petitioner. The petitioner's witnesses RW-3 had shown his ignorance in his cross examination that the petitioner had taken the house in dispute on rent from the respondent No.2. The learned First Appellate Court has properly appreciated these facts available in the evidence of the parties while reaching at the conclusion that there exist relationship between the parties of landlord and the tenant. Even otherwise it is for the tenant to establish his status in the demise premises by leading convincing and cogent evidence, which has not been tendered by the petitioner in the instant case. The findings recorded by the learned First appellate Court being unexceptionable are liable to be maintained.

5. For what has been discussed above, this petition fails and is dismissed.

K.M.Z./M-886/L Petition dismissed.

2012 M L D 507
[Lahore]
Before Syed Muhammad Kazim Raza Shamsi, J
ISHRAT alias SHAISTA---Petitioner
Versus
STATION HOUSE OFFICER---Respondent

Criminal Miscellaneous No.1378-H of 2011, decided on 12th August, 2011.

Criminal Procedure Code (V of 1898)---

----Ss. 491 & 497---Penal Code (XLV of 1860), Ss.420, 468 & 471---Cheating, forgery, using as genuine a forged document---Habeas corpus petition---Conversion of habeas corpus petition into petition for bail after arrest---Challan in the case had been prepared and was sent to the Prosecution Branch for onward transmission to the court concerned---Contention that, retention of alleged detenu had become illegal for not passing the proper remand order, was of no consequence for the reason that alleged detenu was being produced in the court on each adjourned date---Argument that no request for sending detenu to judicial lock up from the side of the Police was available on the file, rendering the remand order illegal, was untenable for the reason that after sending the challan to the Prosecution Branch, the Police had completed its probe whereafter the only duty of the Police left in the matter was the production of accused from the jail before the court on the adjourned date---Making of any request for sending detenu to the judicial remand was not needed as same was required in cases where challan was not prepared and file was with the Police---Detention of alleged detenu with the Superintendent Jail was not illegal---Offences charged against alleged detenu not being of heinous nature, habeas corpus petition was treated as petition for bail after arrest---Offences of Ss.468, 471, P.P.C. were non-cognizable while the offence under S.420, P.P.C. was bailable in nature---Alleged detenu was admitted to bail, in circumstances.

Allah Ditta v. The State 1991 PCr.LJ 408 and Syed Azmat Ali Shah and another v. The State and another PLD 1999 Pesh. 39 distinguished.

Abdus Samee Khawaja for Petitioner.
Muhammad Ishaq, D.P.G.
Ch. Abdur Razaq for the Complainant.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Through this habeas petition it is stated that the husband of the petitioner had been booked in case F.I.R. No. 168 dated 17-5-2011 registered against him at Police Station City Sangla Hill, under sections 420, 468 and 471, P.P.C. She further stated in her petition that her husband Muhammad Ali had been detained in judicial lock up without having any proper remand order, therefore, his custody is illegal and prayed for his release from the jail.

2. On this petition after giving notice to the respondents the record has been requisitioned from the police station as well as from the Superintendent District Jail Sheikhupura. The record revealed that the challan in the case was completed on 30-6-2011, while the accused of the case was arrested by the police on 27-6-2011. The accused was sent on judicial remand on 27-6-2011 as is evident from the first Robkar of the learned Area Magistrate. The challan was then forwarded by the Deputy District Public Prosecutor Nankana Sahib on 2-8-2011 to the Court. It appears that during the period starting from 30-6-2011 till 2-8-2011 the file remained with the Prosecution Branch. On the other hand, the learned Magistrate sent the accused to judicial lock up on 27-6-2011 with a direction for his production in the Court on 11-7-2011. The accused was produced in the court on 11-7-2011, 25-7-2011, 28-7-2011 and 10-8-2011 during which time the challan had not been received in the court.

3. In this background the learned counsel for the petitioner submitted that the court sent the accused in judicial lock up without passing any appropriate order in respect of submission of challan, therefore, the custody of the accused with the Jail Authorities was illegal, as such, the petitioner is liable to be released. In this connection learned counsel for the petitioner has referred to the cases of Allah Ditta v. The State 1991 PCr.LJ 408, Syed Azmat Ali Shah and another v. The State another (PLD 1999 Peshawar 39). The learned counsel has also referred to two unreported cases i.e. Criminal Miscellaneous No.231-H/1987 and Criminal Miscellaneous 241-H/1087 which have been cited in the judgment of this court in the case of Allah Ditta (supra). The judgments have been gone through minutely and it is found that those cases are distinguishable from the facts of the instant case. In the instant case the challan had been prepared and was sent to the Prosecution Branch for onward transmissions to the Court concerned, which was not the case in the cited judgments. The contention of the counsel that detention of the accused has become illegal for not passing the proper remand order is also of no consequence for the reasons that the accused was being produced in the court on each adjourned date; under section 344, Cr.P.C. The other arguments of the counsel that no request for sending the accused to judicial lock up from the side of the police is available on the file rendering the remand order illegal, is untenable for the simple reason that after sending the challan to the Prosecution Branch the police had completed its job whereafter the only duty of the police left in the matter was the production of the accused from the jail before the court on the adjourned date, therefore, there was no need of making any request for sending the accused to the judicial remand which is required in cases where challan is not prepared and the file, is with police.

4. As it has been observed above that the detention of the accused Muhammad Ali with the Superintendent District Jail Sheikhupura is not illegal, however, this court while taking it into consideration that the offences charged against the petitioner are not of heinous nature, is inclined to treat this petition as after arrest bail of the petitioner Muhammad Ali. Notice of this petition has been given to the State which was accepted. It is found that the offences of sections 468, 471, P.P.C. are non-cognizable while the offence under section 420, P.P.C. is bailable in nature, therefore this court admits the petitioner to bail who is in judicial lock up since 27-6-2011 till date. The petitioner shall be released on bail on furnishing of bail

bonds in the sum of Rs.50,000 with one surety in the like amount to the satisfaction of the learned trial court. With the above terms this petition is disposed of.

H.B.T./I-41/L Order accordingly.

2012 M L D 571
[Lahore]
Before Syed Muhammad Kazim Raza Shamsi, J
MUHAMMAD ZAFAR and another---Appellants
Versus
PUNJAB PROVINCIAL CO-OPERATIVE BANK LTD. through Zona Chief --- Respondent

S. As. Os. Nos. 82 and 83 of 2010, heard on 22nd November, 2011.

West Pakistan Urban Rent Restriction Ordinance (VI of 1959)---

----Ss. 2(d), (f)(g), 5-A, 13 & 15---Ejectment of tenant on grounds of default in payment of rent and bona fide personal need of landlord---Earlier ejectment petition was filed by the landlord on the ground of subletting, which did not find favour with the courts below and finally matter was settled by High Court---Ground of personal need, which had been taken in the present petition had not been taken in the said petition---Effect---Present petition was not barred by principle of res judicata---Contention of tenant that landlord did not get plan for constructing the Branch of the Bank sanctioned, was without substance, as it was not essential for the landlord to get sanction for the site plan prior to the filing of the ejectment petition, which act could be performed after having the vacant possession of disputed property---Such sanction could add to the bona fides of the landlord but it was not a condition precedent for filing an ejectment petition on the same ground---Counsel for the tenant had contended that S.5-A of West Pakistan Urban Rent Restriction Ordinance, 1959 was not applicable to the facts of the case as the plot was rented out to the tenant, which could not be treated as "non-residential building", and that enhancement of rent as envisaged by S.5-A of the Ordinance was only applicable to the buildings mentioned in S.2(d) of the Ordinance---Tenants had installed 'Ara'/Saw Machine at the premises, which was a kind of business and a trade---Contention of counsel for tenants, was repelled because provisions of S.5-A of West Pakistan Urban Rent Restriction Ordinance, 1959 were squarely applicable in the case---Tenants having never paid the enhanced rent, when it had become due against them, they had defaulted in payment of rent---Courts below, in circumstances, had rightly passed ejectment order against the tenants after properly appreciating the evidence on record---Findings of the courts below being unexceptional, were maintained, in circumstances.

Qari Nadeem Ahmad Awaisi for Appellants.
Haroon Dugal for Respondent.
Date of hearing; 22nd November, 2011.

JUDGMENT

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---By way of this judgment Second Rent Appeals Nos.82 and 83 of 2010 are proposed to be disposed of as common questions of law and facts are involved in both appeals.

2. Both appeals are directed against judgment dated 7-11-2009 passed by the learned Addl. District Judge, Pakpattan whereby the ejectment order dated 25-11-2008 has been upheld.

3. The respondent-bank claimed the ejectment of Muhammad Zafar and Nazir Ahmad from the plots rented out to them on the ground of default in the payment of rent and personal need. It is narrated therein that the bank wants to open a new branch over the disputed property, which is suitable to its need. The petition was resisted by the respondent on the ground that earlier the ejectment petition of the bank was dismissed upto this Court. On merits, it was asserted that the bank does not need the property in dispute for its own use and occupation. Both the Courts disagreed with the contention of the appellants and held that the premises were required by the bank for establishing a new branch.

4. Parties heard and record perused.

5. It is noticed from the record that earlier ejectment petition was filed by the respondent-bank on the ground of subletting, which did not find favour with the Courts below and the matter was finally settled by this Court through judgment dated 14-5-2004 recorded in S.A.O. No.40 of 2000. It is noticed from the available record that in that petition the ground of personal need was not taken as such the fresh petition on the said ground is not barred by principle of res judicata. The other argument of the learned counsel for the appellant is that the respondent did not get sanctioned the plan for constructing the branch of the bank, is without substance for the reason that it is not essential for a landlord to get sanctioned the site plan prior to the filing of the ejectment petition, which act can be performed after having the vacant possession of the disputed property. However, it adds to bona fide of the landlord if a plan is got sanctioned before filing the ejectment petition, but it is not a condition precedent for filing an ejectment petition on the same ground. It is also the contention of the learned counsel for the appellant that section 5-A of the Punjab Urban, Rent Restriction Ordinance, 1959 is not applicable to the facts of the instant case as the plot was rented out to the appellant, which cannot be treated as non-residential building and the enhancement of rent as envisaged by section 5-A (ibid) is only applicable to the buildings mentioned in section 2(d) of the Ordinance, 1959. This argument of the learned counsel has been examined in the light of the definition of 'rented land' provided in section 2(e) and 'non-residential building' defined in section 2(d). From the perusal of both these definition the purpose of both these sections in respect of the business activities is evident. 'Non-residential building' has been defined as 'a building being used solely for the purpose of business and trade' while the definition of 'rented land' has been defined as 'any land let separately for the purpose of being used principally for business or trade.' From the definition it has become definite that the provisions do not relate to the residential building, which has separately been defined in section 2(g) of the Ordinance. The Legislature had

enacted two separate provisions in respect of 'non-residential building' and 'rented land' to meet with the future needs of the landlords otherwise the intention is that the rented land also included in the definition of non-residential building as only commercial activities could be undertaken in both the cases and the site cannot be used for residential purpose unless it is covered by section 2(g) of the Ordinance. Viewing these provisions of law it is noticed that the appellant is using the property in dispute for trade and business purpose and thus for that purpose his case squarely covered within the meaning of non-residential building. The appellants have installed Ara machine at the premises, which is a kind of business and a trade. It is not the case of the appellant that they are using the property in dispute for residential purpose and that they have not raised any structure on the vacant plot. So the provisions of section 5-A of the Ordinance, 1959 are squarely applicable in the instant case. The appellants never paid the enhanced rent when it hasbecome due against them, thus they clearly defaulted therein. The case-law cited by the learned counsel for the appellant in support of the contention has distinguishing features from the facts of the instant case as such not applicable directly. The Courts below after properly appreciating the evidence on the record had drawn right conclusion for passing ejectment order against the appellants, which findings being unexceptional are liable to be maintained.

6. For the foregoing reasons, the appeals having no merits are dismissed with costs.

H.B.T./M-395/L Appeals dismissed.

2012 M L D 760

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi, J

Mst. NAZISH KANWAL---Petitioner

Versus

ADDITIONAL SESSIONS JUDGE and others---Respondents

Writ Petition No.24253 of 2011, decided on 17th February, 2012.

Criminal Procedure Code (V of 1898)---

---Ss. 22-A & 22-B---Constitution of Pakistan, Art. 199---Constitutional petition---Maintainability---Order of registration of F.I.R. by Justice of Peace against petitioner was assailed---Husband (respondent) had submitted an application before the ex-officio Justice of Peace, alleging that on the day of occurrence when he returned to his house, his wife (petitioner) was not present and cash and gold ornaments were missing from his house---Ex-Officio Justice of Peace issued directions to the S.H.O. for registration of case to redress grievance of husband---Wife (petitioner) had challenged the order passed by ex-officio Justice of Peace, contending that she could not be charged for committing theft of an article in the absence of her husband in the house, as she was equal owner of that property---Validity---Constitutional petition was not entertainable for the reason that interference by High Court in the impugned order could have amounted to quashing of F.I.R., which was to be registered by the S.H.O. under the orders of the court of competent jurisdiction---

Contentions raised by wife would be available to her when she would avail her legal remedies available to her under the law---High Court could not indulge for resolving factual controversies between the parties---High Court declined to interfere in the order of the ex-officio Justice of Peace---Constitutional petition was dismissed.

Azmat Ali Chohan for Petitioner.

Ch. Khadim Hussain Qaiser, Additional Advocate-General Punjab.

Rana Muhammad Amin Azeemi for Respondent No.3.

Rab Nawaz, S.I. along with record.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Mst. Nazish Kanwal, being aggrieved by an order dated 30-9-2011, passed by the learned Additional Sessions Judge/Ex-Officio Justice of Peace, Lahore has challenged its veracity through the instant Constitutional petition alleging that being wife of one lqbal Ahmad, she cannot be charged for committing theft of the article in the absence of her husband lying in the house as she is equally owner of that property.

2. Through the petition before the learned Additional Sessions Judge/Ex-Officio Justice of Peace, Lahore, Iqbal Ahmad alleged that he had contracted second marriage with the present petitioner in September, 2011 and when on 16-9-2011, he returned to his house at 6-00 p.m., his wife was not present in the house and cash of Rs.200,000 was also missing along with the golden ornaments. He alleged that threats of dire consequences were also extended to him. On this application, the learned Ex-Officio Justice of Peace issued direction to the S.H.O. for redressal of the grievance of petitioner.

3. Parties heard.

4. The instant petition against an order passed by the learned Additional Sessions Judge/Ex-Officio Justice of Peace issuing direction for registration of case is not entertainable for the simple reason that the interference by this court in the said order may amount the quashment of the F.I.R. to be registered by the S.H.O. of the police station under the orders of court of competent jurisdiction. The points agitated in the instant petition would also be available to the petitioner when she would avail her legal remedies available to her under the law. At this stage, this court cannot be indulged for resolving factual controversy between the parties. In this situation, I am not inclined to interfere into the order passed by the learned Additional Sessions Judge/Ex-Officio Justice of Peace, Lahore.

5. The petition, thus, in hand is dismissed with the direction to the petitioner to avail her legal remedies available to her under the law where she may agitate the points raised through the instant Constitutional petition.

M.W.A./N-8/L Petition dismissed.

2012 M L D 732
[Lahore]
Before Syed Muhammad Kazim Raza Shamsi, J
SHAKEEL AHMAD---Petitioner
Versus
THE STATE and another---Respondents

Criminal Miscellaneous Nos.17587-B of 2011 and 104-M of 2012, decided on 19th January, 2012.

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

----S. 498---Penal Code (XLV of 1860), S. 406---Criminal breach of trust---Pre-arrest bail, refusal of---Contumacious conduct of bail applicant---Falsely posing to be on bail---Accused was alleged to have misappropriated an amount which he obtained after selling the house of the complainant---Pre-arrest filed by accused was dismissed by court below but accused was not arrested by the police---Complainant procured an order of issuance of non-bailable warrants of arrest against accused in return of which accused lodged F.I.R. against the complainant---Accused provided a certificate to the Investigating Officer of the case showing that accused was granted ad interim pre-arrest bail in the case and due to such certificate Investigating Officer did not arrest the accused---Complainant, on noticing the matter, filed an application for cancellation of the bail before the court below, where it transpired that bail petition filed by accused was for a different F.I.R. than the one in which he had been nominated and that affidavit appended with bail application contained F.I.R. number in which accused was nominated but the front page of the said bail application contained a different F.I.R. number, which clearly showed that accused deceitfully obtained an interim order of bail from the court below by mentioning the incorrect number of F.I.R.---Accused had failed to place on record any evidence to prove that the bail application was not filed by him---Accused had also filed a constitutional petition before the High Court, which was disposed of with the direction to the Superintendent Police (Investigation) for conducting honest and transparent investigation into the matter---Accused had misused the process of court for his own advantage and posed himself to be on bail in a different F.I.R. than the one he was nominated in and had not approached either court below or High Court with clean hands---Court not being inclined to lend any benefit to accused for his wrongs, his bail petition was dismissed.

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

----S. 498---Pre-arrest bail---Scope---Relief of anticipatory bail is an extraordinary relief, which cannot be granted to a person, who comes to court with unclean hands.

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

----Ss. 497 & 498---Bail---Principles---No bar for refusing bail to person whose conduct is contumacious and who is willing to play with the courts.
Shoaib Zafar for Petitioner.

Muhammad Ishaque, D.P.-G. with Liaqat Ali, A.S.-I.
Nadeem Shibli for the Complainant.

Criminal Miscellaneous No.104-M/2012

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---This is an application for placing certain documents on the record of this criminal miscellaneous petition. For the reasons narrated therein the same is allowed subject to all just and legal exceptions.

Main Petition
The petitioner Shakeel Ahmad through the instant criminal miscellaneous petition seeks anticipatory bail in case arising out of F.I.R. No.1423 of 2011, dated 15-10-2011 registered under section 406, P.P.C. with Police Station Madina Town, Faisalabad, which contained the allegation of misappropriation of Rs.17,80,000, which amount was obtained by the petitioner after selling the house of the complainant of the case and refused to return the same.

2. It is contended by the learned counsel for the petitioner that the F.I.R. was lodged with an unexplained delay of six years; that there is no evidence on the record about the selling of the house by the petitioner; that the disputed house existed in the name of the son of the complainant, who executed a general power of attorney and agreement to sell in favour of the petitioner after receiving consideration; that subsequently the son of the complainant sold the disputed house to one Aurangzeb, who lodged an F.I.R. against the complainant of this case as well as her son; that in order to resolve the controversybetween the parties the petitioner agreed to pay Rs.7 lacs to the complainant, which was payable till 20-10-2011 but the complainant with mala fide intention lodged the instant F.I.R. prior to that date; that the petitioner never filed any pre-arrest bail petition before Mr.Abdul Majeed, learned Addl. Sessions Judge, Faisalabad, which the complainant's party itself filed to cause loss to the petitioner and that the offence under section 406, P.P.C. is not made out from the facts of the case.

3. The petition has been opposed by the learned D.P.-G., assisted by the learned counsel for the complainant, who has commented upon the conduct of the petitioner in the prosecution of the case. He submitted that due to contumacious conduct of the petitioner he is not entitled for the concession of extraordinary relief of anticipatory bail.

4. Parties heard and record perused.

5. After examining the record of the case, I feel that instead of deciding this petition on merits the conduct of the petitioner is relevant to be discussed and the petition can be decided on this score. In this connection there is an order dated 4-1-2012 on the file passed by Mr. Abdul Majeed, learned Addl. Sessions Judge, Faisalabad, wherein he has highlighted the contumacius conduct of die petitioner in the prosecution of the bail matter. According to the facts on the record the pre-arrest bail filed by the petitioner in the instant

F.I.R. was dismissed by Mr. Muhammad Akram Sheikh, Addl. Sessions Judge, Faisalabad vide order dated 14-11-2011 but the petitioner was not arrested by the Police. The complainant of the case through application dated 23-11-2011 procured an order of issuance of non-bailable warrants of arrest against the petitioner in return of which the petitioner lodged an F.I.R. against the complainant of this case on 16-12-2011. On 22-12-2011 the petitioner provided a certificate to the Investigating Officer of the case showing that the petitioner was granted ad interim pre-arrest bail in case F.I.R. No.1423 of 2011 till 4-1-2012. Due to this certificate the I.O. did not arrest the petitioner. When the matter came to the notice of the complainant she filed an application for cancellation of the bail petition in the Court of Mr. Abdul Majeed, Addl. Sessions Judge where it transpired that the bail petition in case F.I.R. No.123 of 2011 registered under section 406, P.P.C. with Police Station Madina Town, Faisalabad was filed. The Court further noted that the affidavit appended with the bail petition contained F.I.R. No.1423 but the front page of the bail application contained F.I.R. No.123. This shows that the petitioner deceitfully obtained an interim order of bail from the Court on 22-12-2011 by mentioning wrong number of the F.I.R. Although the petitioner has denied that he had filed any bail application before the learned Addl. Sessions Judge but he could not place on record any such evidence proving that the petition was not filed by the petitioner. In the meanwhile the petitioner had also approached this Court by filing Writ Petition No.23906-Q of 2011, which was disposed of by this Court vide order dated 29-10-2011 with the direction to the S.P (Investigation) for conducting honest transparent investigation in the matter. The afore-noted facts clearly show that the petitioner had misused the process of court for his own advantage and posed himself to be on bail in a different F.I.R. than the one under consideration. The relief of anticipatory bail is an extraordinary relief, which can be granted to a person, who comes to the court with unclean hands. The facts narrated above are sufficient to prove that the petitioner has not approached either the Court of learned Addl. Sessions Judge or High Court with clean hands. There is no bar for refusing bail to such like person, whose conduct is contumacious and who is willing to play with the Courts. In these circumstances this Court is not inclined to lend any benefit to the petitioner for his own wrongs.

6. For the foregoing reasons, the petition is dismissed.

M.W.A./S-13/L Bail rejected.

P L D 2012 Lahore 41

Before Syed Muhammad Kazim Raza Shamsi, J

TAYYAB HUSSAIN---Petitioner

Versus

RENT CONTROLLER, GUJRAT and others---Respondents

Writ Petition No.15395 of 2010, decided on 21st June, 2011.

Punjab Rented Premises Act (VII of 2009)---

----Ss. 15, 22(2) & 28(2)---Constitution of Pakistan, Art.199---Constitutional petition---Application seeking leave to contest ejectment petition---Limitation---Condonation of delay---Tenant had filed application seeking leave to contest ejectment petition beyond the period of ten days as prescribed under S.22(2) of Punjab Rented Premises Act, 2009---Such delayed leave application was not only entertained by the court, but was also granted---Court, which did not enjoy any jurisdiction to condone the time for filing said application, had exercised jurisdiction in entertaining application, which was not vested in it under mandatory provisions of the statute---If such practice of entertaining a time barred petition under S.22 of Punjab Rented Premises Act, 2009, was not curbed, same could lead to long standing litigation between the parties, which would waste the precious public time, would cause inconvenience to the parties and would defeat spirit of legislation---High Court in such like matters could interfere in its constitutional jurisdiction---Order passed by Special Judge (Rent) being not maintainable in the eyes of law, was set aside---Special Judge (Rent) was directed to proceed with the matter and pass an order under S.22(6) of Punjab Rented Premises Act, 2009.

Zulfiqar Ahmed Warraich for Petitioner

Nemo for Respondents

Date of hearing: 21st June, 2011.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---This constitutional petition filed under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 is directed against an order dated 22-5-2010 passed by learned Special Judge (Rent), Gujrat whereby he entertained the petition under section 22 of the Punjab Rented Premises Act, 2009 and allowed the same.

2. At the call of the case, learned counsel for respondents did not turn up although his name is reflected in the cause list, as such the ex parte proceedings are taken against respondents.

3. It is contended by counsel for the petitioner that the petition seeking leave to contest the ejectment petition was instituted on 21-10-2009 while the first appearance of the respondents in court was on 11-9-2009, thus, the same was filed beyond the period of ten days as prescribed by the law.

4. The examination of record appended with this petition reveals that after the service of notice the respondents for the first time appeared in court on 11-9-2009 who were directed to file petition under section 22 of the Act ibid, the respondents sought adjournment for the purposes and filed the same on 21-10-2009 which was obviously beyond the period as prescribed by section 22(2) of the Act ibid. In this matter the court does not enjoy any jurisdiction to condone the time for filing the petition. This Court is conscious of the fact that this court can not exercise constitutional jurisdiction against the interlocutory orders passed by court constituted under above said Act in view of the provisions contained in section 28(2) of the Act but in the instant case the leave application has been filed beyond the period of limitation which was not only entertained by the court but had also granted the same. Thus, the Court exercised jurisdiction in entertaining application which is not vested

in it under mandatory provisions of statute. If this practice of entertaining a time barred petition under section 22 of the Act ibid is not curbed at this stage that may lead to long standing litigation between the parties which would waste the precious public time, cause inconvenience to the parties and would defeat spirit of legislation. Keeping in view this principle in mind this court is of the view that in such like matters this court may interfere in its constitutional jurisdiction.

5. Accordingly the order passed by the learned Special Judge (Rent), Gujrat is not maintainable in the eyes of law, as such is liable to be set aside.

6. The petition is accordingly allowed by declaring the impugned order as having been passed without lawful authority and of no legal consequence and same is set aside. The learned Special Judge (Rent) is directed to proceed with the matter and pass an order under section 22(6) of the Act ibid.

H.B.T./T-25/L Petition allowed.

P L D 2012 Lahore 38

Before Syed Muhammad Kazim Raza Shamsi, J

MUHAMMAD AWAIS---Petitioner

Versus

Mst. ZAHIDA PARVEEN---Respondent

Writ Petition No.16081 of 2010, decided on 25th November, 2011.

West Pakistan Family Courts Act (XXXV of 1964)---

----S. 5, Sched. & S.14---Constitution of Pakistan, Art.199---Constitutional petition---Jurisdiction of Family Court---Scope---Plaintiff (wife) filed suit in Family Court for recovery of gold ornaments on the basis that in Column No.17 of Nikah Nama, there was a condition that gold ornaments weighing eight tolas valuing Rs.2,00,000 would be given to her, but the defendant (husband) did not give said ornaments---Contention of defendant was that suit filed before Family Court was not maintainable as same was triable by civil court---Family Court dismissed the suit holding that matter was not triable by a Family Court---Appellate Court disagreed with the findings of Family Court and found that claim of plaintiff fell within the jurisdiction of Family Court and Appellate Court remanded the case for fresh trial to the Family Court---In the present case gold ornaments, in question had never changed hands from the defendant to the plaintiff---Till determination of entitlement to acquire belongings, it could not be said that the gold ornaments had become the property of the plaintiff and that she had acquired proprietary rights---Entry in Column No.17 of the Nikah Nama was still a promise of the defendant with the plaintiff, enforceable through courts of plenary jurisdiction, but on the basis of such promise, family suit was not maintainable as it fell out of the ambit of S.5 and Schedule of West Pakistan Family Courts Act, 1964---Family Court had no jurisdiction to determine the claim lodged before it by the

plaintiff---Appellate Court had misinterpreted the law by holding that the claim of plaintiff was actionable before the Family Court---Impugned judgment of Appellate Court was set aside declaring same to be without lawful authority and of no legal consequence.

Muhammad Akram v Mst. Hajira Bibi PLD 2007 Lah 515; Nasrullah v District Judge PLD 2004 Lah. 588 and Syed Mukhtar Hussain Shah v. Mst. Saba Imtiaz and others PLD 2011 SC 260 **rel.**

Nasrullah v. District Judge PLD 2004 Lah 588 distinguished.
Sardar Abdul Mjeed Dogar for Petitioner
Ch. Abdul Majeed for Respondent No.1
Date of hearing: 25th November, 2011.

JUDGMENT

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---This constitutional petition is directed against the judgment dated 21-6-2010 passed by the learned Additional District Judge, Okara whereby he accepted the appeal and remanded the case to the learned Judge, Family Court, Okara for decision afresh.

2. Facts of the case briefly stated are that the respondent Mst. Zahida Parveen instituted a suit for recovery of gold ornaments in the Family Court at Okara against the defendant on the ground that in column No.17 of her Nikah Nama, there is condition that gold ornaments weighing eight tolas valuing Rs.2,00,000/- shall be given to her which shall be her property and that the defendant did not give her ornaments thus, prayed for the decree of eight tolas gold ornaments or as alternate value of Rs.2,00,000.

3. The suit was contested by the present petitioner/defendant with an assertion that the suit was not maintainable as the claim made therein was triable by Civil Court and Family Court has no jurisdiction to entertain the suit.

4. The learned trial court after hearing the parties, while agreeing with the objection of the defendant dismissed the suit holding that the matter was not triable by a Family Court.
5. Mst. Zahida Parveen assailed the findings of the Family Court in the appeal where the learned appellate court disagreed with the findings of Family Court and held that claim of the appellant fell within the jurisdiction of Family Court thus by accepting the appeal remanded the case for fresh trial to the court of first instance. Judgment of the appellate court is subject-matter of instant constitutional petition.

6. Learned counsel for the petitioner submitted that this court in the case of Muhammad Akram v. Mst. Hajira Bibi (PLD 2007 Lahore 515) has candidly observed that only the claim of personal belongings and property of the bride could be entertained by a Family Court, the condition contained in column No.17 of the Nikah Nama, in respect of gold ornaments does not constitute personal property and belongings of the respondent thus, the learned appellate court has misdirected itself in holding that matter in hand is entertainable by a family court.

7. On the other hand, learned counsel for respondent No.1 supported the judgment of the learned appellate court and argued, that right created by Column No.17 of Nikah Nama could be enforced through a family suit. He has cited the case of Nasrullah v. District Judge (PLD 2004 Lahore 588).

8. I have considered the submissions made by the learned counsel for the parties and perused the record.

9. The case-law cited at the bar has minutely been examined and it is noticed that the Hon'ble Supreme Court in the case of Syed Mukhtar Hussain Shah v. Mst. Saba Imtiaz and others (PLD 2011 Supreme Court 260) has approved the ratio of the case of Muhammad Akram (supra) and dissented with view taken by this Court in the case of Nasrullah (supra). The ratio of the reported judgment of the Hon'ble Supreme Court is that for determination of entry in the column of Nikahnama with respect to acquisition of property as personal belongings of bride, civil court is the proper forum, and family court is not competent to decide question.

10. Lending support from Syed Mukhtar Hussain Shah's case (supra), facts of instant case have been examined. It is alleged by the respondent in para 3 of her plaint that the petitioner has to give eight tolas of gold ornaments to her in view of the condition contained in column No.17 of her Nikah Nama which ornaments till the institution of the suit had not been given to her. It was further asserted that when she raised demand for giving such ornaments, the petitioner divorced her. This averment contained in the plaint necessarily shows that there was allegedly a promise of the petitioner to bequeath the gold ornaments to the respondent which was not fulfilled as such, claim for the recovery of the said gold ornaments has been lodged in the family court. It flows from the assertion that till date, those gold ornaments have not become the personal property or belonging of the respondent. Under section 5 and Schedule of West Pakistan Family Courts Act, 1964, a Family Court has jurisdiction to entertain the claim of a wife in respect of the belongings which have been given to her at the time of her marriage, not as dowry, or acquired subsequently by bride as gift. In the instant case, the gold ornaments never changed hands from the petitioner to the respondent as such, till determination of entitlement to acquire these belongings, it cannot be said that the gold ornaments had become the property of the respondent and she has acquired proprietary rights. The entry in column No.17 of the Nikah Nama is still a promise of the petitioner with the respondent, enforceable through the courts of plenary jurisdiction but on the basis of this promise, a family suit is not maintainable as it falls out of ambit of section 5 and Schedule of Act supra.

11. For what has been discussed above, I am of the firm view that the Family Court has no jurisdiction to determine the claim lodged before it, by respondent bride. The learned appellate court has misinterpreted law by holding that the claim of the respondent was actionable before the learned Family Court thus, the judgment rendered is without lawful authority.

12. For the foregoing reasons, the petition is allowed declaring the impugned judgment as without lawful authority and of no legal consequences. Resultantly, the same is set aside and the judgment recorded by the learned Judge Family Court, Okara is restored.

H.B.T./M-383/L Petition allowed.

P L D 2012 Lahore 107
Before Syed Muhammad Kazim Raza Shamsi, J
MUHAMMAD AMIR HABIB---Petitioner
Versus
ZAHEER AHMAD and 2 others---Respondents

Writ Petition No.2625 of 2010, heard on 10th August, 2011.

Punjab Rented Premises Act (VII of 2009)---

----Ss. 15 & 22---Constitution of Pakistan, Art.199---Ejectment petition---Application for leave to defend---Striking off defence of tenant---Rent Controller ordered issuance of Proclamation in the newspapers on special date---Tenant appeared on the said date, filed Vakalatnama, whereupon he was directed to file the written statement---Rent Controller, struck off the defence of the tenant on the ground that leave application was not filed within the prescribed time and passed ejectment order against the tenant---Appeal by the tenant having remained unsuccessful, tenant filed constitutional petition---Validity---Tenant appeared before the Rent Controller in response to the Proclamation published in the newspaper, which Proclamation did not contain the condition that leave application was to be filed within 10 days---No notice in the prescribed form was received by the tenant---Where first appearance was made by the tenant in ejectment petition, through Proclamation in newspapers, it was duty of the court to inform the tenant, when he did not appear through counsel, to file leave application within 10 days from that date and also should fix date of 10 days for having the leave application---Order in such regard should be a speaking order---Said procedure having not been followed by the Rent Controller nor noticed by the Appellate Court, judgments of Rent Controller and Appellate Court, were not sustainable in the eyes of law---Impugned order were set aside and Rent Controller was directed to decide the leave application of the tenant on its own merits afresh.

PLD 2009 Lah. 489 rel.

Talish Umar Ch. for Petitioner.
Arshad Ali Warraich for Respondents.
Date of hearing: 10th August, 2011.

JUDGMENT

SYED MUHAMMAD KAZIM RAZA SHAMSI J.---This constitutional petition is directed against an order dated 28-1-2010 passed by Mr. Muhammad Sarfraz Akhtar,

learned Addl. District Judge, Faisalabad whereby he maintained the order dated, 16-12-2009 passed by the learned Rent Controller, Faisalabad, whereby the defence of the petitioner was struck off and the final order was passed against him.

2. In the ejectment petition filed by the respondent against the present petitioner on 9-7-2009 the Rent Controller ordered for issuance of proclamation in the newspaper for 29-7-2009. The petitioner appeared in the Court on 29-7-2009 and filed Vakalatnama, whereupon he was directed to file the 'written statement' in the Court on 3-9-2009. The Court on the adjourned date directed the petitioner to file written reply, which was filed by the petitioner on 27-10-2009. The landlord then filed an application before the learned Rent Controller for striking off the defence of the petitioner on the ground that the leave application was not filed within the prescribed time, as such requested for final order against the tenant. Learned Rent Controller accepted that application and passed eviction order against the tenant, which was assailed in the appeal but the tenant remained unsuccessful there.

3. It is the contention of the learned counsel that no direction for filing the petition for leave to contest was given by the learned Rent Controller, rather it was directed to file written statement, as such the eviction order is bad in law and cannot be implemented against him.

4. On the other hand, learned counsel for the respondent while relying upon the provisions of section 22 of the Punjab Rented Premises Act, 2009 submitted that the Court has no option except to pass final order when the leave application is not filed within the prescribed time.

5. The contention of the learned counsel for the respondent is found to be without substance for the reasons that the petitioner had appeared before the Rent controller in response to the proclamation published in the newspaper, which proclamation did not contain the condition that leave application was to be filed within 10 days. Moreover, it is evident that no notice in the prescribed form had been received by the petitioner that is why the Court ordered the proclamation, thus it was not within the knowledge of the petitioner as to what proceedings he has to undertake by appearing in the Court. In the landmark judgment of this Court reported as PLD 2009 Lahore 469 it was directed that the notice in the prescribed form be issued to the respondent of the case informing him to file leave application within 10 days from the date of his first appearance in the Court and if notices are not sent in prescribed form then question of filing leave application within ten days does not arise. The learned Rent Controller has ignored this fact thus had committed illegality. Furthermore, in such cases, where first appearance is made by respondent in ejectment petition, through proclamation in newspaper, it is duty of the Court to inform respondent, when not appeared through counsel, to file leave application within ten days from that date and should also fix date of ten days for having leave application. The order in this regard should be speaking order. This procedure has not been followed by learned Rent Controller nor noticed by learned first appellate Court, thus judgments rendered are not sustainable in eyes of law.

6. For the foregoing reasons, this petition is allowed by setting aside the impugned orders. The learned Rent Controller is directed to decide the leave application of the petitioner on its own merits afresh.

H.B.T./M-305/L Petition allowed.

P L D 2012 Lahore 110
Before Syed Muhammad Kazim Raza Shamsi, J
MUHAMMAD ANWAR---Petitioner
Versus
NADIA NASREEN and others---Respondents

Writ Petition No.167 of 2011, decided on 26th September, 2011.

West Pakistan Family Courts Act (XXXV of 1964)---

----S. 5, Sched. & S.14---Constitution of Pakistan, Art.199---Constitutional petition---Suit for recovery of maintenance allowance---Annual increase of 15%---Family Court fixed maintenance allowance of plaintiff at the rate of Rs.1500 per month with annual increase of 15%---Said order of Family Court had been maintained by the Appellate Court---Validity---Defendant had alleged that courts below while imposing increase of 15% per annum upon payment of monthly maintenance allowance, had proceeded against the spirit of law---Held, annual increase in the payment of maintenance allowance not been provided in any provision of the West Pakistan Family Courts Act, 1964 and it was for the legislature to take into consideration the growing prices of the articles, whereafter the same could legislate the law for imposing annual increase in the payment of maintenance allowance, till then, the courts had no jurisdiction to impose or levy any increase upon the payment of maintenance allowance---Increase levied bythe courts below upon the payment of maintenance allowance lacked statutory sanction---Petition was partly allowed by modifying the judgment of Family Court to the extent of levy of 15% increase---Plaintiff would be entitled for the maintenance allowance of Rs.1500 per month without any increase---Order accordingly.

Ch. Inam Rasool Deo for Petitioner.
Ayaz Safdar Sindhu for Respondent No.1.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Mst. Nadia Nasreen daughter of the present petitioner Muhammad Anwar on 13-12-2006 instituted a suit for recovery of maintenance allowance against her father alleging that she is 17 years of age and is entitled for the maintenance allowance from her father at the rate of Rs.5,000 per month. It was alleged that her father is a man of means and earns more than Rs.75,000 per month from the different sources, The suit was contested by Muhammad Anwar denying the allegation and

the learned Judge Family Court vide judgment dated 11-3-2008 fixed the maintenance allowance of the minor daughter at the rate of Rs.1,500 per month with annual increase of 15%. In appeal, filed by the present petitioner, the order was maintained vide judgment dated 25-4-2008 passed by Mr. Pervaiz Ismail Joiya, learned Additional District Judge, Samundri, District Faisalabad.

2. It is the contention of the learned counsel for the petitioner that the courts below while imposing increase of 15% per annum upon payment of monthly maintenance allowance have proceeded against the spirit of law as such, the increase in the payment of maintenance allowance is liable to be set aside.

3. Learned counsel for respondent No.1 while rebutting this submission argued that due to hike in prices in respect of commodities of daily use, the courts below had rightly granted annual increase.

4. After hearing both the parties, this court does not agree with the submission of learned counsel for respondent No.1 for the simple reason that the annual increase in the payment of maintenance allowance has not been provided in any provisions of the West Pakistan Family Court Act, 1964. It is the legislature to take into consideration the growing prices of the articles whereafter the same could legislate the law for imposing annual increase in the payment of maintenance allowance, till then, the courts have no jurisdiction to impose or levy any increase upon the payment of maintenance allowance. The increase levied by the courts below upon the payment of maintenance allowance lacks statutory sanction as such, to this extent, the judgments of the courts below are liable to be set aside.

5. For the foregoing reasons, this petition is partly allowed by modifying the judgment of the learned trial court to the extent of levy of 15% increase. The respondent shall be entitled for the maintenance allowance of Rs.1500/- per month without any increase.

H.B.T./M-313/L Order accordingly.

P L D 2012 Lahore 170

Before Seed Muhammad Kazim Raza Shamsi, J

M. UMAR FRAZ---Petitioners

versus

ADDITIONAL DISTRICT JUDGE and others---Respondents

Writ Petitions Nos.15500 and 15501 of 2008, decided on 11th October, 2011.

(a) West Pakistan Family Courts Act (XXXV of 1964)---

----S. 5 & Sched.---Constitution of Pakistan, Art. 199---Constitutional petition---Suit for recovery of maintenance allowance for minor---Appellate Court fixed maintenance allowance for minor child at Rs.3000 per month with an annual increase of 15 per cent'in the same---Validity---Contention of petitioner that grant of increase of 15 per cent in

maintenance allowance did not have any statutory sanction appeared to be on a correct dimension---Appreciation of provisions of West Pakistan Family Courts Act, 1964 showed that the Act nowhere directed the court to allow such increase in payment of maintenance allowance to minors---Increase was fixed by the court having been influenced by circumstances prevailing in the society forgetting that the duty of court was to implement law as it had been enacted---Courts could not be allowed to challenge the wisdom of legislature which consciously did not provide any such rule to impose levy on the allowance---Legislature, may, at any stage, keeping in view rate of inflation, prices of articles of daily use, expensive education and health as well as needs of the minor in the future, may promulgate legal provisions for meeting with such situations---Till - the time such amendment was made by the legislature, the court was supposed to follow the law in its -original form---Grant of 15 per cent increase in maintenance allowance of minor by Appellate Court was wholly unwarranted and to that extent constitutional petition was allowed---High Court provided guidelines and recommendations for the legislature to amend the West Pakistan Family Courts Act, 1964 accordingly.

Dr. Tariq Shaheen v. Miss. Wafiah Fatima and others C.P. No.76-L of 2007 and Tauqeer Ahmad Qureshi v. Additional District Judge, Lahore and others Civil Appeal No.748 of 2008 rel.

(b) Interpretation of statutes ---

----Court being influenced by circumstances prevailing in the society forgetting its duty to implement the law as it had been enacted could not challenge the wisdom of the legislature.

Muhammad Zawar Shah for Petitioner.
Imran Idrees Butt and Ihsan Qadar Sial for Respondents.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---By this single judgment Writ Petition No.15500- of 2008 and Writ Petition No.15501 of 2008 are proposed to be disposed of as the same are directed against the consolidated judgment recorded by learned First Appellate Court.

2. Both the-petitions are directed against judgment dated 28-8-2008 passed by Mr. Gabriel Francis Khan, the learned Additional District Judge Faisalabad, whereby he dismissed the appeal of the petitioner and partly accepted the appeal of the respondent No.3 Mst. Riffat Kausar.

3. Briefly stated the facts of the case are that respondent No.3 instituted a suit for maintenance allowance for herself and for her minor daughter Mst. Mah Noor respondent No.4, on the ground that she was deserted from his house by the defendant in the month of

August, 2005 when she was having the pregnancy of a few months, therefore, and he did not maintain her as well as her minor daughter, who was born in her maternal grand parents' house. She claimed the maintenance allowance from August, 2005 till March, 2006 at the rate of Rs.2500/- per month along with the delivery charges of Rs.12094/- for herself and maintenance allowance for the minor daughter at the rate of Rs.5,000/ per month with effect from 17-2-2006 till 31-3-2006. Future maintenance was also claimed at such rate.

4. The defendant controverted the allegation contained in the plaint stating that the plaintiff herself left the house with her free will who was subsequently divorced on 14-8-2005 and that he is suffering eyes disability and is not in a position to pay exorbitant maintenance as claimed by the plaintiffs.

5. The learned Family Court, out of pleadings of the parties framed the issues on the material facts and after recording the evidence decreed the suit of maintenance allowance to the extent of the minor at the rate of Rs.3,000/- per month from March, 2006 till her marriage and to the ex-tent of mother decreed for the Iddat Period. The claim of delivery expenses was also granted.

6. Both the parties feeling aggrieved by the findings of the learned Judge Family Court, had preferred two separate appeals which were decided by the learned First Appellate Court by way of consolidated judgment. The period of payment of maintenance allowance to the minor girl was fixed by the appellate court with effect from 17-2-2006 at the rate of Rs.3000/- per month with 15% annual increase. To this extent the appeal filed by the respondent was allowed while the appeal filed by the present petitioner was dismissed.

7. The learned counsel for the petitioner argued that the courts below had determined the maintenance allowance to the minor at the rate of Rs.3,000/- during her infancy period and till the time she is married which finding does not proper as during infancy period. the requirements of the minor are not of that scale than her needs in the grown up age. He has also submitted that the grant of increase of 15% per annum in the payment of maintenance allowance is unwarranted by law, as such, the same cannot be imposed upon the petitioner without having any statutory sanction. The learned counsel for respondent submitted that the courts below had rightly fixed the increase of 15% per annum keeping in view prevailing circumstances, rate of inflation and future needs of the minor, who is to go on long way.

8. Parties heard. The submission of the learned counsel for the petitioner that grant of increase 15% per annum is not having any statutory sanction appears to be on correct dimension. Appreciation of A the provisions of West Pakistan Family Courts Act, 1964 shows that it nowhere directs the court to allow the increase in the payment of maintenance allowance to the minors. In this respect, guidelines have been provided by the apex Court in two cases i.e. the case of Dr. Tariq Shaheen v. Miss. Wafiah Fatima and others delivered on 28-2-2007 in C.P. No. 76-L of 2007 and in the case of Tauqeer Ahmad Qureshi v. Additional District Judge, Lahore and others delivered on 2-2-2009 in Civil Appeal No. 748 of 2008. This increase in allowance is being fixed by the courts being influenced by the circumstances prevailing in the society forgetting that their duty is to implement the law as

has been enacted. They cannot be allowed to challenge the wisdom of legislature, which consciously did not provide any such rule to impose levy on the B allowance. It is the duty of the legislature, which may, at any stage, by keeping in view the rate of inflation and sky rocketing prices of the articles of daily use, expensive education and health as well as the needs of the minor in future, may promulgate the legal provisions for meeting with such situations. Till that time, if this amendment is made by the legislature in the law the courts are supposed to follow law in its original form: The amendment in law is further essential to bring the uniformity in fixation of the rate of increase in the payment of maintenance allowance to the minor. It is noticed that the courts up till now are not consistent in fixing the rate of increase on the payment of maintenance allowance. In some areas the courts are fixing 5% annual increase while in other area the courts are fixing the increase up to 30% per annum. In this manner, the courts are burdening opponent in unpaved way. It is the need of the day to make such amendment in the family law, so that the courts could impose the increase in the, payment of maintenance allowance to the minor by keeping in view the growing needs and price hike in the articles used by the minor for living proper life in the society. They courts thus have left with no jurisdiction to grant the increase without having statutory sanction. They cannot be licensed to impose a penalty upon the father to pay the maintenance allowance with the increase in absence of any mandate of the legislature. It has also experienced the growing trends of the female folk who have developed habit of procuring ex parte decree of maintenance with an increase resulting in colossal outstanding amount at the credit of the husband whereafter an execution petition is instituted for the recovery of the said amount. In some cases it is observed that the males are always not in a position to liquidate the said decretal amount, consequently they have to face detention in the jail. The legislature is expected also to safeguard the rights of the males of the society. For this purpose, the Courts are being used as tool to procure decrees and for its execution later on. It is recommended in this connection that some beneficial amendment in section 25 of the Act 1964 be promulgated putting some check and embargo for filing family matters in area where husband or the parents of female reside like the provisions contained in Muslim Family Law Ordinance, 1961, in respect of sending notice of talaq in Union Council where wife resides or Nikah is registered. This will help in curbing practice of institution of family cases at places where female never visited or resided. This will further support in reduction of unnecessary litigation.

9. The crux of the whole discussion is that grant of 15% increase per annum by learned First Appellate Court is wholly unwarranted, as such, to this extent the impugned judgment is required to be modified.

10. For the foregoing reasons both the petitions are partly allowed by deleting the grant of increase of 15% upon the maintenance allowance of Rs.3,000/- determined for the minor. The office is directed to send a copy of this judgment to the quarter concerned for considering recommendations made in the judgment in hand.

K.M.Z./M-345/L Petitions partly allowed.

P L D 2012 Lahore 178

Before Syed Muhammad Kazim Roza Shamsi, J

NADEEM ZAFAR and others---Petitioners

versus

MUHAMMAD ISMAEEL and others---Respondents

Writ Petition No.3605 of 2011, decided on 11th October, 2011. (a)

(a) Punjab Rented Premises Act (VII of 2009)---

----S. 30---Interpretation and object of S.30, Punjab Rented Premises Act, 2009---Word "shall" as used in S.30---Connotation---Examination of S.30 of the Punjab Rented Premises Act, 2009 revealed that it consisted upon two parts, firstly, that it required that written intimation shall be sent to the tenant informing him about new ownership and secondly, the new landlord shall apply to the Rent Registrar for entering his name as the landlord of the premises---Section 30 nowhere provided that if no notice either to the tenant or to the Rent Registrar was sent, ejectment petition could be liable to be dismissed ---Word "shall" though had been used, but it appeared that the intention of the legislature while enacting the provision of law could be that the cases of the parties should not be thrown out of the court on the basis that notice of change of ownership had not been sent---Such intention of the legislature was also evident from the Preamble to the Punjab Rented Premises Act, 2009, where it was provided that. the purpose of the Act was to provide expeditious remedy in rent matters but it did not allow expeditious disposal at the cost of technicalities---Word "shall" used in S. 30, in view of legal position of the law as well as rules of interpretation shall be read as "may "---Such interpretation found further support from other facts; that the question of default of payment in rent was to be determined by the court after recording the evidence of the parties or in cases where the default was evident from the record or in case where the relationship of landlord and tenant wasdenied by the parties, such determination had to be undertaken even if no notice, as required under S.30 of the Act, was sent---Purpose of enactment of S.30 of the Act' was to regulate and register the new landlord so that dispute of denial of tenancy could be avoided which was a consistent practice when the repealed law was in field, and where ejectment petitions remained pending in courts for years for the determination of the title of landlord---Keeping in view expediency, and the mechanism provided for expeditious disposal of rent matters, the ejectment petitioner may not be non-suited on the ground that he did not send intimation regarding new ownership either to the tenant or to the Rent Registrar, particularly, when tenant had notice of the same when ejectment petition was instituted against him.

(b) Punjab Rented Premises Act (VII of 2009) ---

----Ss. 30 & 15---Constitution of Pakistan, Art. 199---Constitutional Petition---Ejectment petition filed by the petitioner was dismissed by Appellate Court on the ground that notice as required under S. 30 of the Punjab Rented Premises Act, 2009, regarding change of ownership was not served upon the respondent (tenant)---Validity---Petitioner had served notice upon the respondent (tenant) informing him that he purchased the property from his brother and then raised the demand for payment of rent, and to such extent he had complied

with one requirement of S.30 of the Punjab Rented Premises Act, 2009 about sending intimation of change of ownership but he did not apply for registration as new landlord to the Rent Registrar---Petitioner (landlord), in view of the interpretation of the S.30 of the Punjab Rented Premises Act, 2009, could not be penalized for such disobedience as such non-compliance did not materially affect rights' of the respondent (tenant) who had already denied the relationship of landlord and tenant between himself and the petitioner---Respondent (tenant), prior to the institution of the ejectment petition had admitted that he had knowledge that the previous landlord had sold the property to the petitioner---Landlord, in view of such admission of the respondent (tenant), could not be non-suited merely on the ground that he did not apply to the Rent Registrar for entering his name as the new landlord---Dismissal of petitioner's ejectment petition by Appellate Court was against the spirit of law and was not sustainable---Order of Appellate Court was set aside, and case was remanded to the Appellate Court---Constitutional Petition was allowed, accordingly.

Sh. Sajid Mehmood for Petitioners.
Ali Akbar Qureshi for Respondents.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---This constitutional petition is directed against an order dated 17-1-2011 passed by Mr. Suleman Baig, the learned Additional District Judge Faisalabad, whereby he accepted the appeal filed by the respondent and set-aside the order of ejectment dated 21-7-2010 passed by Mr. Shafaqat Ali Special Judge (Rent), Faisalabad, consequently dismissed the ejectment petition.

2. The ejectment petition filed by the present petitioner was allowed, as stated above, and in appeal, the same was dismissed on the sole ground by the learned Additional District Judge Faisalabad that notice as required under section 30 of Punjab Rented Premises Act, 2009 regarding change of ownership was not served upon the tenant, as such, the petition is not maintainable.

3. The learned counsel for the petitioner submitted that the provisions of section 30 of the Act ibid are directory in nature as it does not follow by penal consequences in case the requirement of the section is not fulfilled, as such, the order passed by the learned First Appellate Court is not sustainable. He while taking this court through various documents submitted that the respondent himself admitted at various places that he knew that Shahid Hussain had sold the property in dispute to the present petitioner, in these circumstances, it was not essential for the petitioner to send the notice to the respondent. It is also the contention of the learned counsel that as held by the apex Court in various judgments the filing of ejectment petition could be treated as a notice of change of ownership.

4. The learned counsel for the respondent argued that it is a principle of law that when an act is prescribed to be done in a manner provided by law then it has to be performed in such a manner, thus, it was the incumbent upon the petitioner to send a notice to the respondent as well as to the Rent Registrar of the area for entering his name in his relevant register. He further submitted that the writ petition is not maintainable as the petitioner has failed to

point out any illegality committed by the learned First Appellate Court in dismissing the ejectment petition

5. The parties have been heard at length. The point for determination in the instant petition is whether the provisions of section 30 of the Act ibid are mandatory in nature or merely are directory and whether a party becomes defaulter in the payment of rent if no notice of change of ownership is sent to the Rent Registrar for entering the name of new landlord in his record. In order to examine these questions, the provisions of section 30 have been reproduced as under:

"30. Transfer of ownership.---(1) If the ownership of a rented premises has been transferred, the new owner shall send a written intimation of the transfer by registered post or a courier service to the tenant and shall apply to the Rent Registrar for entering his name in the register as the landlord of the premises.

(2) the Rent Registrar shall inform the tenant through a notice at the expense of the landlord about the transfer of ownership of the premises and the tenant shall not be deemed to have defaulted in the payment of the rent if the rent due is paid or tendered to the new landlord within a period of thirty days from the date when the notice should in normal course have reached the tenant."

6. The examination of this provision of law reveals that it is consisted upon the two parts. In the first place, it requires that a written intimation shall be sent to the tenant informing him about the newownership and secondly he shall also apply to the Rent Registrar for entering his name in the register as the landlord of the premises. Under sub section (2) of the Section, Rent Registrar, after receiving the application of the new landlord, shall inform the tenant through a notice about the transfer .of the ownership of the premises and the tenant shall not be, deemed to have defaulted in the payment of the rent if the rent due is paid or tendered to the new landlord within a period of 30 days from the date when the notice should in normal course have reached the tenant. It is nowhere provided in either part of section if no notice either to tenant or to Rent Registrar is sent whether ejectment petition would be liable to be dismissed. Although in section the word "shall" has been used, but it appears that the intention of the legislature while enacting this provision of law could be that the cases of the parties should not be thrown out of the court on the basis that notice of change of ownership has not been sent. This intention of the legislature is also evident from the preamble of the Act ibid which reads as under:--

"Whereas it is expedient to regulate the relationship of landlord and tenant, to provide a mechanism for settlement of their disputes in an expeditious and cost effective manner and for connected matters." (emphasis provided).

Thus it follows that purpose of enactment is to provide expeditious remedy in rent matters but it does not allow expeditious disposal at cost of technicalities.

7. In view of this legal position of the law as well as rules of interpretation the word "shall" used in section shall be read as "May". C This interpretation of the Section finds further

support from the other facts that the question of default in the payment of rent is to be determined by the court after recording the evidence of the parties or in , cases where the default is evident from the record or in case where relationship of landlord and tenant is denied by the parties. This determination has to be undertaken even if no notice as required is sent. The purposes of the enactment of this section is to regulate and register the new landlord so that the dispute of denial of tenancy could be avoided which was a consistent practice when the repealed law was in the field. In those cases the ejectment petition remained pending in the court for years for determination of title of the landlord. Keeping in view C this expediency and mechanism provided for expeditious disposal of the rent matter, it is held that ejectment petitioner may not be non suited on the ground that he did not send intimation regarding new ownership either to the tenant or to the Rent Registrar, particularly, when tenant had notice of the same when ejectment petition is instituted against him.

8.Now coming to the facts of the instant case, it is noticed that the petitioner had served a notice upon the respondent on 21-5-2009 informing him that he had purchased the disputed property from his brother Shahid Hussain and raised demand of the payment of rent. The petitioner to this extent had complied with one requirement of Section 30 of the Act ibid about sending intimation but he did not apply for his registration as new landlord. In view of the interpretation of section-30 supra, the petitioner cannot be penalized for this disobedience as this non-compliance did not materially affect the rights of the respondent who has already denied the relationship of landlord and the tenant between him and the petitioner. Moreso, the respondent has admitted as R.W.1 D that prior to the institution of the ejectment petition he had the knowledge that his previous landlord Shahid Hussain, the brother of present petitioner, had sold the property to Zafar Hussain ejectment petitioner. In view of this admission of the respondent the petitioner could not be non-suited merely on the ground that he did not apply to the Rent Registrar for entering his name in the relevant register as new landlord. In this scenario the learned First Appellate Court while dismissing the ejectment petition on this score has proceeded against the spirit of law, as such, the judgment is not sustainable.

9.? For the foregoing reasons, this writ petition is allowed by setting aside the impugned order. The learned First Appellate Court shall re-decide the appeal, which shall be deemed to be pending before it, after E providing fair opportunity to the parties of hearing. The parties shall appear before the learned First Appellate Court on 21-10-2011.

K.M.Z./N-76/L Case remanded.

2012 P Cr. L J 104
[Lahore]
Before Syed Muhammad Kazim Raza Shamsi, J
Hafiz MUHAMMAD NAEEM and 3 others---Petitioners
Versus
THE STATE and another---Respondents

Criminal Miscellaneous Nos. 1269-M and 1817-M of 2011, heard on 10th August, 2011.

Penal Code (XLV of 1860)---

----Ss. 337-A(i), 337-F(i), 337-F(v), 337-N & 34---Criminal Procedure Code (V of 1898), S.561-A---Causing Shajjah-i-Khafifah, Damiyah and Hashimah---Sentence, enhancement of---Trial Court awarded sentence of payment of Daman to accused persons and did not award any imprisonment as 'Tazir'---Rigorous imprisonment from one to two years, was awarded to accused persons on revision, against which accused had filed petition under S.561-A, Cr.P.C.---Contention of accused that no notice for enhancement of sentence was served upon them, had no substance, as requirement of law was the hearing of accused himself or through his pleader in the proceedings, where his sentence was to be enhanced---Separate written notice was not required to be given to accused under S. 439, Cr.P.C. before enhancing the sentence awarded to them---Under provisions of subsection (2) of S.337-N, P.P.C., courts in all hurt cases would award the principal sentence of Daman and Arsh and would indict accused for imprisonment as 'Tazir', if he was found previous convict, habitual, hardened, desperate or dangerous criminal; or he had committed the offence in the name or on the pretext of honour and punishment of imprisonment could not be inflicted in all cases of hurt---Nothing was available in the evidence of the prosecution to show that the petitioners fell within the category of such offenders---Sentence of imprisonment imposed on accused persons by the Appellate Court while enhancing the sentence, was illegal---Impugned order whereby sentence was enhanced, was set aside and accused detained in jail, were set at liberty, in circumstances.

2000 PCr.LJ 2075 and Mushtaq Ahmad and others v. Secretary, Ministry of Defence through Chief of Air and Army Staff and others PLD 2007 SC 405 **ref.**

Ali Muhammad v. The State PLD 2009 Lah. 312 **rel.**

Syed Ihtisham Qadir Shah for Petitioners.
Muhammad Aqeel Nasir Rana and M. Ishaq, D.P.-G. for Respondents.
Date of hearing: 10th August, 2011.

JUDGMENT

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---By this judgment, I propose to decide Criminal Miscellaneous No.1269-M of 2011 and Criminal Miscellaneous No.1817-M of 2011 as both these petitions have arisen out of one judgment.

2. The petitioners, Hafiz Muhammad Naeem, Hafiz Muhammad Ameen, Hafiz Muhammad Saeed and Hafiz Muhammad Shareef, allegedly on 10-8-2008 at about 11-30 p.m. while armed with sticks came at the house of the complainant and asked him as to why he had rented out the house to one Hafeez Ullah. The complainant replied that the house was owned by him and it was his sweet will to rent out the same to any person. Muhammad Shareef accused then inflicted a stick blow upon the complainant hitting him at his right 'Ghutney'. Muhammad Saeed also inflicted stick blow on the left hand of the complainant whereafter rest of the accused started beating the complainant with fist blows, kicks and sticks. On the alarm raised by the complainant Muhammad Ibrahim and Asmat Ullah attracted at the spot. The motive for the occurrence stated in the F.I.R. is that Muhammad Shareef had the grudge against complainant for renting out his house to Hafeez Ullah. In this scenario case F.I.R. No.284 of 2008, dated 22-8-2008 was registered at Police Station Kundian, District Mianwali against the accused persons under sections 337-A(i), 337-F(i), 337-F(v) and 34, P.P.C.

3. On this complaint the Police after conducting the investigation, sent challan to the Court for trial of the accused persons. Rana Khalil Ahmad Khan, learned Judicial Magistrate Section 30, Piplan, District Mianwali after recording the evidence convicted the accused Muhammad Shareef and Muhammad Saeed under section 337-F(v), P.P.C. and awarded Daman of Rs.15,000 each while the accused Naeem and Ameen were convicted under section 337-A(i), P.P.C. and were awarded the sentence of payment of Daman of Rs. 5,000 each. It is noteworthy that the learned Magistrate did not award any imprisonment to the accused persons as Tazir. The conviction was recorded vide order dated 29-5-2010.

4. The complainant of the case feeling aggrieved by the conviction order assailed the same in revision petition filed under section 439-A, Cr.P.C. for enhancing the punishment to the accused persons. The accused of the case did not assail the judgment of the leaned Judicial Magistrate, rather paid the amount of Daman. Mr. Muhammad Yar Gondal, learned Additional Sessions Judge, Mianwali Camp at Piplan vide his judgment dated 17-5-2011 accepted the revision petition and awarded the rigorous imprisonment for two years in respect of injury No.1, two years in respect of injury No.2, one year in respect of injury No.3 and one year in respect of injury No.4-B. He further directed that the simple imprisonment for six months shall also be undergone by the accused persons in case of non-payment of Daman. The benefit of section 382-B, Cr.P.C. was extended to the convicts. The accused persons feeling aggrieved by the infliction of the sentence of imprisonment have assailed the same in the instant petition under section 561-A, Cr.P.C. The complainant of the case also filed an application for further enhancement of sentence.

5. Learned counsel for the petitioners-accused argued that the Courts below did not notice that the F.I.R. was lodged with a considerable delay of 11 days against the accused persons for which no plausible explanation was given. It is further submitted that there was a fracture of bone as per the medical record but the Radiologist was not

examined as prosecution witness before the Court therefore, in view of the judgment reported as **2000 PCr.LJ 2075** the conviction could not be recorded against the accused. He further submitted that under section 439, Cr.P.C. it was mandatory for the Appellate Court to issue notice to the accused persons before enhancing their sentence, which notice was never given, as such the judgment is bad in law. By citing the case of Ali Muhammad v. The State (PLD 2009 Lahore 312), a judgment of Full Bench of this Court, it is argued that the award of sentence of imprisonment as a Tazir' by the learned Addl. Sessions Judge is not warranted by law as under section 337-N(2), P.P.C. such imprisonment can only be awarded if the accused is desperate, hardened, habitual, dangerous or previous convict whereas admittedly the accused do not fall within this category. He thus prayed for setting aside the judgment of the Appellate Court.

6. On the other hand, learned counsel for the respondent-complainant while placing reliance upon the case of Mushtaq Ahmad and others v. Secretary, Ministry of Defence through Chief of Air and Army Staff and others (PLD 2007 SC 405) submitted that no notice was required to be given to the petitioners under the law before the enhancement of their sentence. He has supported the sentence awarded by the learned Courts below and also prayed for the enhancement of the sentence on the ground that the complainant of the case was given merciless beating by the accused persons. Learned DPG also supported the judgments of the Courts below.

7. After considering the submissions made by the learned counsel for the parties as well as the case-law cited at the bar, it is observed that the first two grounds taken by the learned counsel for the petitioners have no substance for the reason that these grounds could be taken by the petitioners by challenging the conviction order in the appeal before the Appellate Court, which appeal they did not opt to file, as such the conviction order of learned Judicial Magistrate attained finality against the petitioners. The impugned judgment has arisen out of the revision petition filed by the respondent whereby he prayed for the enhancement of the sentence awarded to the accused, as such the scope of the case has become very limited on this aspect of the case.

8. There is also no substance in the contention of the learned counsel for the petitioners in respect of his arguments that no notice for enhancement of sentence was served upon the petitioners. The perusal of the revision petition filed by the respondent before the Appellate Court reveals that it was filed for the enhancement of the sentence in which the petition learned counsel for the petitioners-accused persons appeared and argued the same as is apparent from the impugned judgment. At this juncture subsection (2) of section 439, Cr.P.C. is relevant to be reproduced hereunder:--

> "(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his defence."

Evidently the requirement of law is the hearing of the accused himself or through his pleader in the proceedings where his sentence was to be enhanced. It is not mentioned in the section that a separate written notice shall be given to the accused person before enhancing the sentence awarded to them. The contest of the present petitioners of the revision petition before the Appellate Court clearly manifest that they were conscious of

the fact that the petition was filed against them for the enhancement of their sentence and they were heard through their learned counsel before passing the conviction order by the Court below. Accordingly the requirement of law was complied with, thus the objection of the learned counsel for the petitioners is repelled.

9. As far as the question of award of imprisonment in the case where the punishment of imprisonment is optional/additional punishment, the contention of the learned counsel for the petitioners has substance. There is a landmark judgment of Full Bench of this Court mentioned supra whereby this Court after taking into consideration the different views of the Court taken in other cases hasauthoritatively determined that the punishment of imprisonment as 'Tazir' in all cases of hurt where the normal punishment to be awarded to an offender is the payment of Arsh and Daman the sentence of imprisonment can only be awarded additionally if the requirement of subsection (2) of section 337-N, P.P.C. are fulfilled. For the purpose of ready reference the wording of the section are reproduced hereunder:--

> "(2) Notwithstanding anything contained in this chapter, in all cases of hurt, the court may, having regard to the kind of hurt caused by him, in addition to payment of Arsh, award Tazir to an offender who is previous convict, habitual or hardened, desperate or dangerous criminal or the offence has been committed by him in the name or on the pretext of honour."

The section in the view of this Court thus clarifies that the Courts in all hurt cases shall award the principal sentence of Daman or Arsh and would indict the accused for imprisonment as 'Tazir' if he is found previous convict, habitual, hardened, desperate or dangerous criminal or he had committed the offence in the name or on the pretext of honour and not in all cases of hurt, this punishment of imprisonment can be inflicted. There is nothing in the evidence of the prosecution to show that the present petitioners fall within the category of the offenders as stated above, as such in view of thecase of 'Ali Muhammad' (supra) the sentence of imprisonment imposed by the learned Additional Sessions Judge against the accused persons is found to be illegal.

10. For the foregoing reasons, Criminal Miscellaneous No.1269-M of 2011 is allowed resulting into the setting aside of the impugned order imposing sentence of imprisonment against thepetitioners while the petition filed by the respondent-complainant for enhancement of the sentence is dismissed. The petitioners are presently detained in the jail. They shall be set at liberty forthwith if not required in any other case.

H.B.T./M-306/L Petition allowed.

2012 P Cr. L J 1301
[Lahore]
Before Syed Muhammad Kazim Raza Shamsi, J
AKBAR ALI---Petitioner
Versus
JAMSHAID ALI and others---Respondents

Criminal Miscellaneous No.4740-B of 2011, decided on 15th March, 2012.

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

----S. 497(5)---Penal Code (XLV of 1860), S. 489-F---Dishonestly issuing a cheque---Application for cancellation of bail---Withdrawal of bail application---Scope and effect---Bail application filed by accused before Magistrate had been dismissed, whereafter accused filed two successive bail applications before court below, but same were withdrawn---Third bail application filed before court below was dismissed on ground of the conduct of the accused; a week after which accused filed another bail application which was accepted---Contention of complainant was that withdrawal of two successive bail applications of accused filed before court below amounted to dismissal of such applications on merits and as such there were no fresh grounds available to him for seeking his release on bail, but court below without adverting to this fact had illegally granted bail to the accused---Validity---Withdrawal of bail petition simpliciter would not mean that it was dealt with on merits or on grounds pressed---Such withdrawal would not be a bar in moving a second bail application, which must be heard by the same judge/bench which allowed the withdrawal of the first bail application---Bail petition of accused was not decided on merits, rather court below found him disentitled for the concession of bail due to his faulty conduct---Application for cancellation of bail was dismissed, in circumstances.

Muhammad Rizwan v. The State and 3 others 2007 PCr.LJ 78; Noraz Akbar v. The State and another 2011 PCr.LJ 852 and Wajid Ali v. The State 2009 PCr.LJ 275 rel.

Sono Khan v. Sikandar and another 2000 PCr.LJ 614; Muhammad Riaz v. The State 2002 SCMR 184; Haji Mian Abdul Rafique v. Riaz ud Din and another 2008 SCMR 1206 and Gohar Rehman v. Muhammad Tahir and another 2001 SCMR 815 ref.

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

----S. 497(5)---Penal Code (XLV of 1860), S. 489-F---Dishonestly issuing a cheque---Application for cancellation of bail--- Bail application filed by accused before Magistrate had been dismissed, whereafter accused filed two successive bail applications before court below, but same were withdrawn--- Third bail application filed before court below was dismissed on grounds of the conduct of the accused with the observation that accused had not moved the Trial Court for his release on bail on any fresh ground and again filed his third bail application before court below---Validity---Observation of court below that remedy of bail was not availed before the Trial Court was factually incorrect because earlier two successive applications, which were dismissed as withdrawn were filed before the court

below and as such the third one was to be filed in the same court instead of approaching the Trial Court.

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

----S. 497(5)---Penal Code (XLV of 1860), S. 489-F---Dishonestly issuing a cheque---Application for cancellation of bail---Bail application filed by accused before Magistrate had been dismissed, whereafter accused filed two successive bail applications before court below, but same were withdrawn---Third bail application filed before court below was dismissed on grounds of the conduct of the accused; a week after which accused filed another bail application which was accepted---Contention of complainant was that bail granting order of court below amounted to review of its previous order by which it had dismissed bail application of accused because of his conduct---Validity---Bail petition of accused was not decided on merits, rather court below found him disentitled for the concession of bail due to his faulty conduct, whereas the application in which bail was granted was decided by the court below independently on merits and on grounds pressed therein---No bar existed for raising grounds mentioned in the application for the reason that these grounds although were noted by court below in refusing bail to accused, but no decision was given by it thereon---Application for cancellation of bail was dismissed, in circumstances.

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

----S. 497(5)---Penal Code (XLV of 1860), S. 489-F---Dishonestly issuing a cheque---Application for cancellation of bail---Withdrawal of bail application---Scope and effect---Withdrawal of bail application simpliciter would not mean that it was dealt with on merits or on grounds pressed---Such withdrawal would not be a bar in moving second bail application which must be heard by the same judge/bench which allowed withdrawal of first bail application.

Wajid Ali v. The State 2009 PCr.LJ 275 rel.

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

----S. 497(5)--- Penal Code (XLV of 1860), S. 489-F--- Dishonestly issuing a cheque---Application for cancellation of bail---Scope---Bail granting order can be recalled in very exceptional circumstances and such practice should not be encouraged particularly in a matter in which trial before the court was in progress.

Haji Mian Abdul Rafique v. Riaz ud Din and another 2008 SCMR 1206 and Gohar Rehman v. Muhammad Tahir and another 2001 SCMR 815 rel.

Ch. Babar Waheed for Petitioner.
Ch. Muhammad Qasim for Respondent No.1.
Muhammad Ishaque, D.P.-G. with M. Amjad, A.S.-I.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---The petitioner Akbar Ali by filing instant criminal miscellaneous application under section 497(5), Cr.P.C. seeks cancellation of post-arrest bail granted to Jamshad Ali, respondent No.1, by the learned Addl. Sessions Judge, Lahore vide order dated 18-4-2011.

2. Briefly stated the facts of the case are that the petitioner lodged case F.I.R. No.676, dated 30-8-2010 against respondent No.1 under section 489-F, P.P.C. with Police Station Mozang, Lahore with the allegation that he had given Rs.45 lacs to respondent No.1 for supplying the milk, which he supplied for five months only whereafter he stopped the supply. On checking the account a sum of Rs.30 lacs found outstanding towards respondent No.1 regarding which a demand was raised in lieu of which respondent No.1 issued three cheques, which were dishonoured subsequently. Accordingly, above referred criminal case was lodged against respondent No.1.

3. It is pointed out by the learned counsel for the petitioner that bail applied by respondent No.1 was declined by the learned Allaqa Magistrate, Lahore, whereafter respondent No.1 filed two successive post arrest bail petitions before the learned Additional Sessions Judge, Lahore but the same were withdrawn. Thereafter third application was filed, which was dismissed by the learned Additional Sessions Judge on 29-3-2011 (incorrectly written as 29-3-2012 in the order of the learned Additional Sessions Judge). It is further stated that after seven days of the dismissal of said bail application another bail application before the same Court was filed by respondent No.1 seeking his release on bail, which was allowed by the learned Addl. Sessions Judge vide order impugned in the instant petition.

4. It is contended by the learned counsel for the petitioner that the earlier application of respondent No.1 was dismissed on merits, as such second application before the same Court and acceptance thereof amounts review of order by the learned Court, which is not permissible under the law. He further argued that when the first petition of respondent No.1 was dismissed on merits then there was no fresh ground available to him for seeking his release on bail through the second application but the learned Court without adverting to this fact had illegally granted bail to respondent No.1. Further argued that withdrawal of earlier two applications by respondent No.1 would amount to decision of petitions on merits, thus third application dismissed by the Court could only be maintainable, if any fresh ground is available. He has further commented upon the conduct of respondent No.1 in prosecution of the bail applications as well as instant petition by submitting that in the instant petition respondent No.1 intentionally avoided to appear in this Court and this Court in order to procure his attendance had adopted coercive measures as such respondent No.1 is not entitled for any concession. In this connection, learned counsel has placed reliance upon the cases of Sono Khan v. Sikandar and another (2000 PCr.LJ 614), Muhammad Rizwan v. The State and 3 others (2007 PCr.LJ 78) and Noraz Akbar v. The State and another (2011 PCr.LJ 852).

5. Conversely, learned counsel for respondent No.1 countered the arguments of the learned counsel for the petitioner by submitting that earlier bail petition of respondent No.1 was

dismissed by the learned Additional Sessions Judge on 29-3-2011 on technical ground noting down the conduct of respondent No.1 regarding withdrawal of his earlier two applications, thus the decision of the Court cannot be treated as the one pronounced on merits. He elaborated his arguments and contended that the bail granting order clearly shows that since earlier petition of respondent No.1 was decided on technical ground and not on merits, as such, there is no need to canvass fresh ground for seeking post arrest bail from the same Court. Added further that simpliciter withdrawal of earlier two applications by respondent No.1 does not amount decision on merits. Thus fresh application, could be filed without asserting fresh ground. He further pointed out that the challan in the case has been submitted in the Court in which the trial Court has taken cognizance by framing the charge and the case is now fixed for recording of prosecution evidence. Learned counsel submitted that in these circumstances at this stage when the trial of the case is in progress the practice of recalling of bail granting order has been deprecated by the apex Court. Reliance has been placed on the cases of Muhammad Riaz v. The State (2002 SCMR 184), Ali Hassan v. The State (2001 SCMR 1047), Wajid Ali v. The State (2009 PCr.LJ 275), Mian Abdul Rafique v. Riaz ud Din and another (2008 SCMR 1206) and Gohar Rehman v. Muhammad Tahir and another (2001 SCMR 815).

6. I have considered the submissions made by the learned counsel for the parties and examined the record as well as case-law cited at the bar. The ratio of the cases cited by the learned counsel for the parties is precisely noted hereunder:--

(i) In Sono Khan and Muhammad Rizwan case (supra) the Hon'ble Karachi High Court held that the grounds which were available at the time of first application even if not considered it will be presumed that the same were considered and rejected and second bail application would lie when there is new and fresh ground arose after dismissal of the first bail application.

(ii) In the case of Noraz Akbar (supra) this Court observed that the first bail petition filed by the accused had been withdrawn by his counsel after arguing the case at some length. Fresh application for bail would not lie unless the some fresh ground for bail is available.

(iii) Case of Muhammad Riaz (supra) provides that simple withdrawal of bail application would not be a bar in moving second petition. Same view has been adopted by this Court in the case of Wajid Ali (supra).

(iv) Cases of Haji Mian Abdul Rafique and Gohar Rehman, deprecate practice of cancellation of bail in matters where trial in a case is in progress.

7. The ratio of cases cited at serial No.(i) and (ii), is that when an earlier bail petition filed by an accused person is dismissed on merits then second bail application would only be maintainable if any fresh ground is available to him. These observations of the Court in the cases, are based upon the judgment of the apex Court recorded in the case of 'The State through Advocate-General N.-W.F.P. v. Zubair and 4 others (PLD 1986 SC 173). There is no cavil to proposition that second bail application would only be maintainable if it is filed on the grounds, which were not available to the petitioner at the time ofdismissal of his first

application on merits but the matter in hand is some what on different footing than the one noted in the afore-noted precedent cases.

8. In the instant case the question is whether the decision of the learned Additional Sessions Judge dated 29-3-2011 regarding dismissal of first bail application of respondent No.1 was on merits or the application was dismissed on technical ground and further that the order dated 18-4-2011 passed on the subsequent application by the learned Additional Sessions Judge would amount to review of its earlier order. In this connection the order dated 29-3-2011 is to be seen to determine the first question. The order of the learned Court is reproduced hereunder for correctly appreciating the same:--

"9. No doubt the offence against the accused/petitioner does not fall within the ambit of prohibitory clause and in alternative it is also punishable with fine only yet in my humble view there is sufficient ground to disentitle the petitioner from the concession of bail. His first bail application was rejected by the trial Court vide order dated 27-12-2010. After that he moved two bail application above referred before the Court of Mr. Muhammad Ajmal Hussian, the then learned Addl. Sessions Judge, Lahore which were dismissed as withdrawn vide order dated 26-1-2011 and 2-3-2011. Subsequently, he has not moved the learned trial Court for his release on bail on any fresh ground and again filed this third bail application before this Court. Under these circumstances, this petition is dismissed ....."

9. The bare perusal of the order reveals that the Court found that respondent No.1 was entitled for the grant of bail but the same relief was refused to him due to his conduct of filing successive applications before the same Court and that the remedy was not availed by respondent No.1 before the Court of first instance. Although this observation of the Court that the remedy of bail was not availed before the Court of first instance is factually incorrect because the earlier two applications, which were dismissed as withdrawn were filed before the learned Additional Sessions Judge as such the third one was to be filed in the same Court instead of approaching the Court of first instance but for the purpose of disposal of this petition I am not going into such niceties.

10. Now adverting to question whether decision dated 29-3-2011 was on merits or not, said order is found to be self-explanatory which if is read with reference to its context it shows the intention of the Court of not deciding petition on grounds noted therein, rather Court proceeded to invoke equitable principles of law i.e. one must approach Court with clean hands. Thus it is not difficult to hold that the bail petition of respondent No.1 was not decided by the learned Additional Sessions Judge on merit, rather found respondent No.1 disentitled for the concession of bail due to his faulty conduct. At this juncture, learned counsel for the petitioner submitted that withdrawal of the earlier two applications would amount to dismissal of the bail applications on merits and in this connection learned counsel has relied upon the case of Noraz Akbar (supra). This contention of the learned counsel cannot be accepted as withdrawal simpliciter was not considered a decision of the bail petitions on merits. In holding this view, I am fortified by the ratio laid down in the case of Muhammad Riaz (supra), wherein the apex Court while taking note of this situation had observed that withdrawal of bail application simpliciter would not mean that it was dealt with on merits or on grounds pressed. It is further observed that such withdrawal

would not be a bar in moving second bail application, which must be heard by the same Judge(s)/Bench allowing withdrawal of the first bail application. The same view was followed by this Court in the case of Wajid Ali (supra) wherein it was held that mere withdrawal of the bail application would not amount that it was decided on merits.

11. Another contention of the learned counsel for the petitioner that the order dated 18-4-2011 amounts to review of order dated 29-3-2011 is also misconceived for the reason that the earlier bail petition, as observed above, was not decided by the Court on merits whereas the second petition was decided by the Court independently on merits and on the grounds pressed therein. There is no bar for raising the grounds mentioned in the application upon which the impugned order was passed by the learned trial Court for the reason that these grounds although were noted down by the learned trial Court in bail refusing order dated 29-3-2011 but no decision was given by it thereon.

12. It has now been settled by the precedent cases that in very exceptional circumstances a bail granting order can be recalled and this practice should not be encouraged particularly in the matter in which the trial before the Court is in progress. In this connection the cases of Haji Mian Abdul Rafiqaue and Gohar Rehman (supra) lend support to this view.

13. In this backdrop, I see no reason to recall the order dated 18-4-2011 wherein respondent No.1 was admitted to bail by the learned Additional Sessions Judge, Lahore. Resultantly, instant petition having no merits is dismissed.

M.W.A./A-52/L Application dismissed.

2012 P Cr. L J 1610

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi, J

KARIMA BIBI---Petitioner

Versus

THE STATE and others---Respondents

Writ Petition No.9497 of 2012, decided on 16th April, 2012.

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

----Ss. 22-A, 22-B, 154, 195 & 476---Constitution of Pakistan, Art.199---Constitutional petition---Prosecution for certain offences relating to documents given in evidence---Concurrent civil and criminal proceedings---Principles---Complainant (petitioner) filed an application before Justice of Peace alleging that her accused-brother (respondent), with the connivance of a stamp vendor prepared a forged memorandum of gift on behalf of their deceased father and in this manner deprived her from her sharai share in legacy of her father---Justice of Peace declined to allow such application of the complainant---Contention of complainant was that commission of cognizable offence was made out against the accused, therefore, Justice of Peace was not justified in declining issuance of the direction to the Station HouseOfficer (SHO)---Validity---Civil suit concerning partition of property

was pending between the parties, and allegedly forged gift deed had been produced in the said suit---Allegedly fabricated memorandum of gift was under consideration of the civil court where its execution and other allied matters would be determined by the court after recording of evidence, therefore, it was not appropriate at present stage to set the criminal machinery into motion---Civil and criminal cases could proceed side by side but ultimately preference was to be given to civil matters to avoid conflict of judgments---Order of Justice of Peace did not call for any interference---Constitutional petition was dismissed, accordingly.

Akhlaq Hussain Kiyani's case 2010 SCMR 1835 rel.

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

----Ss. 154, 195 & 476---Prosecution for certain offences relating to documents given in evidence---Jurisdiction of court--Scope---Jurisdiction of the court under Ss.195 and 476, Cr.P.C., in relation to the proceedings being conducted before the court could only be invoked if illegal act was performed during the proceedings pending in the court, while for all other illegal acts performed, the matter was to be proceeded by making a statement under S.154, Cr.P.C. before the police.

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

----Ss. 154, 195 & 476---Prosecution for certain offences relating to documents given in evidence---Scope---Concurrent civil and criminal proceedings---Principle---Held, in such cases, it was advisable to wait for the verdict of the civil court, which had the jurisdiction to direct the registration of a case if it found that a document under its consideration was fake and frivolous.

Sardar Akbar Ali Dogar for Petitioner.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---This constitutional petition is directed against an order dated 3-4-2012 passed by the learned Additional Sessions Judge, Okara/Ex-Officio Justice of Peace whereby the request of the petitioner to issue direction to the SHO, Police Station concerned to record her version and for taking the legal proceedings thereon was declined.

2. Mst. Karima Bibi being real sister of respondent No.5, Ghulam Farid filed an application under sections 22-A and 22-B, Cr.P.C. before the learned Ex-Officio Justice of Peace, Depalpur, District Okara stating that after death of her father her brother Muhammad Ishaq with the connivance of the Stamp Vendor fraudulently prepared a memorandum of gift on behalf of late Haji Muhammad Yousaf and in this manner has deprived her from shari share in legacy of her father. She prayed for registration of case against the respondents mentioned in her application for forgoing and fabricating a memorandum of gift.

3. Learned Ex-Officio Justice of Peace had secured the report from the local police which disclosed that after death of Haji Muhammad Yousaf the parties have a dispute of partition of the property of their late father and in this connection civil suit titled Muhammad Ismail v. Mst. Karima Bibi is pending in the Civil Court where the alleged gift deed has been produced and the matter is under consideration of theCourt. After perusing the report and other material on the record the learned Ex-Officio Justice of Peace declined to allow the application of the petitioner vide the order impugned in the instant constitutional petition.

4. Learned counsel for the petitioner argued that from the bare perusal of the application the commission of cognizable offence is made out against the respondents, thus the learned Ex-Officio Justice of Peace was not justified in declining issuance of the direction to the SHO of the Police Station concerned. He has also commented upon the application of the section 195 as well as section 476, Cr.P.C. and submitted that if any illegal act is performed in the presence of the Court then the afore-noted sections shall come into play while in other cases the matter is to be reported to the police. Learned counsel has also referred to the cases of Ch. Abdul Hameed v. D.P.O Distirct Vehari and 7 others (2006 PCr.LJ 832), Muhammad Shafi v. Deputy Superintendent of Police (Malik Gul Nawaz), Narowal and 5 others (PLD 1992 Lahore 178), Ghazala Ikram v. Muhammad Akram Ali and another (2007 YLR 1820) and Hidayatullah and others v. The State through Advocate-General N.-W.F.P. Peshawar High Court, Peshawar (2006 SCMR 1920).

5. I have considered the submission made by the learned counsel for the petitioner and examined the case-law cited at the bar. There are no two opinions about the proposition led by the learned counsel for the petitioner that the jurisdiction of the Court under sections 195 and 476, Cr.P.C. in relation to the proceedings being conducted before the Court can only be invoked if illegal act is performed during proceedings pending in the Court while for all other illegal acts performed by the persons the matter is to be proceeded by making a statement under section 154, Cr.P.C. before the local police but the question in the instant case is that the alleged fabricated agreement memorandum of gift is under consideration of Civil Court where its execution and other allied matters would be determined by the Court of competent jurisdiction after recording the evidence of the parties, thus in my opinion at this stage it would not be appropriate to set into motion the criminal machinery as well. No doubt civil and criminal cases can proceed side by side but ultimately preference is to be given to the civil matters to avoid conflict of judgments. In Akhlaq Hussain Kiyani's case (2010 SCMR 1835), the Hon'ble Supreme Court of Pakistan had stayed the proceedings in the criminal case till the decision of the said civil matter, thus it is adviseable, in the such like cases, to wait for the verdict of the Civil Court which its enjoysjurisdiction to direct the registration of case if it finds that a document under its consideration was a fake and frivolous document.

6. In view of the above, the order passed by the learned Ex-Officio Justice of Peace does not call for interference of this Court, thus the petition in hand having no merits is dismissed in limine.

MWA/K-11/L Petition dismissed.

2012 P Cr. L J 1861

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi, J

ABIDA PARVEEN---Petitioner

versus

DEPUTY SUPERINTENDENT OF POLICE and others---Respondents

Writ Petition No.19444 of 2011, decided on 27th February, 2012.

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

----Ss. 22-A, 22-B, 154 & 157---Constitution of Pakistan, Art. 199---Constitutional petition--- Registration of F.I.R.--- Information in cognizable cases---Ex-Officio Justice of Peace had directed the Station House Officer (SHO) to receive the application of the complainant (petitioner) and to proceed with it in accordance with the law, but the SHO instead of recording the statement of the complainant under S.154, Cr.P.C., straightaway proceeded to take cognizance under 5.157, Cr.P.C.---Validity---SHO was bound to record the statement of the complainant under 5.154, Cr.P.C. and then had to take further proceedings under the relevant provision of law-Act of SHO to straightaway proceed under S.157, Cr.P.C., was illegal---Sections 154 and 157, Cr.P.C., dealt with different contingencies, as the former provided for recording of F.I.R. at the instance of the complainant while S.157, Cr.P.C. dealt with the procedure for investigation of cognizable offences--- Section 157, Cr.P.C. left it to the judgment of the police official to refuse to investigate in certain cases but such power was not to be confused with his initial responsibility to record the F.I.R.---SHO had no choice but to record the F.I.R. although he had discretion in conducting the investigation---Order passed by Justice of Peace had not been implemented by the SHO in letter and spirit, and accordingly, he was directed by High Court to record the F.I.R. in compliance with the order of the Justice of Peace.

Lal Din v. SHO and others 1997 MLD 246; Tariq Siddiqui Khokhar v. ASJ and others PLD 2006 Lah. 507 and Haji Muhammad Khan v. Ch. Khizer Hayat PLD 1997 Lah. 424 rel.

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

---Ss. 154 & 157---Constitution of Pakistan, Art. 199---Constitutional petition--- Distinction between Ss.154 and 157, Cr.P.C.---Scope---Sections 154 and 157, Cr.P.C., dealt with different contingencies, as the former provided for recording of F.LR. at the instance of the complainant while section 157, Cr.P.C. dealt with the procedure for investigation of cognizable offences---Section 157, Cr.P.C. left it to the judgment of the police official to refuse to investigate in certain cases but such power was not to be confused with his initial responsibility to record the F.I.R.---SHO had no choice but to record the F.I.R. although he had discretion in conducting the investigation.

Lal Din v. SHO and others 1997 MLD 246; Tariq Siddiqui Khokhar v. ASJ and others PLD 2006 Lah. 507 and Haji Muhammad Khan v. Ch. Khizer Hayat PLD 1997? Lah. 424? rel.

Mirza? Shahid? Baig? for? Petitioner.
Muhammad? Nasir? Chohan, A.A.-G. with? Farman? Ali, S.-I. for? Respondents.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---The learned Ex-Officio Justice of Peace, Wazirabad, vide order dated 21-7-2011 had directed the SHO of the police station to receive the application of the present petitioner and proceed with in accordance with law. The SHO of the police station instead of recording the version of the petitioner under section 154, Cr.P.C. proceeded to take steps under section 157, Cr.P.C: The petitioner prays through the instant constitutional petition for the implementation of the order of the learned Justice of Peace dated 21-7-2011.

2.? Parties heard and record perused.

3. The learned Justice of Peace, Wazirabad had directed the SHO of the police station to receive the application of the petitioner and to proceed with it in accordance with law. The SHO was bound to record the statement of the petitioner under section 154, Cr.P.C. and then to take further proceedings under the relevant provisions of law. The SHO instead of recording the statement of the petitioner under section 154, ' Cr.P.C. has straightaway proceeded to take proceedings under section 157, Cr.P.C. which are illegal. Sections 154 and 157, Cr.P.C. deal with different contingencies. The former provides for recording of F.I.R. at the instance of complainant while section 157, Cr.P.C. deals with the procedure for investigation of cognizable offence. The later provisions leaves it to the judgment of the police to refuse to investigate in certain cases but this power should not be confused with his initial' responsibility to record the F.I.R. The SHO has no choice but to record the F.I.R. although, he has discretion in making investigation. In this connection, the cases of Lal Din v. SHO and others (1997 MLD 246), Tariq Siddique Khokhar v. ASJ and others (PLD 2006 Lahore 507) and Haji Muhammad Khan v. Ch. Khizer Hayat (PLD 1997 Lahore 424) may be referred. Since the order passed by the learned Justice of Peace has not been implemented by the SHO of the police station in letter and spirit, as such, he is directed to record the F.I.R. in compliance with order of learned Justice of Peace and send a copy of the same to this court through Deputy Registrar (Judicial) of this court. The petition in had disposed of in the above terms.

MWA/A-50/L Constitutional petition allowed.

2012 P Cr. L J 830

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi and Sh. Ahmad Farooq, JJ

OKEKE EREC IFEANYI---Appellant

versus

THE STATE and another---Respondents

Criminal Appeal No.99 of 2010, decided on 4th January, 2012.

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

----S. 9(c)---Possession and trafficking of narcotics---Appreciation of evidence---Circumstances in which narcotic was recovered, had shown that 16 kgs. heroin was planted upon accused by complainant for reason best known to him---Chemical Examiner's report did not reflect that all the eight samples were properly sent to the Office of the Chemical Examiner for analysis---Report made by the Chemical Examiner, in circumstances had no legal value---Set format of giving the report by Chemical Examiner, was not available on the file---Whether substance sent to the Chemical Examiner was narcotic substance was doubtful--- Neither the complainant nor the Chemical Examiner had placed on record any material showing as to how the "heroin" was separated from the shampoo, which was in liquid form inthe bottles---All said deficiencies/lacunas, had not been properly considered/evaluated by the Trial Court, while convicting accused, which had made case of prosecution highly doubtful---Prosecution having failed to prove the charge against accused beyond any shadow of doubt, accused was acquitted, in circumstances.

Hammad Akbar Wallana for Appellant.
M. Naeem Sheikh, D.P.-G. for the State.
Date of hearing: 15th December, 2011.

JUDGMENT

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---This criminal appeal is directed against judgment dated 26-10-2009 passed by the learned Additional Sessions Judge, Lahore, whereby on conclusion of the trial, the appellant, who is a foreign national, was convicted under section 9(c) of Control of Narcotics Substances Act, 1997 and awarded sentence of imprisonment for life with fine of Rs.500,000, or in default thereof to further undergo simple imprisonment of two years. Benefit of section 382-B, Cr.P.C. was, however, extended to the convict. The trial was conducted in case arising out of F.I.R. No.17, dated 2-2-2003, registered, under sections 6, 7, 8, 9(c), 14, 15 and 16 of Control of Narcotic Substances Act, 1997 with Police Station Sarwar Road, Lahore Cantt.

2. The allegation against the appellant is that he on 2-2-2003 at about 5-00 a.m on checking in departure lounge of Allama Iqbal International Airport, Lahore was found carrying two suit-cases, of blue and green colours. On opening of blue suit case, eight bottles of different size apparently containing shampoo were recovered and on suspicion, the liquid in the

bottles was tested with test-tube and it was found that the substance in bottles contained heroin. The stuff was weighed and 16-Kgs of heroin was recovered therefrom. Formal F.I.R. was lodged against the appellant and after conclusion of investigation, the challan was sent to the Court for trial.

3. The appellant did not plead guilty to the charges and claimed trial. The prosecution examined five witnesses in all. After conclusion of the prosecution evidence, the appellant set up his defence in his statement recorded under section 342, Cr.P.C. by asserting that nothing was recovered from his possession, rather, he was arrested by Mazhar-ul-Haq, Custom. Inspector on 1st February, 2003 along with another foreigner from Model Town Flats, Lahore and in order to usurp his luggage consisting of T.V, Refrigerator, DVD Player, Movie Camera and 2000 US Dollars, the complainant Mazhar ul Haq falsely implicated him in the instant case. The appellant neither produced any evidence in his defence nor appeared as his own witness as required by section 340(2), Cr.P.C. The learned trial Court at the conclusion of the trial held the appellant guilty of having possession of 16-Kgs heroin and awarded him sentence in the above terms.

4. Learned counsel for the appellant argued that the complainant of the case had allegedly prepared 16 samples but sent only 8 samples to the Chemical Examiner for examination; that the samples were deposited in the laboratory with the delay of five days for which no explanation has been given by the complainant in his statement; that the statements of the witnesses under section 161, Cr.P.C. were also recorded after seven days of the occurrence; that the report of the Chemical Examiner is a maneouvered and fabricated document, and is not in the form as prescribed by the Control of Narcotic Substances/Government Analysts Rules, 2001; that no mode of separation of the "heroin" from the liquid shampoo has been brought on the file, thus there is no evidence on the record showing that the shampoo contained any narcotic substance; that during the trial, the samples were checked in the Court on 10-8-2006 and the total gross weight of the material was 7310 grams, much less than the weight of heroin planted upon the appellant; that the samples were not sent in the safe custody for delivery to the Chemical Examiner; that there are material contradictions in the statements of the prosecution witnesses, which have been ignored by the learned trial Court while convicting the appellant.

5. On the other hand, learned DPG agued that the appellant was arrested from the Airport premises as is apparent from his air ticket and the passport, thus the plea that he was arrested from Model Town Flats, Lahore is negated from this fact. He further submitted that there could not be any mala fide on the part of the complainant as the appellant is a foreign national against whom no ill-will could be developed by the locals; that huge quantity of narcotic substance was recovered from the possession of the appellant and the report of the Chemical Examiner is also positive, thus he prayed for dismissal of the appeal.

6. We have considered the submissions made by the learned counsel for the parties and perused the record.

7. The first question for determination is that how the samples of narcotic/heroin from the bottles of shampoo were extracted by the complainant. Learned trial Court on 10-8-2006 had checked the samples in the Court which were placed in the cotton bag. Each sample

was de-sealed which was containing of 100 ml liquid. The bottles were exhibited as Exh.P3/A to Exh.P3/H. On opening of these bottles, the Court found a hard substance; in each sample, whereafter the Court again sealed the bottles. The Court noted the gross weight of each sample. The total gross weight of Exh.P3/G was 3440 grams while Exh.P3/H was having weight of 3870 grams. The court noted the total weight of these samples as 7310 grams. As per statement of the complainant, he had prepared 16 samples containing 5 grams of heroin each meaning thereby he had extracted 80 grams substance from the bottles for sample purpose and if this quantity is added in the gross weight of recovered narcotic substance from the bottles that come to 7390 grams, thus in any case, 16-Kgs. of heroin was not available in all eight bottles. If this contention of the complainant is admitted as correct that 16-Kgs. of heroin was recovered from 8 bottles, then necessarily each bottle was containing about 2-Kgs. of heroin, which is quite impossible in view of above circumstances as the capacity of one bottle was only 100 ml. In this manner, it appears that 16 Kgs. heroin was planted upon the appellant for the reasons best known to the complainant.

8. We have also examined the report of the Chemical Examiner Exh.P4/1, which is in the form of a letter issued by the Seizing Officer Ch. Mazhar-ul-Haq Inspector Customs. On the back of this letter, the Chemical Examiner has given his report. This letter shows that only 5 grams of the substance was sent to the Chemical Examiner as the same weight is recorded in Column No.5 of the letter. It further shows that the letter sent was a communication to the Chemical Examiner without containing any request for the determination of the nature and description of substance. This letter does not reflect that all the eight samples were properly sent to the office of the Chemical Examiner for analysis. The report made by the Chemical Examiner on the said letter thus has no legal value. There is a set format of giving the report by a Chemical Examiner, which is not available on this file as such, document Exh.P.4/1 has no evidentiary value. In the circumstances, it is doubtful that the substance sent to the Chemical Examiner was narcotic substance. Similarly, neither the complainant nor the Chemical Examiner has placed on record any material showing that how the heroin was separated from the shampoo, which was in liquid form in the bottles. All these deficiencies/lacunas have not been properly considered/evaluated by the learned trial Court while convicting the appellant, although same make the prosecution case highly doubtful. In this situation, we are not inclined to subscribe to the view taken by the learned trial Court while convicting the appellant, hence, it is established that the prosecution has miserably failed to prove the charge against the appellant beyond any shadow of doubt.

9. For the forgoing reasons, the appeal is accepted and the appellant/Okeke Erec Ifeanyi is acquitted of the charge. He shall be released forthwith from jail, if not required in any other criminal case. He along with his documents shall be handed over to the concerned Embassy. The case property shall be destroyed.

H.B.T./O-1/L Appeal accepted.

2012 Y L R 34
[Lahore]
Before Syed Muhammad Kazim Raza Shamsi, J
SHAHID MUSTAFA---Petitioner
Versus
MUNIR AHMAD, A.D.J and others---Respondents

Writ Petitions Nos.21415 to 21419 of 2011, decided on 28th September, 2011.

(a) Punjab Rented Premises Act (VII of 2009)---

----Ss. 9(b) & 15---Constitution of Pakistan, Art. 199---Constitutional petition---Ejectment proceedings---Rent agreement not brought in conformity with provision of S. 5 of Punjab Rented Premises Act, 2009---Tenant's plea that Rent Tribunal had no jurisdiction to entertain ejectment petition---Order of Tribunal dismissing ejectment petition set aside by Appellate Court remanding case to Rent Tribunal for its decision afresh after having compliance of S. 9(b) of Punjab Rented Premises Act, 2009---Validity---Tribunal after having case on its file and before assuming jurisdiction had to seek compliance of S.9(b) by directing one of parties to deposit penalty in terms thereof---Tribunal in case of non-compliance of such order would not have jurisdiction to enter ejectment petition---Intention of law had never been to non-suit a party without affording him an opportunity to comply with provision of law---Appellate Court in remanding case had advanced cause of justice in its true spirit---High Court dismissed constitutional petition in circumstances.
Allah Ditta Sajid v. Muhammad Saleem Qureshi and others (C.P. No.3490-L 2010); PLD 1984 SC 289 and Muhammad Faiz and another v. Ch. Yaqoob Hussain and others PLD 2010 Lahore 197 rel.

(b) Administration of justice---

----Intention of law had never been to non-suit a party without affording him an opportunity to comply with provision of law.
PLD 1984 SC 289 rel
Mirza Hafeez-ur-Rehman for Petitioner

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---By this single order, Writ Petitions Nos.21415 of 2011, 21416 of 2011, 21417 of 2011, 21418 of 2011 and 21419 of 2011 are proposed to be disposed of due to commonality of the landlords of the rented premises and similarity in the impugned orders.

2. In all these five cases, different petitioners had assailed the orders of learned Special Judge (Rent), Lahore dated 14-4-2009 and 20-12-2010 in appeals before the learned first appellate court which were accepted vide order dated 14-9-2011, remanding cases to learned Rent Tribunal for deciding ejectment petitions afresh after having compliance of section 9(b) of the Punjab Rented Premises Act, 2009. This finding was given by appellate

court keeping in view an unreported judgment of apex court delivered on 26-5-2011 in the case of Allah Ditta Sajid v. Muhammad Saleem Qureshi and others (C.P. No.349-L-2010). The order is impugned in the instant petitions.

3. The main ground alleged in the petitions is that the ejectment petitions were not entertainable as the rent agreement was not brought in conformity with section 5 of the Punjab Rented Premises Act, 2009, thus appellate court has misconstrued the judgment of apex court.

4. The petitioners have relied upon the judgment of Apex Court to say that the petitions were not entertainable under section 9 of the Act (ibid) but this argument of the learned counsel is not entertainabie for the simple reason that if judgment of the Apex Court is read minutely, it would show that Rent Tribunal before assuming jurisdiction has to seek compliance of section 9 of the Act (ibid) by directing one of the parties to deposit penalty as prescribed in law. The order of the Apex Court reads as followed:--

"The Rent Tribunal was not competent to assume jurisdiction before directed the respondent/ landlord and to deposit a fine equivalent of the annual value of the rent of the premises in terms of section 9(b) of the Act. Underline is mine."

This sentence in the judgment clears the intention of Apex Court that court has to pass an order in terms of section 9(b) before assuming jurisdiction. This finding in judgment does not support contention of the counsel that ejectment petitions were not entertainable by Rent Tribunal. The court after having case on its file is to pass such order which if not complied with, then court lacks jurisdiction and ejectment petitions are not entertainable. In case in hand, this irregularity committed by Rent Tribunal was cured by appellate court by ordering compliance of requirement of section 9(b) of the Act (ibid). It is never intention of law to non-suit a party without affording it reasonable opportunity to comply with relevant provision of law. In this connection guidelines have been provided in the judgment of Apex Court reported as (PLD 1984 Supreme Court 289) wherein it was held that a plaint cannot be rejected on the ground of non-fixation of court-fee unless a court determines amount of court-fee and directs a plaintiff to affix same on a plaint by certain date and then to reject plaint in case of non-compliance of direction. In the judgment, earlier judgment given in Walayat Khatoon's case, was over-ruled whereby plaint was held to be not entertainable if deficiency in court-fee is not made up by the plaintiff. This ratio was adopted by this court in the case of Muhammad Faiz and another v. Ch. Yaqoob Hussain and others (PLD 2010 Lahore 197). In this situation, learned court did not commit any illegality in remanding the cases rather has advanced cause of justice in its true spirit.

5. For what has been discussed above, the petitions failed and are dismissed in limine.

S.A.K./S-156/L Petitions dismissed.

2012 Y L R 202

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi, J

Mian MUHAMMAD MUZAFFAR---Petitioner

versus

MEMBER BOARD OF REVENUE/ CHIEF SETTLEMENT COMMISSIONER, PUNJAB and 6 others---Respondents

Writ Petitions Nos. 144-R of 2004 and 163-R and 35-R of 2005, decided on 29th June, 2011.

Evacuee Property and Displaced Persons Laws (Repeal) Act (XIV of 1975)---

----Ss. 2 & 3---Constitution of Pakistan, Art.199---Constitutional petition---Transfer of evacuee property---House in dispute was placed in the Earmarking Scheme of Settlement and Rehabilitation Department and a female succeeded in earmarking---Said lady associated with her nephew by way of an Association Deed and surrendered all her rights in his favour and a P.T.D. for the same was issued in his favour---Later on, Settlement Department marked a portion of said house a separate number and made it available for auction, which action of the department was challenged by said transferee and finally Supreme Court accepted the claim of the transferee and disputed portion was restored in his favour---Executive District Officer (Revenue)/Notified Officer by way of impugned order recommended that the transfer of entire house be issued in favour of successors of transferee---Notified Officer passed impugned order after spot inspection and after hearing the parties---Notified Officer after examining the pros and cons of the case, jotted down the objection raised by the parties, had very comprehensively determined the question of the measurements of the excess area in question; and had rightly recommended the issuance of transfer order in favour of transferee of the house---In absence of any reason, the findings of fact recorded by the Notified Officer, could not be interfered with by High Court, in constitutional petition---Constitutional petition was dismissed.

1988 SCMR 1001 rel

Mian Zahid-ur-Rehman for Petitioner

Mehmood Ahmed Bhatti for Respondents

Date of hearing: 14th June, 2011

JUDGMENT

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.--In Writ Petition Nos.144-R/2004, 163-R/ 2005 and 35-R/ 2005 an order dated 3-7-2004 passed by Ch. Ghulam Nabi, Executive District Officer (Revenue)/ Notified Officer, Sialkot has been assailed, therefore, these are being disposed of by this single judgment.

2. The dispute between the parties is in respect of Bungalow bearing Survey No.1/1299, situated at Paris Road, Sialkot, which was placed in the Earmarking Scheme of Settlement and Rehabilitation Department in the year 1959. Mst. Kalsoom-un-Nisa succeeded in

earmarking on 13-12-1959. She associated with her real nephew Muhammad Ismail Qureshi by way of Association Deed, processor-in-interest of the respondents in the writ petitions and surrendered all her rights in his favour. Consequently, a PTD for the house was issued in his favour on 7-1-1960. The Settlement Department then marked a portion of the property by a separate number and made it available in the auction, which action of the department was challenged by Muhammad Ismail Qureshi through a civil suit praying for restraining the department for auctioning any portion of the property allotted to him.

3. Later on one Ghulab Din, who was in possession of outhouse filed an appeal before Addl. Settlement Commissioner, Lahore against the transfer of the house in favour of Muhammad Ismail Qureshi. It is pertinent to mention at this juncture that in the said appeal Muhammad Ismail Qureshi was not impleaded as a party and in his absence the appeal was accepted by the Addl. Settlement Commissioner. This order of the Addl. Settlement Commissioner was assailed before the Settlement Commissioner in revision petition, which was dismissed being barred by limitation and the matter was further assailed in the writ petition in this Court, which was also dismissed on the ground that the petition suffered from laches. The matter was then taken up by the Apex Court through Civil Appeal No.150 of 1975, which was accepted by the Hon'ble Supreme Court vide judgment dated 19-3-1988, reported as 1988 SCMR 1001. It was observed by their Lordships that the order of allotment procured by Ghulab Din was obtained in the absence of the allottee Muhammad Ismail Qureshi, who was not heard by the Addl. Settlement Commissioner, consequently the appeal was accepted and the house originally allotted to Mst.Kalsoom-un-Nisa was restored in favour of Muhammad Ismail Qureshi.

4. During the course of the litigation Ghulab Din surrendered his rights in property allotted to him in favour of one Mian Muhammad Ismail, now represented through legal heirs, the petitioners, Dr. Khalida Ismail and Mian Muhammad Muzaffar and others. Afterwards Mian Muhammad Ismail applied for the transfer of the surplus land in his favour while Muhammad Ismail Qureshi submitted an application for transfer of the property as restored by apex Court in his favour. The request of Mian Muhammad Ismail was turned down by the Settlement Department while the request of Muhammad Ismail Qureshi was accepted by the Member, Board of Revenue/Chief Settlement Commissioner, Punjab, vide order dated 26-12-1992. Prior to this order the Addl. Deputy Commissioner (General)/Notified Officer, Sialkot vide order dated 3-6-1990 after carrying out the measurements recommended the transfer of the property in favour of Muhammad Ismail Qureshi.

5. In Writ Petition No.33-R/1993 the order of Chief Settlement Commissioner/ Member, Board of Revenue dated 26-12-1992 regarding the allotment of the property in favour of Muhammad Ismail Qureshi was assailed. That writ petition was accepted by this Court vide order dated 24-10-2001 determining the fact that the out house attached with the house allotted to Muhammad Ismail Qureshi was not part of that house, thus remitted the case to the Notified Officer having jurisdiction in the matter to calculate and determine the excess area and dispose of the same in accordance with law. After the remand of the case the matter was taken up by Ch. Ghulam Nabi, Executive District Officer (Revenue), Sialkot and after hearing the concerned parties he by way of the impugned order recommended that

the transfer order of entire Bungalow No.1/1299, Paris Road, Sialkot be issued in favour of successors of Muhammad Ismail Qureshi.

6. The petitioners in all these three petitions being dissatisfied with the verdict of the Notified Officer/Executive District Officer (Revenue) have assailed the same in the instant three constitutional petitions, separately.

7. Learned counsel for the petitioners including learned Addl. Advocate-General have attacked the impugned order mainly on the ground that the Notified Officer had been de-notified, as such it was not within his jurisdiction to decide the matter on 3-7-2004; that Mian Muhammad Muzaffar etc. was not heard by the learned Notified Officer, as such he has been condemned unheard; that the Notified Officer before passing the impugned order did not visit the site, as such measurements given by him are presumptive; that the Notified Officer did not comply with the terms of remand order passed by this Courtdated 24-10-2001, as such the same is bad in law and that the Notified Officer did not determine the genuineness of Association Deed executed by Mst. Kalsoom-un-Nisa in favour of Muhammad Ismail Qureshi. According to the learned counsel the same was fabricated after the death of the lady, who did not appear before the Settlement Authorities for making her statement. Learned counsel have also cited the case law in support of their submissions.

8. Learned counsel for the private respondents while supporting the order of the Notified Officer submitted that on the day on which the impugned order was passed Ch. Ghulam Nabi was very much a Notified Officer, who had also inspected the spot and heard the parties at length, comprehensively determined the point in issue vide order assailed in these writ petitions. It is further contended by the learned counsel for the respondents that the matter of execution of Association Deed by Mst. Kalsoom-un-Nisa in favour of her real nephew was not the mandate of the order dated 24-10-2001 and was a past and closed transaction, as such it was not within the jurisdiction of the Notified Officer to comment upon the same.

9. Anxious thoughts have been given to the submissions made by the learned counsel for the parties and with their able assistance the whole record of the case along with the case-law cited at the bar has been examined thoroughly.

10. Learned counsel for the petitioners in support of his first submission has provided this Court a better copy of extraordinary issue of the Punjab Gazette dated 7-7-2004 whereby the powers of Notified Officer were bestowed upon the Member (Judi-II) of Board of Revenue, Punjab. The examination of this notification dated 7-7-2004 shows that the same was effective from the date of its issuance and was not retrospective in its effect, as such the order passed by the Notified Officer on 3-7-2004 was very much within his jurisdiction to decide the matter. Besides this notification the petitioners could not convincingly establish that the Notified Officer did not pass the order on the date mentioned therein, therefore, the argument of the learned counsel is repelled.

11. The other contention of the learned counsel that Mian Muhammad Muzaffar was condemned unheard and the order dated 3-7-2004 was passed at his back has also no

substance for the reason that throughout the proceedings initiated by the petitioners after the death of their predecessor-in-interest Mian Muhammad Ismail, Maj. (R) Pervaiz Iqbal is prosecuting the matter on behalf of his wife Mst. Khalida and others. Mian Muhammad Muzaffar is also one of those persons on whose behalf said Maj. (R) Pervaiz lqbal conducted the proceedings in the instant case also without any objection from either party, which is reflected from the order sheet appended with the writ petition. During all these proceedings after the remand only the attendance of the Maj. (R) Pervaiz Iqbal has been marked while none of the other legal heirs of Mian Muhammad Ismail have appeared before the Notified Officer

12. Coming to the third submission of the learned counsel for the petitioners that the Notified Officer passed the order without inspecting the site, after the examination of the record this contention proves to be fallacious. The order sheet reveals that on 31-1-2004 it was recorded by Notified Officer that the case was adjourned for the spot inspection and arguments to 17-2-2004. On the adjourned date the staff of the Building Department was not present due to which the site could not be inspected, which was then inspected on 13-3-2004 in the presence of Maj. (R) Pervaiz Iqbal, who was present at that stage. An Advocate and Dilawar Hussain Head Clerk Settlement were also present. The Notified Officer recorded the statement of Maj. (R) Pervaiz Iqbal and Mr. Maqsood Ahmad, Advocate, counsel for Muhammad Ismail Qureshi and also heard the partial arguments of the parties. In the presence of this record, which enjoys presumption of truth, the argument of the learned counsel for the petitioners has no legs to stand.

13. It is also wrongly argued on the side of the petitioners that the Notified Officer did not comply with the directions contained in order of this Court dated 24-10-2001. It was not pointed out during the course of arguments as to which point had not been considered by the Notified Officer about which he was directed by this Court. It appears that it was an argument for the purpose of an argument and nothing else. Last ground of the petitioners is that the Notified Officer did not determine the genuineness of the Association Deed executed by Mst. Kalsoom-un-Nisa in favour of Muhammad Ismail Qureshi. It is noted that the Hon'ble Supreme Court in the reported case supra between the same parties after accepting the Association Deed of Mst.Kalsoom-un-Nisa with Muhammad Ismail Qureshi restored the allotment in favour of the latter, thereafter it was not within the jurisdiction of any Court or Tribunal to ponder upon the question of determination of the Association Deed. The Notified Officer had rightly did not touch this point, which was settled by the Apex Court in its reported judgment.

14. The Notified Officer after examining the pros and cons of the case jotted down the objections raised by the parties, has very comprehensively determined the question of the measurements of the excess area and has rightly recommended the issuance of transfer order in 'favour of Muhammad Ismail Qureshi. This Court sees no reason to interfere into the findings of fact recorded by the Notified Officer.

15. For the foregoing, these petitions bereft of merits are dismissed with costs.

H.B.T./M-257/L Petition dismissed.

2012 Y L R 1288

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi, J

MUHAMMAD WARIS---Petitioner

Versus

D.P.O. and others---Respondents

Writ Petition No.4383 of 2012, decided on 24th February, 2012.

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

----Ss. 22-A, 22-B & 154---Penal Code (XLV of 1860), S.489-F---Constitution of Pakistan, Art 199---Constitutional petition---Dishonestly issuing cheque---Registration of F.I.R.---Accused (respondent) had allegedly borrowed money from the complainant (petitioner), but refused to return the same---Punchayat was constituted to resolve the controversy between the parties and complainant and accused, both handed over blank cheques to the arbitrator---Arbitrator could not resolve the matter between the parties and handing over of cheques as security was recorded in the register of petition writer---Contention of complainant that accused violated the terms of entry made in the register and refused to return the borrowed amount and instead lodged an F.I.R. against the complainant on basis of cheque submitted to the arbitrator, which was dishonored on presentation---Application of complainant for registration of case against accused submitted before Justice of Peace was declined on the grounds that complainant himself was facing a case regarding dishonouring of cheque---Validity---Station House Officer (S.H.O.) was bound to perform his duties in accordance with law and when any matter regarding commission of cognizable offence was reported to him, he had to register the F.I.R. in terms of S. 154, Cr.P.C, but the condition precedent was that commission of a cognizable offence be reported or statement made by informant should be in respect of a cognizable offence---In the present case, application filed by complainant before S.H.O. did not disclose any commission of cognizable offence---Complainant had delivered the cheque as a security to the arbitrator appointed by both the parties with their free-will and cheque was not issued for any consideration either by the complainant or the accused, therefore, it could not be said that cheque was issued by the opposite party for consideration or with dishonest intention---Order passed by Justice of Peace did not suffer from any legal infirmity---Constitutional petition was dismissed.

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

----S. 154---Information in cognizable cases---Scope---Station House Officer (S.H.O.) was bound to perform his duties in accordance with law and when any matter regarding commission of cognizable offence was reported to him, he had to register the F.I.R. in terms of S. 154, Cr.P.C, but the condition precedent was that commission of a cognizable offence should be reported or statement made by informant should be in respect of a cognizable offence.

Rana Nadeem Ahmad for Petitioner.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Through the instant constitutional petition, the petitioner has assailed the legality of order dated 7-2-2012 passed by the learned Additional Sessions Judge/Ex-Officio Justice of Peace, Jhang whereby the application filed under sections 22-A and 22-B, Cr.P.C. seeking direction to the Station House Officer, Police Station Kotwali, District Jhang for registration of the case against the delinquents was declined.

2. The petitioner filed an application to the Station House Officer with the assertion that Muhammad Ishaq had borrowed Rs.11,00,000 from the petitioner which he paid by getting en cashed his two cheques and a cheque of Rs.1,00,000 was also handed over to him. The said Muhammad Ishaq on the demand of the petitioner for return of the amount agreed to sell his land in lieu of the amount but subsequently, he refused. In this connection for return of the amount, a civil suit was filed in the Civil Court. It is further alleged in the application that to resolve the controversy between the parties, a Punchayat was also constituted in which both the parties i.e. the petitioner and Muhammad Ishaq handed over blank cheques to the arbitrator. Later on, the arbitrator did not resolve the matter between the parties. The matter of handing over the cheques as security was recorded in the register of petition writer. According to the petitioner, the respondent Muhammad Ishaq violated the terms of entry made in the register and refused to return the amount rather lodged a counter claim of Rs.15,00,000 against the petitioner. With these allegations, the petitioner prayed for the registration of case against Muhammad Ishaq and others.

3. The learned Additional Sessions Judge/Ex-Officio Justice of Peace after examining the record and securing the report from the S.H.O. of the police station concerned observing that the petitioner was facing a case regarding dishonouring of the cheque, declined the request of the petitioner.

4. It is contended by the learned counsel for the petitioner that the Station House Officer of said police station was bound to record the statement of the petitioner under section 154 of the Cr.P.C. and then to investigate the same but before that, he submitted the report in the court mentioning that an F.I.R. was registered against the present petitioner. He further argued that the learned Justice of Peace has committed illegality in not issuing the direction to the S.H.O. for recording the statement of the petitioner. In this connection, learned counsel has cited the cases of Muhammad Bashir v. The State (PLD 2007 SC 539) and Khalid Mehmood v. S.H.O. Police Station Jaranwala, District Faisalabad (2011 YLR 2284).

5. There is no cavil to the proposition that Station House Officer of a police station is bound to perform his duties in accordance with law and when any matter regarding commission of cognizable offence is reported to him, he has to register the F.I.R. in terms of section 154, Cr.P.C. Before doing this exercise, the condition precedent is that commission of a cognizable offence should be reported or in other words the statement made by informant should be in respect of a cognizable offence. In the instant case, it is noticed that when the petitioner filed application to the Station House Officers, the same does not disclose any

commission of cognizable offence. Admittedly, the petitioner had delivered the cheque as security to the arbitrator appointed by both the parties with their free-will and the said cheque was not issued for any consideration either by the petitioner or the respondent. In this manner, it cannot be said that the cheque in question was issued by the opposite party for consideration or with this dishonest intention. This submission of the petitioner that according to the record of the petition writer, the cheque was issued by the petitioner to the arbitrator which allegedly was handed over by them to the prospective accused and on the basis of that cheque, an F.I.R. had lodged against the present petitioner under section 489-F, Cr.P.C. can be agitated by the petitioner before the forum where the matter is pending. The contents of the petition further discloses that the dispute between the parties is in respect of return of money and the cheque allegedly issued as a security, for the recovery of which amount as well as the cheque, criminal machinery cannot be set into motion. In the case-law cited by the petitioner, it is so held by the apex court that the Station House Officer of the Police Station is bound to register the case if commission of cognizable offence is made out from the application or the statement of the informant. This condition is lacking in the application filed by the petitioner before the Station House Officer.

6. In view of this position, it can be said that the order passed by the learned Additional Sessions Judge/Ex-Officio Justice of Peace does not suffer from any legal infirmity as observed by the apex court in the case of Rai Ashraf and others v. Muhammad Saleem Bhatti and others (PLD 2010 SC 691) that the petitioner has the alternate remedy of instituting a criminal complaint if so advised.

7. For the foregoing reason, the petition in hand having no merit is dismissed.

M.W.A./M-65/L Petition dismissed.

2012 Y L R 1342

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi, J

MUHAMMAD TARIQ and others---Petitioners

versus

THE STATE and another---Respondents

Criminal Miscellaneous No.1906-B of 2012, decided on 2nd March, 2012.

Criminal Procedure Code (V of 1898)---

----Ss. 498---Penal Code (XLV of 1860), Ss. 420/ 468/ 471--- Cheating and dis-honestly inducing delivery of property, forgery for purpose of cheating, using as genuine a forged document---Pre-arrest bail, confirmation of---Civil dispute between the parties concerning an agreement to sell was pending---F.I.R. had been lodged with a delay of two years---According to the contents of the agreement between the parties, Rs. one crore was allegedly paid by the accused to the complainant for the purchase of the land in dispute---Enforcement of such agreement was subject-matter of the civil suit between the parties,

where the court had to determine its genuineness and validity---Anomaly would be created in the case if High Court convicted accused for an offence charged in the F.I.R. and sentenced them, holding the agreement to sell to be forged, and on the other hand civil court granted a decree of specific performance of the same agreement in favour of the accused holding the same to be valid and enforceable---Criminal proceedings, in such circumstances would prove to be a futile exercise and wastage of time---Civil court was the competent forum for the determination of the genuineness of the document and also had the power to set aside the same if the document in question was not proved in accordance with the law---Court also enjoyed the jurisdiction to initiate criminal proceedings against the person found involved in the fabrication of document in question, if it was adjudged to be a fabricated one---Perusal of case record showed that the complainant, in order to usurp the amount paid by the accused persons had lodged the present case against them---Application of accused persons was allowed and interim pre-arrest bail already granted to them was confirmed.

Mian Muhammad Aslam for Petitioner.
M. Ishaq, D.P.-G. along with Abdul Haq A.S.-I. For the State.
Syed Mumtaz Hussain Bukhari for the Complainant.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Muhammad Tariq, Noor Ahmad and Allah Ditta petitioners pray for grant of anticipatory bail in a case F.I.R. No. 31 dated 20-1-2012 registered under sections 420, 468, 471, P.P.C. with Police Station, Pir Mehal District Toba Tek Singh for forging an agreement to sell.

2. Heard.

3. It is noticed that the occurrence had taken place on 22-11-2010 but the F.I.R. has been lodged with the delay of two years i.e. on 20-1-2012. The petitioners on the basis of agreement to sell had instituted a suit for specific performance of argument on 22-2-2011 against the complainant party. After having knowledge of institution of civil suit on the basis of same agreement to sell, the complainant did not approach the court for setting into motion the criminal machinery against the petitioners. According to the contents of the agreement Rs.one crore was paid by petitioners to the complainant for the purchase of the land in dispute and some of the money was transferred into the account of the complainant through on line banking. Enforcement to that agreement is subject-matter of the civil suit where the court shall determine its genuineness and validity. Anomaly can be created in case the court convicts the petitioners for an offence charged in the F.I.R. and sentenced them, holding that the agreement to sell was forged document, whereas the other side picture could be that a civil court may grant a decree of specific performance of that agreement to sell in favour of the petitioners holding the same as valid and enforceable document. In this situation whole of the criminal proceedings would prove as futile exercise and wastage of precious public time. Needless to say that the civil court is competent forum for the determination of the genuineness of the document which also enjoys a power to set aside the same if that document is not proved in accordance with law. Further the court also enjoys the jurisdiction to initiate criminal proceedings against the person found involved in

the fabrication of that document adjudged to be a fabricated one. According to the record, the petitioners had made payment of huge amount to the complainant party and it appears that the complainant in order to usurp the amount: had lodged the instant case against the petitioners. In this scenario the detention of the petitioners in jail would not serve ends of justice, rather would cause harassment and humiliation to the petitioners.

4. In these circumstances, this petition is allowed and interim pre-arrest bail already granted to the petitioners vide order dated 13-2-2012 is confirmed subject to their furnishing bail bonds in the sum of Rs. One million each with two sureties each in the like amount to the satisfaction of learned trial court.

M.W.A./M-72/L Bail confirmed.

2012 Y L R 1636

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi, J

ABDUL WAHAB---Petitioner

versus

THE STATE and others---Respondents

Criminal Miscellaneous No.1 of 2012 in Criminal Appeal No.2154 of 2009, decided on 29th March, 2012.

Criminal Procedure Code (V of 1898)---

----S. 426(1-A)(c)---Penal Code (XLV of 1860), Ss. 302(b), 324, 337-A(ii), 337-F(i), 337-F(v) & 34---Qatl-e-amd, attempt to commit qatl-e-amd, shajjah-i-mudihah, ghayr-jaifah-damiyah, ghayr-jaifah-hashimah, common intention---Suspension of sentence on the ground of statutory delay in decision of appeal---Scope---Contention of accused (petitioner) that three years had elapsed and his appeal had not come up for hearing for no fault of his, and that his role was at par with his co-accused, who had already been admitted to bail on basis of suspension of their sentences---Validity---Concession provided in S. 426(1-A)(c), Cr.P.C, could not be extended to a person who was a desperate or hardened criminal---Statements of one of the prosecution witnesses, in the present case, hadrevealed that accused initiated the attack and at first instance inflicted four injuries with his "sarya" on the head of the deceased, and such fact was supported by the medico-legal report as well as the post-mortem report which showed the desperation of the accused while committing the offence---No other accused had been nominated for causing head injuries to the deceased---Complainant had also filed a criminal revision, praying for the enhancement of sentences awarded to the accused which was pending in the High Court and was to be taken up with the appeals of the accused and his co-accused---Petition for suspension of sentence was dismissed, in circumstances.

Syed Ijaz Qutab for Petitioner.

Muhammad Ishaq, Deputy Prosecutor General Punjab for Respondent.

Ghulam Murtaza Khan Ch. for the complainant.

ORDER

CRL. MISC. NO.1-2012

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Criminal Miscellaneous No.1 of 2012, filed by the petitioner Abdul Wahab in Criminal Appeal No.2154 of 2009, is proposed to be disposed of. The petition has been filed seeking suspension of the sentence awarded to the petitioner vide judgment dated 23-11-2009, on the ground of delay in decision of the appeal within the statutory period of two years.

2. The petitioner along with his other co-accused was tried in case F.I.R. No.166 of 2008, dated 26-5-2008, registered under sections 302, 324, 337-A(ii), 337-F(i), 337-F(v), 148, 149, 34, P.P.C. with Police Station Zafarwal District Narowal. The learned Trial Court vide judgment dated 23-11-2009, held the petitioner responsible for committing Qatl-e-Amd of Muhammad Aqeel and byconvicting him under section 302(b), P.P.C. awarded sentence of imprisonment to life. The co-accused Amir Sohail and Muhammad Bilal were also awarded same punishment. All the three were also convicted under sections 324, 337-A(ii), 337-F(i), 337-F(v) read with section 34, P.P.C. for causing injuries with the blunt weapons to Maqbool Hussain injured P.W. and inflicted different other sentences as narrated in the judgment. The above said conviction has been assailed by the petitioner in Criminal Appeal No.2154 of 2009, which appeal is awaiting decision up-till now.

3. Mian Muhammad Ashraf, P.W.15, the complainant of the case and father of Muhammad Ageel, deceased, reported the matter to the police mentioning that the petitioner Abdul Wahab armed with Sarya, Amir and Usman armed with dagger (Khanjar), Fahad armed with rod, Bilal armed with iron pipe, Umar armed with Chhurri, Shoaib and Noman armed with sotas along with three unknown persons armed with pistols launched murderous assault upon his son Muhammad Aqeel. Abdul Wahab and Amir Sohail, raised lalkara and inflicted sarya blows on the head of the deceased who fell on the ground whereafter the other co-accused started beating with their respective weapons.

4. It is pertinent to mention that sentences inflicted upon Amir Sohail, co-accused were suspended by this court vide order dated 10-6-2010, passed in Criminal Miscellaneous No.1 of 2010 while the sentence awarded to Muhammad Bilal, co-accused was also suspended on 3-2-2012, passed in Criminal Miscellaneous No.591-M of 2011.

5. While taking the concession awarded by subsection (1)(A) of section 426, Cr.P.C., the learned counsel for the petitioner submitted that three years have elapsed but till-date the appeal of the petitioner has not come up for hearing and could not be decided within this period for no fault of the petitioner, thus, he is entitled for the protection of law as narrated above. He further submitted that the head injuries received by the deceased were caused with blunt weapons with which allegedly the petitioner and co-accused Bilal and Fahad were armed, thus, it cannot be said that the petitioner was

solely responsible for causing head injuries to the deceased. He further submitted that Amir Sohail and Muhammad Bilal, co-accused have been admitted to bail by this court and the role of the petitioner is at par with them, thus, he is also entitled for the same treatment.

6. The petition has been resisted by the learned counsel for the complainant arguing that the petitioner had raised commanding Lalkara and started the occurrence by inflicting Sarya blows at the head of the deceased, thus, his case is not at par with his co-accused. He further submitted that according to postmortem report, the deceased had received four injuries at his head caused with blunt weapons which were caused by the petitioner, thus, he acted in a desperate and dangerous manner, as such, is not entitled for the concession enunciated by the law. Further added that P.W.15 in his statement had specifically nominated the petitioner for causing four injuries at the head of his son who after receiving the same fell on the ground whereafter the other co-accused gave general beating with their respective weapons. He prayed for dismissal of the application.

7. Parties heard. Record perused.

8. No doubt by virtue of amendment made in section 426, Cr.P.C. subsec-tion (1)(A) has been added by the Code of Criminal Procedure (Amendment) Act, 2011, providing a concession to the convicts whose appeals could not be decided within the statutory period of two years, for being released on bail till the decision of their appeals but there is a qualification provided by the said subsection for availing the concession provided in sub-clause (c), to the effect that such concession cannot be extended to a person who is a desperate or hardened criminal. Undeniably, the appeals filed by the petitioner could not be decided within the time span provided by law and he could be entitled for such concession but the case of the petitioner falls within the proviso attached with the section supra as according to the statement of P.W.15, the petitioner had initiated the attack and at first instance gave four injuries with his Sarya at the head of the deceased. No other convict has been nominated for causing head injuries. This fact is supported by the medico-legal report as well as the postmortem report which shows the desperateness of the petitioner while committing the offence. Further more, the complainant of the case has also filed criminal revision praying for enhancement of sentence awarded to the petitioner which is also pending in this court and is to be taken up when they appeals are fixed for regular hearing. The learned counsel for the petitioner has placed reliance upon various judgments of this court as well as of the august Supreme Court of Pakistan to say that release on bail is a statutory right of a person but in those cases the convicts were not found to have acted in a desperate or dangerous manner, thus, the case-law is of no help to the petitioner.

9. For what has been said above, the instant petition having no merits is **dismissed**.

M.W.A./A-62/L Petition dismissed.

2012 YLR 2244
[Lahore]
Before Syed Muhammad Kazim Raza Shamsi, J
IKRAM ULLAH KHAN---Petitioner
Versus
THE STATE and 3 others---Respondents

Writ Petition No.16089-Q of 2011, decided on 8th February, 2012.

Penal Code (XLV of 1860)---

----Ss. 420/468/471---Constitution of Pakistan, Art. 199--- Constitutional petition--- Cheating, forgery, using as genuine a forged document---Quashing of F.I.R.---Proposed action in the impugned F.I.R. depended on the result of the decision of the civil suit filed by the petitioner for specific performance of an agreement to sell---Till the decision of the civil suit, further proceedings in the challan case would be abuse of process of law and wastage of public time---Proceedings in the challan case initiated in pursuance of the impugned F.I.R. were, consequently, stayed till the decision of the regular first appeal presently pending in the High Court regarding the civil dispute between the parties---After decision of the appeal, parties would be at liberty to seek restoration of the proceedings in the aforesaid F.I.R.---Constitutional petition was disposed of accordingly.

Akhlaq Hussain Kayani v. Zafar Iqbal Kiyani and others 2010 SCMR 1835 rel.

Rai Muhammad Hussain Kharal for Petitioner.
Wali Muhammad Khan, Assistant Advocate-General Punjab along with Zafar, A.S.-I.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Through the instant Constitutional petition, the petitioner prays for quashment of F.I.R. No.82 of 2011 dated 10-5-2011 registered under sec-tions 420, 468, 471, P.P.C. with Police Station Mankera District Bhakkar.

2. According to the facts of the case, one Mst. Sughra Bibi had agreed to sell her landed property to one Muhammad Zubair Khan but she did not honour the agreement whereupon a suit for specific performance was filed in the learned Civil Court where the same was dismissed and the matter is now pending in this court vide R.F.A. No.466 of 2011. It is the case of the petitioner that the lady again sold about 80-Kanals of land to one Abdul Sattar Khan who got a direction from the learned Additional Sessions Judge/Ex-Officio Justice of Peace for registration of case against the petitioner and consequently F.I.R. No.82 of 2011 dated 10-5-2011, stood registered against the petitioner and others. It is the contention of the learned counsel for the petitioner that the disputed F.I.R. is based upon mala fide of the complainant of the same as the petitioner party is the prior purchaser of land in dispute from Mst. Sughran Bibi.

3. The learned Law Officer assisted by Zafar, A.S.-I. pointed out that Challan in the case has been submitted in the court, as such the petitioner may avail his legal remedy before the learned trial Court. The learned counsel for the petitioner facing with this situation while relying upon the case reported as "Akhlaq Hussain Kayani v. Zafar Lobal Kiyani and others" (2010 SCMR 1835) submitted that in such like situation, proceedings in the criminal matter has been advised to be stayed till decision of civil matter.

4. After examining the contentions of the learned counsel for the parties as well as the case law cited at the bar, there is no cavil to the proposition that a proposed action in the F.I.R. under dispute is dependent upon the result of the decision of the suit filed by the petitioner for specific performance of an agreement to sell. Till the decision of that suit, further proceedings in the Challan case would be abuse of process of law and wastage of public time, as such, keeping in view the guidance provided in the case of Akhlaq Hussain supra, the proceedings in the Challan submitted in case F.I.R. No.82 of 2011 dated 10-5-2011 registered under sections 420, 468, 471, P.P.C. with Police Station Mankera District Bhakkar are stayed till the decision of Regular First Appeal pending in this court. After decision of the appeal, the parties shall be at liberty to seek restoration of the proceedings in the above said F.I.R.

5. In view of the above, the petition stands disposed of in the light of observations made in the judgments.

NHQ/I-18/L Order accordingly.

2012 YLR 2458

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi, J

MAHMOOD RIAZ---Petitioner

Versus

KHAN BAHADUR SHEIKH MUHAMMAD NAQI, WAQF through Mutwallis and 3 others---Respondents

Writ Petition No.16360 of 2011, heard on 12th October, 2011.

Civil Procedure Code (V of 1908)---

---S. 12(2) & O. VI, R. 4---Constitution of Pakistan, Art. 199---Constitutional petition---Application under S. 12(2), C. P. C. against alleged fraud and misrepresentation---Procedure-Counsel for applicant had argued that it was incumbent upon the courts below while deciding the application under S.12(2), C.P.C. to frame 'issues and decide the application after recording the evidence of the parties as the allegation of fraud had been alleged therein---Validity---Mere mentioning the word `fraud' in the application, was not sufficient to believe that some fraud was actually committed; and order impugned was obtained by misrepresentation---Order VI, R.4, C.P.C. required that

particular of fraud mandatorily be specified in application--In the present case such particulars were not mentioned---Documents available on record had shown that lease deed in question was never executed by the respondent in favour of the 'applicant---Courts below, in circumstances, had not committed any illegality in dismissing the application of applicant.

Muhammad Akram Malik v. Dr.. Ghulam Rabbani and others PLD 2006 SC 773; Zahida Bibi and 4 others v. Nayyar Sultana and 15 others PLD 2009 Lah. 168; Lahore' Development Authority v. Arif Manzoor Qureshi and others 2006 SCMR 1530; Government of Pakistan through Secretary, Cabinet Division and another v. Dr. M. Akbar Rajput 2011 SCMR 1298; Asifa Khanum through L.Rs v. Sheikh Abdul Ghafoor through L.Rs. 2009 CLC 1089; Khadim Mohy-ud-Din and Mrs. S. Mahmud v. Ch. Rehmat Ali Nagra and Mst.' Aziz Begum PLD 1965 SC 459; Taj Muhammad and others v. Ali Hassan Wanghi and others 1987 SCMR 565; Pakistan State Oil Company Limited v. Sikandar A. Karim and others 2005 CLC 3;, Minochar N. Kharas represented by Legal Heirs v. Ali Hassan Manghi and 6 others 1986 CLC 1378; Messrs Noorani Travels, Karachi v. Muhammad Hanif and others 2008 SCMR 1395 and Muhammad Shafi and 13 others v. Muhammad Farooq and 3 others 1989 CLC 937 ref.

Jehangir A. Jhoja for Petitioner.

Sh. Muhammad Umar for Respondents.

Date of hearing: 12th October, 2011.

JUDGMENT

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---This constitutional petition is directed against an order dated 6-7-2011 passel by Muhammad Qasim the learned Additional District Judge Lahore whereby he maintained the order dated 2-12-2009 passed by Arif Mehmood Khan learned Special Judge Rent whereby an application filed by the petitioner under section 12(2), C.P.C. was dismissed.

2. Facts of the case briefly stated are that Sheikh Razi-ud-Din and Sheikh Khalid Moeen-ud-Din being Matwali of Khan Bahadar Sheikh Muhammad Naqi. Wqaf etc. filed an ejectment petition under section 15 of Punjab Rented Premises Ordinance, 2007 against the one Abdul Hameed Khan in respect of Shop No. 81 Shahra-e-Quaid-e-Azam Lahore, alleging that property in dispute was rented out to the respondent at monthly rent of Rs. 5155 who paid the rent till March, 2007, thereafter from April,' 2007, he defaulted in the payment of rent. It was also alleged that without written permission of the petitioner the shop was subletted by the respondent who had also made structural changes in the rented premises without prior permission.

3. The respondent filed an applicatiqn seeking leave to contest the ejectment petition on the ground that he had vacated the premises on 2-4-2007 and handed over the possession to one Mehmood Riaz with the consent of the petitioner, as such he denied the existence of relationship of land-lord and the tenant between the parties.

4. The learned trial court vide order dated 23-9-2008 dismissed the leave application on the ground that the signatures on the lease documents allegedly executed by the landlord in favour of one Mehmood Riaz differ than the one available on the pleadings of the

case and that the documents were forged and fabricated to show the possession of Mehmood Riaz over the rented premises in order to avoid the liability of arrear of rent. Abdul Hameed did not assail the findings of the learned Rent Controller, in any further proceedings.

5. Subsequently on 6-1-2009 Mehmood Riaz filed an application under section 12(2), C.P.C'. before the learned Rent Controller, alleging that the landlord of the property had executed a lease deed in his favour on 17-4-2007 but he was not impleaded as a 'party in the ejectment petition against Abdul Hameed, as such, the order of the ejectment was obtained at. his back. The respondent-landlord contested the petition alleging that the document produced by the petitioner was never executed by him, as such, are fabricated and forged one.

6. The learned Rent Controller, after considering the submission of the parties dismissed the application holding that the petitioner Mehmood Riaz had fabricated the documents with the connivance of previous tenant Abdul Hameed.

7. The order so passed on the application was assailed in a revision petition before the learned Additional District Judge Lahore, who concurred with the findings of the learned Rent Controller, and dismissed the revision petition.

8. The learned counsel for the petitioner argued that it was incumbent upon the courts below while deciding the application under section 12(2), C.P.C. to frame issues and decide the application after recording the evidence of the parties as the allegation of fraud has been alleged therein. He further submitted that learned courts without having the help of any Hand-writing Expert themselves reached at a conclusion that the signatures of the respondent over the disputed document do not match with the pleadings of the parties, as such, the findings are incorrect. The learned counsel for respondent cited the cases of Muhammad Akram Malik v. Dr. Ghulam Rabbani and others (PLD-2006 SC 773), Zahida Bibi and 4 others v. Nayyar Sultana and 15 others (PLD 2009 Lahore 168), and Lahore Development Authority v. Arif Manzoor Qureshi and others (2006 SCMR 1530).

9. The learned counsel for respondent while controverting the contention, of counsel for the petitioner argued that the respondent had taken a ground of sub-letting in the ejectment petition asserting that property was given by Abdul Hameed without the permission of the respondent, as such, there was no need to implead the petitioner as a party in the ejectment petition; that the Rent acts under special law which do not provide any , special procedure for holding any inquiry in a particular manner, as such, the Tribunal has vast jurisdiction to adopt any procedure for reaching at a just conclusion and in this ,manner the courts while examining itself the signatures of the respondent on the documents relied upon by the petitioner had justifiably, concluded that the signatures were not in the hand-writing of the respondent which findings being unexceptionable are liable to be maintained. He further submitted that an ejectment order was' passed against Abdul Hameed, who did not challenge his eviction before any higher forum, as such, the said order has attained finality and cannot be assailed through

any subsequent proceedings. He also submitted that in the instant case there was no need to frame any issue or to record evidence of any party as the document itself speaks about forgery committed by the petitioner. The learned counsel has cited the case of Government of Pakistan through Secretary, Cabinet Division and another v. Dr. M. Akbar Rajput (2011 SCMR 1298), Asifa Khanum through L.Rs v. Sheikh Abdul Ghafoor through L.Rs. (2009 CLC 1089), Khadim Mohy-ud-Din and Mrs. S. Mahmud v. Ch. Rehmat Ali Nagra and Mst. Aziz Begum (PLD 1965 SC 459), Taj Muhammad and others?????? v. Ali Hassan Wanghi and others (1987 SCMR 565), Pakistan State Oil Company Limited v. Sikandar A. Karim and others (2005
CLC 3), Minochar N. Kharas represented by Legal Heirs v. Ali Hassan Manghi and 6 others (1986 CLC 1378), Messrs Noorani Travels, Karachi v. Muhammad Hanif .and others (2008 SCMR 1395) and Muhammad Shafi and 13 others v. Muhammad Farooq and 3 others (1989 CLC 937).

10. The parties have been heard at length. The cases cited at the bar have been considered.

11. The submission of the learned counsel for the petitioner that the courts below while deciding the application in hand should frame issues and record the evidence as the application contained allegation of fraud seems to be very weak arguments for the reason that mere mentioning the word fraud in an application is not sufficient to believe that some fraud was actually committed and order impugned was obtained by misrepresentation. Order VI Rule 4, C.P.C. requires that particular of fraud mandatorily be specified in application. In the instant case these particulars are not available. It is crystal clear from the documents available on the record that the lease deed was never executed by the respondent in favour of the petitioner. Abdul Hameed while relying upon a 'chit' had mentioned that he had abandoned the possession of premises on 2-4-2007 and the same was handed over to Mehmood Riaz on the same date. It is noticed that on that date the lease deed was not in field, which was written on 17-4-2007 about 15 days after the alleged handing over of the possession of the petitioner. Further it is noted that Abdul Hameed had admittedly been paying the rent @ Rs.5155 to the landlord but in the lease agreement the rate of rent is mentioned @ Rs.2577 per month, with the increase from July, 2007 to Rs.3222. It is quite impossible that the landlord when renting out his property to subsequent tenant would reduce the rate of rent. It is the matter of common knowledge that the properties are rented out always on the higher rent than the rent paid by the earlier tenant. This fact alone is sufficient to disbelieve the documents relied upon by the petitioner and it hardly needs any evidence to prove that the document was executed by the respondent on 17-4-2007.

12. Furthermore the lawyer of Abdul Hameed, the previous tenant had filed petition seeking leave to contest the ejectment petition on behalf of Abdul Hameed had filed application under section 12(2), C.P.C. on behalf of Mehmood Riaz when he himself in PLA of Abdul Hameed in preliminary objection No. C and D had specifically written that the property in dispute was handed over by Abdul Hameed to Mehmood Riaz. This fact shows the connivance of Abdul Hameed and Mehmood Riaz to defraud the landlord of the property. It was wrongly and falsely noted by the same counsel in the subsequent

petition of Mehmood Riaz filed under section 12(2), C.P.C. that Mehmood Riaz came to know about the ejectment order two days prior to the institution of the application. Further it is on the record that the petitioner for the first time sent the rent through money orders to the landlord on 28-8-2008 almost 4 months of his alleged lease agreement. He further deposited the rent of the property after about one year that too after passing of ejectment order against Abdul Hameed. This is clear collusiveness, which apparently existed between Mehmood Riaz and Abdul Hameed who wanted to avoid the liability of arrear of rent stood at his credit. Thus it is evident that it was not necessary in the circumstances and facts of the case for the courts below to frame issues and to record the evidence thereon as all these facts are sufficient to establish that Abdul Hameed has sub-letted the property in dispute to Mehmood Riaz without the permission of landlord and now in the garb of this application he wanted to play with the provisions of law just to avoid payment of arrears of rent. In these circumstances, the courts below did not commit any illegality in dismissing the application of the petitioner.

13. For the foregoing reasons this petition having no- merits is dismissed with costs of Rs.10,000.

HBT/M-378/L Revision dismissed.

2012 Y L R 2681

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi, J

Mst. ZARINA BEGUM---Petitioner

versus

MUHAMMAD ALI and others---Respondents

Writ Petition No.10802 of 2009, heard on 20th October, 2011.

(a) Punjab Rented Premises Ordinance (XII of 2007)---

----Ss.19, 22 & 28---Civil Procedure Code (V of 1908), S.12(2)---Constitution of Pakistan, Art. 199---Constitutional petition--- Maintainability--- Ejectment---Non-filing of leave application within prescribed period and passing of ejectment order---Filing of application under S.12(2), C.P.C. instead of appeal against ejectment order---Dismissal of application under S.12(2), C.P.C. by Rent Tribunal for non-existence of element of fraud and misrepresentation in obtaining ejectment order---Order of dismissal of application under S.12(2), C.P.C. challenged in constitutional petition instead of appeal---Maintainability---Petitioner was obliged to avail remedy of appeal against ejectment order, specifically provided in Punjab Rented Premises Ordinance, 2007---Ejectment order was not alleged to have been procured by fraud and misrepresen-tation, in the application under S.12(2), C.P.C.---Rent Tribunal had rightly exercised jurisdiction to strike-off defence of petitioner and pass ejectment order for his failure to file leave application within time---Constitutional petition would not be maintainable in case of availability of an adequate and efficacious remedy provided by any law---Petitioner had not availed efficacious and adequate statutory remedy of appeal available against ejectment order, but had sought remedy by filing

application under S.12(2), C.P.C. without making out case thereunder---High Court dismissed constitutional petition, for being not maintainable in circumstances.

Farzand Raza Naqvi and 5 others v. Muhammad Din through legal heirs and others 2004 SCMR 400; Happy Family Associate through Chief Executive v. Messrs Pakistan International Trading Company PLD 2006 SC 226; Securities and Exchange Commission of Pakistan v. Mian Nisar Elahi and others 2009 SCMR 1392; Munir Ahmad Moeen v. Mst. Mumtaz Begum 1990 MLD 1689; Mirza Allah Rakha v. Faheem-ud-Din Aziz and 10 others 2011 CLC 452; K.E.S.C. Labour Union through President another v. Federation of Pakistan through Secretary, Ministry of Law, Justice and Human Rights, Islamabad and 2 others 2006 PLC 186; M.G. Gazdar (deceased) through his 4 legal heirs v. Manzoor Hussain 1985 CLC 2438; Samson Sircar v. Rehman Khalil and another 2003 CLC 892; Muhammad Rashid v. Muhammad Javaid Butt and others 2005 CLC 1153 and Shehzad Javed v. Jamshaid Akhtar and others 2011 CLC 1251 ref.

(b) Interpretation of statutes---
----Provision of special law would override general law. [p. 2683] B

(c) Interpretation of statutes---
----Mandatory to perform acts in a manner as provided therefore in the statute.
Muhammad Irfan Khan Ghaznavi for Petitioner.
Zia-ud-Din Kasuri and Sh. Usman Karim-ud-din for Respondents Nos. 1 and 2.
Date of hearing: 20th October, 2011.

JUDGMENT

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Today, the case was fixed for arguments when the learned counsel for the respondents raised preliminary objection that an application filed under section 12(2), C.P.C. by the petitioner before the learned Special Judge (Rent), Lahore was not entertainable which was dismissed vide order dated 27-4-2009 and the petitioner instead of filing an appeal has approached this court through the instant constitutional petition, which is also not maintainable.

2. In this respect, it is submitted by learned counsel for the respondents that an ejectment petition was filed against the petitioner in which the court directed him to file petition to contest the ejectment petition which was not filed, rather a written statement was placed on record that too after ten days, as prescribed by section 22 of Punjab Rented Premises Ordinance, 2007 as such, the court proceeded to strike of the defence and proceeded to pass an ejectment order. He further contended that the petitioner instead of filing an appeal as required by section 28 of the Ordinance (ibid) filed an application under section 12(2), C.P.C. with the learned Special Judge (Rent), which was dismissed by the court on the ground that no element of fraud and misrepresentation existed in the order of ejectment. It is the contention of the learned counsel that there was an adequate and efficacious remedy in the form of appeal which has not been availed by the petitioner and has directly challenged the order through the instant constitutional petition, which is not maintainable. In this connection, learned counsel has placed reliance upon the cases of Farzand Raza

Naqvi and 5 others v. Muhammad Din through legal heirs and others (2004 SCMR 400), Happy Family Associate through Chief Executive v. Messrs Pakistan International Trading Company (PLD 2006 SC 226) and Securities and Exchange Commission of Pakistan v. Mian Nisar Elahi and others (2009 SCMR 1392).

3. On the other hand, learned counsel for the petitioner submitted that when the law has provided two remedies to the petitioner for assailing an adverse order, it is the choice of the petitioner to avail any one of the such remedy thus, the petitioner had availed the remedy of challenging the ejectment order through an application under section 12(2), C.P.C. He further argued that the respondents had committed fraud with the petitioner as such, application under the said provision was maintainable before the learned Special Judge (Rent). It is added that against dismissal of an application filed under section 12(2), C.P.C. in the rent matter no remedy of appeal or revision is provided as such, the constitutional petition in this court is maintainable. In this connection, learned counsel has cited the cases of Munir Ahmad Moeen v. Mst. Mumtaz Begum (1990 MLD 1689), Mirza Allah Rakha v. Faheem-ud-Din Aziz and 10 others (2011 CLC 452), K.E.S.C. Labour Union through President another v. Federation of Pakistan through Secretary, Ministry of Law, Justice and Human Rights, Islamabad and 2 others (2006 PLC 186), M.G. Gazdar (deceased) through his 4 legal heirs v. Manzoor Hussain (1985 CLC 2438), Samson Sircar v. Rehman Khalil and another 2003 CLC 892, Muhammad Rashid v. Muhammad Javaid Butt and others 2005 CLC 1153 and Shehzad Javed v. Jamshaid Akhtar and others (2011 CLC 1251).

4. The parties have been heard at length on the preliminary objection raised by the learned counsel for the respondent.

5. It is noticed from the record that the petitioner could not file petition to contest the ejectment petition within the time prescribed by the Ordinance (ibid), thus, the court proceeded to pass an ejectment order against the petitioner. The petitioner instead of filing an appeal as required by statute itself preferred an application under section 12(2), C.P.C. against ejectment order which remedy has been provided by the provision of General Law. It is rule of prudence that provisions of special law overrides the general law. It is also settled principle of law when a statute provides manner in which certain acts are to be performed then it is mandatory to perform acts in such manner. It is observed that Rent Law directs litigant parties to avail remedy as provided in statute and other remedies provided in different law could be availed in circumstances enshrined in that law. Thus, it was obligatory for the petitioner to avail remedy provided in section 28 of Ordinance (supra).

6. The plea of the learned counsel for the petitioner that the petitioner had exercised her option to avail one remedy out of the two is equally untenable for the reason that the Punjab Rented Premises Ordinance, 2007 itself provides the remedy of appeal in the case where an ejectment order is passed. In this situation, no other option can be exercised by any party except the one which has been specifically provided by the statute itself. The case cited by the learned counsel for the petitioner no doubt provides that an application under section 12(2), C.P.C. can be filed against an order passed in the ejectment petition but it also provided that the elements of fraud and misrepresentation should be alleged in that petition. When the application filed under section 12(2), C.P.C. by the petitioner has been kept in

juxtaposition with the ejectment order passed by the learned Rent Controller, it follows that the order of the ejectment was neither procured fraudulently nor any misrepresentation was made when the same was passed. It was a case where the court had exercised its jurisdiction under the statute when it found that the petition to contest the ejectment had not been filed within the statutory time thus, the court proceeded to strike of the defence of the petitioner followed by an ejectment order. Accordingly, it can be observed that order dated 5-7-2008 was neither procured fraudulently nor any misrepresentation was made before the court. Needless to add that court had jurisdiction to pass such order. In these circumstances, the petition under section 12(2), C.P.C. was not the remedy for the petitioner for challenging vires of order dated 5-7-2008 rather she was required to challenge the ejectment order by filing an appeal. In this situation, this court does not feel any hesitation in holding that in such like circumstances the petitioner has to follow the statutory provisions of relevant law and any extraneous step taken by the petitioner would not be of any help to her.

7. It has rightly been argued by the learned counsel for the respondents that the constitutional petition is not maintainable where an efficacious and adequate remedy has been provided by the law. The appeal under section 28 of the Ordinance (ibid) was an efficacious and adequate remedy for the petitioner to challenge order of her ejectment which she missed and proceeded to seek the remedy which did not make out from the facts of the case. In this situation, this court has no other option except to hold that the petitioner had the remedy of appeal to challenge the ejectment order which has not been avail by her, as such, this constitutional petition is not maintainable.

8. As observed above, the application under section 12(2), C.P.C. in the circumstances of this peculiar case was not maintainable nor is the constitutional petition as such, the objection raised by the learned counsel for the respondent is upheld. Resultantly, this petition stands dismissed being not maintainable.

SAK/Z-42/L Petition dismissed.

2012 Y L R 2780

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi, J

MUHAMMAD AFZAL---Petitioner

versus

THE STATE and others---Respondents

Criminal Miscellaneous No.10141-B of 2012, decided on 30th July, 2012.

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

----S. 497---Penal Code (XLV of 1860), S.489-F---Dishonestly issuing a cheque---Bail, grant of---Case of civil liability---Accused contended that parties had business inter se of selling and purchasing wood and cheque in question was issued by the accused in lieu of

wood purchased by him---Validity---Contention of accused showed that complainant wanted return of sale price of the wood sold to the accused, which contention made the case one of civil liability for which the complainant had to avail the remedy in a court of competent jurisdiction---Offence did not fall within the prohibitory clause of S.497, Cr.P.C---Accused was admitted to bail, in circumstances.

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

----S. 489-F---Dishonestly issuing a cheque---Provision of S. 489-F, P.P.C---Purpose----Said provision had not been promulgated for using it as a tool for recovery of amounts due in business dealings for which civil remedy had already been provided by law.

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

----S. 489-F---Dishonestly issuing a cheque---Burden of proof---Scope---Intent of accused---Scope---Law so promulgated placed a heavy duty upon the complainant to show criminal intent of drawer of negotiable instrument to defraud him by issuing a fake cheque.

Qadeer Hussain Khan for Petitioner.
Muhammad Akhlaq, D.P.-G., with Zulfiqar, S.I.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Muhammad Afzal petitioner seeks his release on bail in case F.I.R. No.153 dated 3-5-2012 registered under section 489-F, P.P.C. with Police Station, Mandi Faizabad, District Nankana Sahib for issuing cheque valuing Rs.13 lacs to the complainant of the case which was dishonoured when presented for encashment.

2. Parties heard. Record perused.

3. At the time of lodging the F.I.R. against the petitioner the police did not collect the original cheque and the slip from the complainant of the case which deficiency was made out by the police when the investigation in the case was completed. The stance of the petitioner is that the parties have business inter se of selling and purchasing of woods and the cheque was issued by the petitioner in lieu of the woods purchased by him. This stance taken by petitioner necessarily shows that the complainant wants return of the sale price of the woods sold to the petitioner which assertion makes the case as one of civil liability for which the petitioner has to avail remedy in the court of competent juris-diction. The provisions of section 489-F, P.P.C. have not been promulgated for using it as a tool for recovery of the amounts due in business dealings for which the civil remedy has already been provided by law. The law so promulgated places heavy duty upon the complainant to show criminal intent of drawer of negotiable instrument to defraud him by issuing a fake cheque. During the business terms it is common practice amongst the business community of issuing cheques as security for liquidating of business liability which cheques are never meant for encashment and usually are returned when the liability is discharged. Admittedly,

the petitioner is in judicial lock up for the last more than two months for an offence which does not fall within the prohibitory clause of section 497, Cr.P.C. It is cardinal rule of law that a person cannot be detained in the jail as punishment before the conclusion of the trial. Accordingly it is a fit case for grant of bail.

4. For what has been discussed above, the petition is allowed and Muhammad Afzal petitioner is admitted to bail subject to his furnishing bail bonds in the sum of Rs.five lacs with two sureties in the like amount the satisfaction of learned trial Court.

MWA/M-269/L Bail granted.

PLJ 2012 Cr.C. (Lahore) 732
[Multan Bench Multan]
Present: Syed Muhammad Kazim Raza Shamsi, J.
Mst. PERVEEN--Petitioner
versus
STATE and another—Respondents

Crl. Misc. No. 1897-B of 2012, decided on 12.6.2012.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 498--Pakistan Penal Code, (XLV of 1860), 1860, Ss. 302, 148 & 149--Anticipatory bail--Grant of--Pre-arrest bail--Confirmed--Undoubtedly, the extrajudicial confession if made by the co-accused cannot be read against the petitioner and cannot be treated as sufficient evidence to connect the petitioner with murder of deceased--Police did not implicate the petitioner for the murder of deceased rather it is the conclusion of the police that the petitioner had participated in hatching conspiracy for the murder--Case against the petitioner appeared to be based upon the mala fide of the complainant of the case--Held: Petitioner being female would be humiliated and harassed if she is sent behind the bars--Bail confirmed. [P. 733] A & B

Ch. Khalid Mehmood Arain-I, Advocate with Petitioner.
Malik Riaz Ahmad Saghla, Deputy Prosecutor General for State.
Mian Tahir Iqbal, Advocate for Complainant.
Date of hearing: 12.6.2012.

Order

Mst. Perveen, petitioner through the instant criminal miscellaneous petition seeks her anticipatory bail in case arising out of FIR No. 109 dated 29.03.2012, registered under Sections 302, 148, 149 PPC with Police Station Tulamba Tehsil Mian Channu District Khanewal.

2. The allegation against the petitioner in the FIR is that she was seen in the company of Umar Hayat, Muhammad Waseem, Muhammad Nadeem and Mst. Rani Bibi taking the deceased Adnan with them whereafter the dead body of the deceased was found.

3. It is contended by the learned counsel for the petitioner that except this last seen evidence there is nothing on the file to implicate the petitioner for the charge of murder. It is further argued that during investigations police reached at the conclusion that the petitioners had only participated in hatching conspiracy of murder of Adnan and she was not present at the time as alleged in the FIR. It is further argued that the petitioner is real sister of Mst. Rani Bibi, step-mother of the complainant with whom the complainant had ill-will whereas co-accused Waseem is brother while Nadeem is her husband. According to the learned counsel, the complainant has thrown a wide net to enrope all the family members of the petitioner in the instant case. He prays for confirmation of interim pre-arrest bail.

4. On the other hand, the learned DPG assisted by the learned counsel for the complainant argued that the petitioner is specifically nominated in the FIR in whose company the deceased was seen lastly; that the co-accused of the petitioner made extrajudicial confession admitting the murder of Adnan, therefore, the petitioner is not entitled for any concession of bail.

5. Arguments heard. Record perused.

6. Undoubtedly, the extrajudicial confession if made by the co-accused cannot be read against the petitioner and cannot be treated as sufficient evidence to connect the petitioner with murder of deceased Adnan. It is mentioned in the FIR that the complainant of the case had some dispute with his step-mother Mst. Rani Bibi, thus, there is every likelihood that the petitioner has been implicated in the instant case due to her relation with her co-accused. Further, the police did not implicate the petitioner for the murder of Adnan rather it is the conclusion of the police that the petitioner had participated in hatching conspiracy for the murder. In this view of the matter, the case against the petitioner appears to be based upon the mala fide of the complainant of the case. The petitioner being female would be humiliated and harassed if she is sent behind the bars.

7. In view of the above, this petition is allowed and interim pre-arrest bail already granted to the petitioner Mst. Perveen vide order dated 21.05.2012, is confirmed subject to her 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.

(A.S.) Bail confirmed.

PLJ 2012 Cr.C. (Lahore) 174 (DB)

Present: Sh. Ahmad Farooq and Syed Muhammad Kazim Raza Shamsi, JJ.

MUHAMMAD ASIF--Petitioner

versus

STATE and another—Respondents

Crl. Misc. No. 15704-B of 2011, decided on 29.11.2011.

Criminal Procedure Code, 1898 (V of 1898)—

----S. 497--Control of Narcotic Substances Act, 1997, S. 9(c)--Bail, grant of--Meager quantity of narcotic substance was recovered--Case of petitioner within 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 petitioner within the ambit of S. 9(c) of Control of Narcotic Substances Act, 1997--Quantity of narcotic substance, alleged to have been recovered from the petitioner was marginally higher from one thousand grams--It is a borderline case between clauses (b) and (c) of S. 9 of Control of Narcotic Substances Act, 1997--There were sufficient grounds to enquire further as to whether the case of petitioner actually falls within mischief of S. 9(c) of control of Narcotic Substances Act, 1997--Petitioner was not previously involved in such like case--He was behind the bars and further detention in jail would not adverse the case of prosecution--It was a fit case for grant of bail. [P. 175] A

PLJ 1981 SC 241.

Mr. Zahid Aslam Malik, Advocate for Petitioner.

Mr. Muhammad Akhlaq, DPG for State.

Date of hearing: 29.11.2011.

Order

Through the instant criminal miscellaneous, the petitioner/ Muhammad Asif seeks his post arrest bail in a case arising out of FIR No. 383/2011 dated 29.4.2011, registered with Police Station Ferozewala, District Sheikhupura, under Section 9(c) of Control of Narcotic Substances Act, 1997 with an allegation that raiding party had recovered 1015 grams Charas and 210 grams heroin from the personal search of the petitioner.

2. After hearing the arguments of the learned counsel for the parties and perusing the record, we find that Charas weighing 1015 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 27.4.2011 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.

3. In view of above, the instant post arrest bail petition, filed on behalf of Muhammad Asif, 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.

(A.S.) Bail granted.

PLJ 2012 Cr.C. (Lahore) 939 (DB)
[Multan Bench Multan]
Present: Sh. Najam-ul-Hassan and Syed Muhammad Kazim Raza Shamsi, JJ.
MUNIR AHMAD--Appellant
versus
STATE and another—Respondents

Crl. Appeal No. 36 of 2011(ATA), heard on 14.5.2012.

Pakistan Penal Code, 1860 (XLV of 1860)--
----S. 365-A--Anti-Terrorism Act, 1997, Ss. 7(e) & 25--Criminal Procedure Code, (V of 1898), Ss. 382-B & 410--Conviction and sentence recorded against accused by trial Court--Challenge to--Neither victim was abducted nor any data of calls allegedly made was collected as such charge of abduction and demanding ransom amount--Material evidence was lacking in prosecution case--Fact of seeing abductee in the company was not supported from statement of abductee--Mobile number was given in FIR--Validity--Abductee himself returned to his house voluntarily meaning thereby that his release from clutches of accused was not due to payment of ransom demanded by him, rather he without any restriction returned to his house--When no money was transferred for release of abductee, offence u/S. 365-A, PPC was not made out, thus charge framed had rendered groundless--Police neither had taken into possession mobile phone nor had collected any data from mobile company for proving that any call was received and that call was made by accused demanding cash amount--Abductee with his own free will had gone somewhere else and was never kidnapped by the accused--Prosecution evidence was neither sufficient nor cogent to prove charges framed against the accused--Appeal was accepted. [P. 941] A, B & C
Mian Abid Hussain Ansari, Advocate for Appellant.
Mr. Munir Ahmad Sial, DPG for State.
Mr. Abdul Samad Ali, Advocate for Complainant.
Date of hearing: 14.5.2012.

Judgment

Syed Muhammad Kazim Raza Shamsi, J.--This criminal appeal filed by Munir Ahmad under Section 25 of the Anti-Terrorism Act, 1997 is directed against judgment dated 11.11.2010 passed by the learned Judge, Anti-Terrorism Court, Dera Ghazi Khan, whereby he was tried in case arising out of FIR No. 188, dated 2.7.2009 registered under Section 365-A, PPC read with section 7(e) of Anti-Terrorism Act, 1997 with Police Station Darahma, District D.G Khan. Under both heads of the charge the appellant was convicted and awarded sentence of imprisonment for life under each head. Moveable and immovable property belonging to the appellant was also ordered to be confiscated in favour of the State. Both the sentences were ordered to run concurrently with the benefit of Section 382-B, Cr.P.C.

2. The criminal machinery in this case was set into motion on the statement of one Muhammad Asif stating that on 27.6.2009 his aunt Mst. Zakia Bibi by summoning the complainant at her house told that Muhammad Suleman, his son, who was working in the

workshop of Mustafa Lashari was kidnapped by one Munir Ahmad, who was seen by Ghulam Akbar taking the victim in a 'Dala'. She further told that Muhammad Suleman on 25.6.2009 had told her that Munir Ahmad had allured him to go to Dubai where he may earn handsome amount. It is further narrated that at 11. p.m on that day Mst. Zakia received mobile call whereby she was informed that Suleman was residing with that person and demanded Rs.200,000/- for the release of Suleman. When Mst. Zakia inquired the name of the caller it was told that Munir Qureshi was talking. In this backdrop the instant FIR was lodged initially under Section 365, PPC and subsequently offence under Section 365-A, PPC read with section 7(e) of Anti-Terrorism Act, 1997 was added.

3. The Police after conducting the investigations sent report under Section 173, Cr.P.C. to the Court concerned for trial. It is pertinent to mention that Muhammad Suleman subsequently returned to his home and joined investigation with the Police where he made a statement under Section 161, Cr.P.C.

4. Learned trial Court after framing the formal charge against Munir Ahmad appellant recorded the requisite evidence consisting upon the statements of six PWs, which was confronted to the appellant. The appellant set up his defence in his statement recorded under Section 342, Cr.P.C. in the following words:--
"Suleman abductee paid amount to the persons for going Dubai but those persons usurped the amount of abductee who were my acquaintance. Abductee and complainant asked him to get return the amount which I refused to do so and I have been falsey implicated in this case. All the PWs are relatives of the complainant. They have deposed against me due to their relationship."

5. He did not appear as his own witness under Section 340(2), Cr.P.C. nor opted to produce any defence evidence. After conclusion of the trial, learned trial Court convicted the appellant and sentenced him in above terms.

6. It is contended by the learned counsel for the appellant that the prosecution could not produce convincing and cogent evidence to establish that the victim was abducted by the petitioner nor any data of the calls allegedly made by the appellant to Mst. Zakia Bibi was collected as such the charge of abduction and demanding ransom of Rs.200,000/- could not be established on the record. It is pointed out by the learned counsel that the learned trial Court has misread the prosecution evidence for reaching at a conclusion of conviction against him.

7. On the other hand, learned DPG termed that the prosecution has successfully established the charge against the appellant by producing corroborative and cogent evidence proving that the appellant had kidnapped Muhammad Suleman for the purpose of obtaining ransom for his release as such his appeal is liable to be dismissed.

8. We have considered the submissions made by learned counsel for the parties and examined the evidence. According to the allegations levelled in the FIR (Ex.PA/1) one Ghulam Akbar had seen the abductee in the company of the appellant, who is a material witness of the case but the Police did not join him in the investigations nor recorded his statement under Section 161, Cr.P.C. Said Ghulam Akbar also did not appear as a witness during the trial. This material evidence is lacking in the prosecution case through which, if

produced, it could be proved that the abductee was seen lastly in the company of the appellant. This fact of seeing the abductee in the company of Munir is also not supported from the statement of Muhammad Suleman abductee, who deposed as PW.4 in the Court. Further when the prosecution evidence is examined minutely it is noticed that the abductee himself returned to his house voluntarily meaning thereby that his release from the clutches of the appellant was not due to the payment of the ransom demanded by him, rather he without any restriction returned to his house. When no money was transferred for the release of the abductee, in our opinion, offence under Section 365-A, PPC is not made out, thus the charge framed under that section has rendered groundless. Further it was the allegation of Mst. ZakiaBibi that she had received a call on her mobile number given in the FIR whereby the caller shown his identification as Munir Qureshi and demanded Rs.200,000/- from her. The Police neither had taken into possession the mobile phone of Mst. Zakia Bibi nor had collected any data from the mobile company for proving that any call was received by the lady at her mobile and that call was made by the appellant demanding the cash amount. It is also oozed out from the evidence available on the record that the abductee with his own free will had gone somewhere else and was never kidnapped by the appellant. Similarly the statement of Mustafa Lashari, the person with whom the alleged abductee was working in his workshop is also very important witness of the case but his statement was not recorded either by the Police nor he was produced in the Court for proving the allegations contained in the first information report. In this backdrop, we are of the candid view that the prosecution evidence was neither sufficient nor cogent to prove the charges framed against the appellant. In view of this scanty evidence, we are constrained to differ with the findings of conviction recorded by the learned trial Court.

9. In view of the above discussion, the appeal filed by the appellant Munir Ahmad is accepted setting aside the conviction and sentence awarded to him. The appellant shall be released from the jail forthwith, if not required in any other criminal case.

(R.A.) Appeal accepted.

PLJ 2012 Cr.C. (Lahore) 355
Present: Syed Muhammad Kazim Raza Shamsi, J.
AKBAR ALI--Petitioner
versus
JAMSHAD ALI etc.—Respondents

Crl. Misc. No. 211-M of 2011, decided on 3.1.2012.

Criminal Procedure Code, 1898 (V of 1898)—

----S. 497(5)--Pakistan Penal Code, (XLV of 1860), S. 489-F--Cancellation of bail--Settled law by precedent cases--In very exceptional circumstances a bail granting order can be recalled and this practice should not be encouraged particularly in the matter in which the trial before the Court is in progress--In this backdrop, I see no reason to recall the order

dated 18.4.2011 wherein Respondent No. 1 was admitted to bail by the learned Addl. Sessions Judge, Lahore--Resultantly, instant petition having no merits is dismissed. [P.] A & B

Ch. Babar Waheed, Advocate for Petitioner.
Ch. Muhammad Qasim, Advocate for Respondent No. 1.
Date of hearing: 15.3.2012.

ORDER

The petitioner Akbar Ali by filing instant criminal miscellaneous application under Section 497(5) Cr.P.C. seeks cancellation of post arrest bail granted to Jamshad Ali, Respondent No. 1, by the learned Addl. Sessions Judge, Lahore vide order dated 18.4.2011.

2. Briefly stated the facts of the case are that the petitioner lodged case FIR No. 676, dated 30.8.2010 against Respondent No. 1 under Section 489-F PPC with Police Station Mozang, Lahore with the it allegation that he had given Rs. 45 lacs to Respondent No. 1 for supplying the milk, which he supplied for five months only where-after he stopped the supply. On checking the account a sum of Rs. 30 lacs found outstanding towards Respondent No. 1 regarding which a demand was raised in lieu of which Respondent No. 1 issued three cheques, which were dishonoured subsequently. Accordingly, above referred criminal case was lodged against Respondent No. 1.

3. It is pointed out by the learned counsel for the petitioner that bail applied by Respondent No. 1 was declined by the learned Allaqa Magistrate, Lahore, where-after Respondent No. 1 filed two successive post arrest bail petitions before the learned Addl. Sessions Judge, Lahore but the same were withdrawn. Thereafter third application was filed, which was dismissed by the learned Addl. Sessions Judge on 29.3.2011 (incorrectly written as 29.3.2012 in the order of the learned Addl. Sessions Judge). It is further stated that after seven days of the dismissal of said bail application another bail application before the same Court was filed by Respondent No. 1 seeking his release on bail, which was allowed by the learned Addl. Sessions Judge vide order impugned in the instant petition.

4. It is contended by the learned counsel for the petitioner that the earlier application of Respondent No. 1 was dismissed on merits, as such second application before the same Court and acceptance thereof amounts review of order by the learned Court, which is not permissible under the law. He further argued that when the first petition of Respondent No. 1 was dismissed on merits then there was no fresh-ground available to him for seeking his release on bail through the second application but the learned Court without adverting to this fact had illegally granted bail to Respondent No. 1. Further argued that withdrawal of earlier two applications by Respondent No. 1 would amount to decision of petitions on merits, thus third application dismissed by the Court could only be maintainable, if any fresh ground is available. He has further commented upon the conduct of Respondent No. 1 in prosecution of the bail applications as well as instant petition by submitting that, in the instant petition Respondent No. 1 intentionally avoided to appear in this Court and this Court in order to procure his attendance had adopted coercive measures as such Respondent No. 1 is not entitled for any concession. In this connection, learned counsel has placed

reliance upon the oases of Sono Khan Vs. Sikandar and another (PLJ 2000 Cr.C [Karachi] 322), Muhammad Rizwan Vs. The State and 3 others (2007 PCr.LJ 78) and Noraz Akbar Vs. The State and another (2011 PCr.LJ 852).

5. Conversely, learned counsel for Respondent No. 1 countered the arguments of the learned counsel for the petitioner by submitting that earlier bail petition of Respondent No. 1 was dismissed by the learned Addl. Sessions Judge on 29.3.2011 on technical ground noting down the conduct of Respondent No. 1 regarding withdrawal of his earlier two applications, thus the decision of the Court cannot be treated as the one pronounced on merits. He elaborated his arguments and contended that the bail granting order clearly shows that since earlier petition of Respondent No. 1 was decided on technical ground and not on merits, as such, there is need to canvass fresh ground for seeking post arrest bail from the same Court. Added further that simpliciter withdrawal of earlier two applications by Respondent No. 1 does not amount decision on merits. Thus fresh application could be filed without asserting fresh ground. He further pointed out that the challan in the case has been submitted in the Court in which the trial Court has taken cognizance by framing the charge and the case is now fixed for recording of prosecution evidence. Learned counsel submitted that in these circumstances at this stage when the trial of the case is in progress the practice of recalling of bail granting order has been deprecated by the apex Court. Reliance has been placed on the cases of Muhammad Riaz Vs. The State (2002 SCMR 184), Ali Hassan Vs. The State (2001 SCMR 1047), Wajid All Vs. The State (2009 PCr.LJ 275), Haji Mian Abdul Rafique Vs. Riaz-ud-Pin and another (2008 SCMR 1206) and Gohar Rehman Vs. Muhammad Tahir and another (2001 SCMR 815).

6. I have considered the submissions made by the learned counsel for the parties and examined the record as well as case law cited at the bar. The ratio of the cases cited by the learned counsel for the parties is precisely noted hereunder:-

(i) In Sono Khan and Muhammad Rizwan case (supra) the Hon'ble Karachi High Court held that the grounds which were available at the time of first application even if not considered it will be presumed that the same were considered and rejected and second bail application would lie when there is new and fresh ground arose after dismissal of the first bail application.

(ii) In the case of Noraz Akbar (supra) this Court observed that the first bail petition filed by the accused had been withdrawn by his counsel after arguing the case at some length. Fresh application for bail would not lie unless the some fresh ground for bail is available.

(iii) Case of Muhammad Riaz (supra) provides that simple withdrawal of bail application would not be a bar in moving second petition. Same view has been adopted by this Court in the case of Wajid Ali (supra).

(iv) Cases of Haji Mian Abdul Rafique and Gohar Rehman, deprecate practice of cancellation of bail in matters where trial in a case is in progress.

7. The ratio of cases cited at Serial No. (i) and (ii), is that when an earlier bail petition filed by an accused person is dismissed on merits then second bail application would only be

maintainable if any fresh ground is available to him. These observations of the Court in the cases, are based upon the judgment of the apex Court recorded in the case of The State through Advocate General. NWFP Vs. Zubair and 4 others (PLD 1986 SC 173). There is no cavil to proposition that second bail application would only be maintainable if it is filed on the grounds, which were not available to the petitioner at the time of dismissal of his first application on merits but the matter in hand is some what on different footing than the one noted in the afore-noted precedent cases.

8. In the instant case the question is whether the decision of the learned Addl. Sessions Judge dated 29.3.2011 regarding dismissal of first bail application of Respondent No. 1 was on merits or the application was dismissed on technical ground and further that the order dated 18.4.2011 passed on the subsequent application by the learned Addl. Sessions Judge would amount to review of its earlier order. In this connection the order dated 29.3.2011 is to be seen to determine the first question. The order of the learned Court is reproduced hereunder for correctly appreciating, the same:-

"9. No doubt the offence against the accused/petitioner does not fall within the ambit of prohibitory clause and in alternative it is also punishable with fine only yet in my humble view there is sufficient ground to disentitle the petitioner from the concession of bail. His first bail application was rejected by the trial Court vide order dated 27.12.2010. After that he moved two bail application above referred before the Court of Mr. Muhammad AjmalHussain, the then learned Addl. Sessions Judge, Lahore which were dismissed as withdrawn vide order dated 26.1.2011 and 2.3.2011. Subsequently, he has not moved the learned trial Court for his release on bail on any fresh ground and again filed this third bail application before this Court. Under these circumstances, this petition is dismissed ....."

9. The bare perusal of the order reveals that the Court found that Respondent No. 1 was entitled for the & grant of bail but the same relief was refused to him due to his conduct of filing successive applications before the same Court and that the remedy was not availed by Respondent No. 1 before the Court of first instance. Although this observation of the Court that the remedy of bail was not availed before the Court of first instance is factually incorrect because the earlier two applications, which were dismissed as withdrawn were filed before the learned Addl. Sessions Judge as such the third one was to be filed in the same Court instead of approaching the Court of first instance but for the purpose of disposal of this petition I am not going into such niceties.

10. Now adverting to question whether decision dated 29.3.2011 was on merits or not, said order is found to be self explanatory which if is read with reference to its context it shows the intention of the Court of not deciding petition on grounds noted therein, rather Court proceeded to invoke equitable principles of law i.e. one must approach Court with clean hands. Thus it is not difficult to hold that the bail petition of Respondent No. 1 was not decided by the learned Addl. Sessions Judge on merit, rather found Respondent No. 1 disentitled for the concession of bail due to his faulty conduct. At this juncture, learned counsel for the petitioner submitted that withdrawal of the earlier two applications would amount to dismissal of the bail applications on merits and in this connection learned counsel has relied upon the case of Noraz Akbar (supra). This contention of the learned counsel cannot be accepted as withdrawal simpliciter was not considered a decision of the bail petitions on merits. In holding this view, I am fortified by the ratio laid down in the

case of Muhammad Riaz (supra), wherein the apex Court while taking note of this situation had observed that withdrawal of bail application simpliciter would not mean that it was dealt with on merits or on grounds pressed. It is further observed that such withdrawal would not be a bar in moving second bail application, which must be heard by the same Judge(s)/Bench allowing withdrawal of the first bail application. The same view was followed by this Court in the case of Wajid Ali (supra) wherein it was held that mere withdrawal of the bail application would not amount that it was decided on merits.

11. Another contention of the learned counsel for the petitioner that the order dated 18.4.2011 amounts to review of order dated 29.3.2011 is also misconceived for the reason that the earlier bail petition, as observed above, was not decided by the Court on merits whereas the second petition was decided by the Court independently on merits and on the grounds pressed therein. There is no bar for raising the grounds mentioned in the application upon which the impugned order was passed by the learned trial Court for the reason that these grounds although were noted down by the learned trial Court in bail refusing order dated 29.3.2011 but no decision was given by it thereon.

12. It has now been settled by the precedent cases that in very exceptional circumstances a bail granting order can be recalled and this practice should not be encouraged particularly in the matter in which the trial before the Court is in progress.] In this connection the cases of Haii Mian Abdul Rafiqaue and Gohar Rehman (supra) lend support to this view.

13. In this backdrop, I see no reason to recall the order dated 18.4.2011 wherein Respondent No. 1 was admitted to bail by the learned Addl. Sessions Judge, Lahore. Resultantly, instant petition having no merits is dismissed.

(A.S.)

PLJ 2012 Cr.C. (Lahore) 698
Present: Syed Muhammad Kazim Raza Shamsi, J.
AKBAR ALI--Petitioner
versus
STATE and another—Respondents

Crl. Misc. No. 9638-B of 2011, decided on 11.8.2011.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 498--Pesticide Ordinance, 1991--Ss. 21 & 22(1)(2)--Bail before arrest, confirmed--Offence does not fall within prohibitory clause--Spuriousness of pesticides--Accused was selling products of pesticides which was found as spurious--Held: Accused was warranty holder of medicine as was evident from delivery invoice, as such he was not responsible for keeping spurious pesticides at his shop in absence of knowledge about spuriousness of pesticides--Prosecution had not placed on record any such evidence--Offence does not fall within prohibitory clause as such ad-interim bail granted to the accused was confirmed. [P. 698] A

Mian Shahid Ali Shakir, Advocate with Petitioner.
Mr. Muhammad Ishaq, DPG for State.
Date of hearing: 11.8.2011.

Order

The petitioner, Akbar Ali, has applied for his pre-arrest bail in case FIR No. 577/2011, dated 27.6.2011, registered against him at Police Station City Jaranwala, under Sections 21/22(1)(2) of Pesticide Ordinance, 1991 as amended in 1997, for having spurious pesticides.

2. Arguments heard and record perused.

3. Admittedly the petitioner is selling the products of M/s Green View International having its head office at Shop No. 1, Main Bull Road, Lahore. The complainant of the case had taken sample of the pesticides, which was found as spurious one and in that regard he arrested the Sales Manager of the company. As per information the said person has been released on bail. The petitioner is the warranty holder of the said medicine as is evident from delivery invoice dated 18.4.2011, as such he is not responsible for keeping the spurious pesticides at his shop in the absence of the knowledge about the spuriousness of the pesticides. The prosecution has not placed on record any such evidence. Even otherwise the offence does not fall within the prohibitory clause, as such ad-interim pre-arrest bail granted to the petitioner vide order dated 02.8.2011 is confirmed subject to his furnishing fresh bail bonds in the sum of Rs.50,000/- with one surety in the like amount to the satisfaction of the learned trial Court.

(R.A.) Bail confirmed.

PLJ 2012 Cr.C. (Lahore) 734
Present: Syed Muhammad Kazim Raza Shamsi, J.
ABDUL HAMEED alias TAHIR HAMEED--Petitioner
versus
STATE and another—Respondents

Crl. Misc. No. 659-B of 2012, decided on 21.5.2012.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 324, 452, 457 & 34--Bail, grant of--Further inquiry--Animosity of litigation--Night time occurrence--Source of identification was missing--It is also a matter of further inquiry whether the fire landed at the testicals of a person can be exited through his back as alleged in the FIR--Medico-Legal Report revealed that the bullet did not exit from the back rather it exited from the buttock--Petitioner was in judicial lock up for the last seven months, whose trial has not yet been concluded--An eye-witnesses of the case was not supporting the prosecution version, thus the guilt of the

petitioner was yet to be probed into during the trial--It was a fit case for grant of the bail to the petitioner. [P. 734] A

Ch. Khalid Mehmood Arain, Advocate for Petitioner.

Mr. Hassan Mehmood Khan Tareen, DPG for State.

Date of hearing: 21.5.2012.

Order

The petitioner Abdul Hameed alias Tahir Hameed through the instant criminal, miscellaneous petition seeks his release on bail in. case arising out of FIR No. 233, dated 30.9.2010, registered under Sections 324, 452, 457 & 34, PPC with Police Station Abdul Hakim, District Khanewal having an allegation that at 2.00 a.m in the night he injured Sajjad son of the complainant with his rifle hitting on the testicals and went through and through the back.

2. After having heard the learned counsel for the parties and perusing the record, it is observed that allegedly the occurrence had taken place in the night of 29/30-9-2010 at 2.00 a.m but the source of identification is missing from the contents of the FIR. Further the complainant has admitted animosity of litigation between the parties. It is also a matter of further inquiry whether the fire landed at the testicals of a person can be exited through his back as alleged in the FIR. The Medico-Legal Report reveals that the bullet did not exit from the back rather it exited from the buttock. The petitioner is in judicial lock up for the last seven months, whose trial has not yet been concluded-Furthermore, the file discloses that Muhammad Younas an eye witnesses of the case is not supporting the prosecution version, thus the guilt of the petitioner is yet to be probed into during the trial. In the circumstances, it is a fit case for grant of the bail to the petitioner.

3. In view of the above, the petition is allowed and the petitioner Abdul Hameed alias Tahir Hameed is admitted to bail on furnishing of bail bonds in the sum of Rs. 100,000/- with one surety in the like amount to the satisfaction of the learned trial Court.

(A.S.) Bail allowed.

2012 P.Cr.R. 561

[Lahore]

Present: **MAZHAR IQBAL SIDHU and S.M. KAZIM RAZA SHAMSI, JJ.**

Fayyaz Maqsood and others

Versus

The State

Crl. Appeal No. 840 of 2006, Crl. Revision No. 563 of 2006 and Murder Reference No. 319 of 2006, decided on 14th February, 2012.

(a) Extra-judicial confession---

---Evidentary value---Precedent case law---The evidence of extra-judicial confession is weakest type of evidence which can only be believed when it is corroborated by any other independent evidence. (Para 17)

MURDER TRIAL---(Extra-judicial confession/Approver)

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

---S. 410---Pakistan Penal Code, 1860, Ss. 302/460/380/412---Charge of murder---Impugned conviction/sentence of death---Extra-judicial confession---Reasons---Approver---Appreciation of evidence---Validity---Instant incident remained un-traceable for long seven years---During the said long time interval, appellants were never suspected for murdering said deceased---Said fact alone was sufficient to shatter story narrated by prosecution through statements of PWs---Material evidence for inducting PW as approver in the case had been withheld by prosecution---Had said person appeared in Court and supported story forwarded by PWs, then prosecution could have a case against appellants, but without independent corroboration, statement of said PW would be viewed as suspicious---Moreover said deposition also suffered from material contradictions which made story narrated therein highly doubtful---Said stand taken in three different statements could never be made basis for awarding death sentence to a person particularly when such statement was not corroborated by other independent evidence---Evidence of extra-judicial confession had been concocted by prosecution to make up a case---Said evidence did not disclose necessity of making confessions by appellants to the person having no influence over complainant party for securing pardon for them---Alleged confession was recorded at time when police was in search of appellants who were not apprehended by PWs nor they were handed over to police---Said PWs did not give exact date and time when appellants allegedly came to them and made confession about their guilt---Extra-judicial confession is weakest type of evidence which can only be believed when it is corroborated by any other independent evidence---It was very strange to think that for eight long years, appellants had kept their crime weapons in their safe custody for presenting same to police as and when they were arrested in the case---Said fact alone cast serious doubt upon recoveries effected by police at instance of appellants---Motor-cycle in question was sent to FSL which determined that it was not that motor-cycle which was stolen on night of occurrence as engine and chasis numbers differed from the one stolen on night of occurrence---Motor-cycle allegedly recovered appeared to have been planted---Prosecution had miserably failed to prove charge against appellants by not producing convincing, trustworthy and coherent evidence---Criminal appeal allowed.

(Paras 16,17,18,19,20,21,22)

[Approver/extra-judicial confession/recovery unreliable. Impugned conviction/sentence of death was set aside].

For the Appellants: **M.A. Zafar and Shoaib Zafar, Advocates.**

For the Complainant: **Inayat Ullah Cheema, Advocate.**

For the State: **Mirza Abid Majeed, D.P.G.**

Date of hearing: **14th February, 2012.**

JUDGMENT

SYED MUHAMMAD KAZIM RAZA SHAMSI, J. --- The appellant Fayyaz Maqsood son of Abdul Majeed with his co-accused Ali Sabir *alias* Chabba son of Muhammad Siddique, Abdul Qayyum son of Muhammad Iqbal and Muhammad Tariq *alias* Nanha son of Muhammjad Hussain were tried in case F.I.R. No. 325, dated 9.10.1996 registered under Sections 302/460/380/412, PPC with Police Station City Gojra, District Toba Tek Singh for committing murder of Sarfraz son of Abdul Gahfoor. The learned Trial Court after conclusion of trial *vide* judgment, dated 16.5.2006 convicted the appellants and following sentences were awarded to them:--

Fayyaz Maqsood son of Abdul Majeed

Death sentence under Section 302(b)/149, PPC with a compensation of Rs. 1,00,000/- to be paid to the legal heirs of Sarfraz deceased as required by Section 544-A, Cr.P.C. and in default thereof to further underego six months' rigorous imprisonment.

Under Section 460/149, PPC for 10 years' R.I.

Under Section 380/149, PPC for five years' R.I. with fine of Rs. 10,000/- and in default thereof to further undergo three months.

Ali Sabir *alias* Chabba and Muhammad Tariq *alias* Nanha

Imprisonment for life under Section 302(b)/149 each with a compensation of Rs. 1,00,000/- each to be paid to the legal heirs of Sarfraz deceased as required by Section 544-A, Cr.P.C. and in default thereof to further undergo six months' each.

Under Section 460/149, PPC for 10 years' R.I. each.

Under Section 380/149, PPC for five years' R.I. with fine of Rs. 10,000/- each and in default thereof to further undergo three months.

Abdul Qayyum son of Muhammad Iqbal

Imprisonment for life under Section 302(b)/149, PPC with a compensation of Rs. 1,00,000/- to be paid to the legal heirs of Sarfraz deceased as required by Section 544-A, Cr.P.C and in default thereof to undergo six months.

Under Section 460/149, PPC for 10 years' R.I.

Under Section 380/149, PPC for five years' R.I. with fine of Rs. 10,000/- and in default thereof to further undergo three months.

Under Section 412/149, PPC for 10 years' R.I. with fine of Rs. 10,000/- and in default of the payment of the amount, he was directed to further undergo three months.

Benefit extended by Section 382-B, Cr.P.C. was also awarded.

Ashiq Ali approver has already been given pardon, he is in custody and released if not required in any other case.

3. Murder Reference No. 319/2006 has been filed by learned Trial Court as required under Section 374, Cr.P.C. seeking confirmation of death sentence awarded to Fayyaz Maqsood appellant.

4. The appellants have preferred appeal bearing (Crl. Appeal No. 840-2006) while Muhammad Khalid complainant sought enhancement of sentence awarded to the appellants Ali Sabir, Abdul Qayyum and Muhammad Tariq by filing Criminal Revision No. 563 of 2006. The appeal and criminal revision are being disposed of by this single judgment alongwith Murder Reference No. 319 of 2006.

5. Muhammad Khalid son of Asmat Ullah complainant (PW-23) in F.I.R. Ex.PN stated that on about 9-½ years ago he and his brother Abdul Ghafoor were residing together in the house in Ashraf Colony, Gojra. His brother Abdul Ghafoor was constructing a house in Aziz Park, Gojra and he used to spend his night over there during those days. Wife and children of complainant were residing on the ground floor whereas the family of his brother Abdul Ghafoor was putting up at the first floor of the same house in Ashraf Colony, Gojra. The nephew Sarfraz deceased son of Abdul Ghafoor was running power looms at Samundri Road during those days. On the night of occurrence, he came from his business place at about 11.00 p.m. and went upstairs to join his mother and sister. Electric light was on in the courtyard. At about 2.30 a.m. (night), on report of fire shot in the upper portion of the house, complainant wake up and noticed that a person was running out of the main gate. His brother's wife and the children were raising alarm when complainant went upstairs and found nephew Muhammad Sarfraz in injured condition, having received a bullet injury on his left shoulder near the neck, who was escorted to the hospital but he died in the way. On this statement, formal F.I.R. Ex.PN was recorded at the Police Station, against unknown persons.

6. Investigations in the case were carried out but assailants could not be traced out. In 2003, complainant came to know that one Ashiq Ali (PW-21) confined in District Jail, Jhang had knowledge of murder of Sarfraz. The complainant and his brother Nisar Ahmad met Ashiq Ali a condemned prisoner in jail who told that on 8.10.1996 he alongwith appellants had chalked out a programme for committing dacoity. They all four in number went to the poultry farm of Tariq who pointed out the house of deceased and they reached at house of deceased who resisted and Fayyaz Maqsood sensing danger fired at him whereafter, they while taking mnotor-cycle, parked in courtyard, left the house. Complainant, after having information made application for making Ashiq Ali as an approver in the case. A statement of Ashiq Ali was recorded by Abdul Ghafoor, S.I. the Investigating Officer.

7. The police completed usual investigation and submitted the challan against four appellants and approver in which they were charge-sheeted on 18.6.2005 under Sections 302/380/412/149, PPC. The accused professed innocence and claimed trial. The prosecution examined twenty-five witnesses to prove the charge. The learned Trial Court at conclusion of trial convicted the appellants in the manner noted in preceding para, while Ashiq Ali was set at liberty.

8. Ashiq Ali (PW-21) and Muhammad Khalid (PW-23) deposed about murder of Sarfraz while Khurram Shahzad (PW-6), Muhammad Arif (PW-7) and Ghulam Qadir (PW-8) deposed about recovery of weapons used in the occurrence. Muhammad Saqlain (PW-12), Bashir Ahmad (PW-13), Rana Ahmad Khan (P2-14), Shafique Ahmad (PW-15), Khalid Hussain (PW-16), Nazir Ahmad (PW-17) and Abad Ali (PW-18) deposed about extra-judicial confession made by appellants to them. Nauman Khalid (PW-20) deposed about identification of motor-cycle P-10. Dr. Muhammad Azam (PW-22) provided the medical evidence while Munir Ahmad (retired Police Inspector) (PW-24) and Abdul Ghafoor, S.I. (PW-25) deposed about their investigations conducted in the case.

9. Dr. Muhammad Azam, Medical Officer, Jinnah Hospital, Lahore (PW-22) on 9.10.1996 at about 11.30 a.m. conducted autopsy over dead-body of Sarfraz deceased and found the following injuries on his body:--

(i) Fire-arm wound of entrance 1 c.m. x 1 c.m. on left front of neck 3 c.m. above from left clavicle with exit wound 1.3 c.m. x 1 c.m. on back left chest 9 c.m. inner to angle of left scapula.

Corresponding holes were present on *Qameez*.

In the opinion of Medical Officer, death was caused due to sole injury. The injury was grievous and fatal to life and was ante-mortem, which were inflicted with fire-arm weapon. The cause of death was due to haemorrhage and shock which was sufficient to cause death in ordinary course of nature. Probable time elapsed between injury and death was within one hour and between death and post-mortem was about within 8 to 12 hours.

10. The prosecution closed its evidence by giving up Safdar and Abdul Ghafoor PWs being unnecessary and Zulfiqar Ali since died. Mst. Iqbal Bibi was given up as she had lost her balance of mind due to death of her sole son, Sarfraz. Report of Chemical Examiner Ex.PS, Serologist Ex.PT and report of Forensic Science Laboratory regarding pistol Ex.PV were also placed on record.

11. The prosecution evidence so recorded during the trial was confronted to the appellants while recording their statements u/S. 342, Cr.P.C. and in an answer to question

"Why this case against you and why the PWs deposed against him?"

they all set up their defence in the following words while negating prosecution evidence:--

> "It was blind murder, remained untraced for about 8 years. Ashiq Ali approver was sentenced to death in a murder case of a lady. Iftikhar a relative of the complainant party was prisoner in District Jail, Jhang. It looks that he developed intimacy with Ashiq Ali approver. He in league with Ashiq Ali planned to save the life of Ashiq Ali approver, concocted false story, got Ashiq Ali agreed to become in approver in this case on the condition that he would manage to him pardon from the heirs of the lady for whose murder he was sentenced to death. Said Iftikhar allured the complainant party of this case to contact the heirs of said lady and get Ashiq Ali pardoned from approver in this case. The complainant made an abortive attempt but failed to convince the heirs of said deceased lady for compromise with Ashiq Ali. When Ashiq Ali was informed about the result he refused to become an approver in

this case. Obviously, he was ready to become approver only on the pre-condition in his life be saved. The complainant continued his efforts, ultimately he got the heirs of said deceased lady agreed for the compromise on the condition that the complainant would manage for the payment of agreed Diyat amount. Ashiq Ali was accordingly intimated who agreed to become approver and depose against us. it is note-worthy that when Ashiq Ali was examined by Abdul Ghafoor, S.I. who recorded his first version Ex.DE, he narrated whatever was tutored to him by Iftikhar prisoner in District Jail, Jhang. Later while appearing before Judicial Magistrate he gave different version as he was so tutored then by his counsel appeared with him. When Ashiq Ali appeared in this Court and deposed as an approver he gave different story then previous two statements. It is thus obvious that he was acting as a tool in different hands at different stages. If all his statements are considered it would be explicitly clear that his statement is not worth the paper written on."

Besides setting up above-said defence, the accused also pointed out contradictory statement of Ashiq Ali in answer to Questions Nos. 2, 3 and 6 pointing out recovery of different motor-cycle than allegedly taken by Abdul Qayyum appellant and recovered from him. The appellants did not want to adduce any evidence in their defence nor did they want to make statement under Section 340(2), Cr.P.C. to disprove the allegation levelled in the prosecution evidence.

12. Learned counsel for the appellants *inter alia* contended that the case of the prosecution is based upon the statement of PW-21 Ashiq Ali, the approver of the case who confessed before one Iftikhar who was also detained with the approver in the jail, about the occurrence mentioning the names of the present appellants for joining him in the dacoity and murder of Sarfraz, which statement of the approver is not free from doubt; that the statement of the PW besides being unreliable and un-trustworthy are also contradictory on material points; that the prosecution did not produce Iftikhar and his father Akhtar Hussain, who undertook to get the pardon for PW-21 from the legal heirs of the deceased lady for whose murder he was awarded death sentence, thus, the chain of circumstantial evidence has broken on this point; that the evidence of extra-judicial confession led by the prosecution is conjectural and does not explain the material facts and the capacity of the PWs for having influence over the complainant party for getting pardon for the appellants; that the recoveries of the crime weapons after eight years of the occurrence are highly unimaginable; that the appellants are not the stranger for the complainant of the case who never nominated them in the instant case for a long interval of seven years and it was only when PW-21 Ashiq Ali approver pointed out the participation of the appellants in the occurrence, thee were booked therein; that on the statement of co-accused Ashiq Ali (PW-21), Fayyaz Maqsood appellant has been attributed the role of firing, a shot on the deceased whereas all the other accused were also allegedly armed with weapons which fact makes the story of the prosecution as doubtful and an attempt to bring the case in line with the medical evidence. Learned counsel for the appellants further submitted that the case against the appellants is highly doubtful and the prosecution could not be establish on the record that the appellants were the persons who participated in the occurrence which had taken place on 8.10.1996. It is the contention of the learned counsel for the appellants that the

recovery of motor-cycle at the instance of Abdul Qayyum appellant cannot be believed for the reason that a different motor-cycle than the one recovered by the police from his custody, thus, the same had been planted upon him to strengthen prosecution case. He negated the facts that Iftikhar co-prisoner of Ashiq Ali approver and father of Akhter Hussain had undertaken to secure pardon for Ashiq Ali rather the Investigating Officer Abdul Ghafoor, S.I. himself visited the jail for the arrest of Ashiq Ali approver in the case and recorded his version Ex.D/E and the story of development of intimacy of said Ashiq Ali with Iftikhar has been concocted to strengthen the prosecution case. While concluding the arguments, learned counsel for the appellants submitted that the prosecution has miserably failed to establish on record through convincing and cogent evidence that the appellants were the persons who had murdered Sarfraz deceased.

13. Learned Deputy Prosecutor General, assisted by the learned counsel for the complainant, submitted that the prosecution through the confidence inspiring evidence proved that the appellants are the real culprits who had murdered Sarfraz and in this connection the evidence of recovery of crime weapons supports the case of the prosecution. It is further argued that all the four appellants have made confession about their guilt before PW.12 to PW.18 and requested them for securing pardon from the complainant party. The learned DPG prayed for the enhancement of sentence awarded to the three appellants other than Fayyaz Maqsood on the ground that the learned Trial Court has taken lenient view in not awarding death penalty to them.

14. We have considered the submissions made by the learned counsel for the parties and re-appraised the evidence available on the record.

15. Although the appellants in their statements recorded under Section 342, Cr.P.C. have painted another picture of the occurrence but we deem it appropriate to first examine the case of the prosecution to determine whether the allegations levelled by it have been established on the record through evidence or not.

16. Admittedly, the occurrence of murder of Sarfraz took place on 8.10.1996 and the assailants of that incident remained untraceable for long seven years when suddenly in the year, 2003, the names of the present appellants floated on the surface. During this long interval, the appellants were never suspected for murdering Sarfraz deceased. It is in the prosecution evidence that the appellant Tariq was having his poultry farm in Chak No. 371/JB, Bhagtoopura, Moongi Road, Gojra, District Toba Tek Singh which could be the place situated near to the place of occurrence where the said Tariq was running his business till the time of his arrest. The complainant could not have any suspicion on the activities of Tariq nor could guess that said Tariq could have participated in the murder of his nephew Sarfraz. Thus, this fact alone is sufficient to shatter the story narrated by the prosecution through the statement of PWs. It is the case of the prosecution that one Iftikhar was facing the sentence in District Jail, Jhang with Ashiq Ali approver who promised the approver for securing pardon from the legal heirs of the deceased lady for which murder Ashiq Ali was charged and awarded death sentence whereafter the said Ashiq Ali confessed his own participation in the murder of Sarfraz alongwith the appellants before the said Iftikhar. In this sense, said Iftikhar was an important witness to support these facts but he has neither been cited as prosecution witness nor was examined in the Court thus, material evidence for

inducting PW-21 as approver in the case has been withheld by prosecution. Had said person appeared in the Court and support the story forwarded by PW-21 and PW-23, then prosecution could have a case against the appellants but without independent corroboration, statement of PW-21 would be viewed as suspicious. The statement of Ashiq Ali (PW-21) in the circumstances, carries no weight nor it can be used against the appellants. Moreover, this deposition also suffers from material contradictions which makes story narrated therein highly doubtful. His first statement was recorded by Abdul Ghafoor, S.I. as Ex.DE which was varied by Ashiq Ali when he appeared before the learned Judicial Magistrate. These two versions further were changed by him when he deposed as PW.21. This stand taken in three different statements can never ever be made basis for awarding death sentence to a person particularly when such statement is not corroborated by other independent evidence.

18. Coming to another factor upon which the prosecution case is based *i.e.* the extra-judicial confession made by the appellants before PW-12 to PW-18. Suffice it would to say that this evidence has been concocted by the prosecution to make up a case. This evidence does not disclose the necessity of making confessions by the appellants to the person having no influence over the complainant party for securing pardon for them; that the confession were recorded at the time when the police as in search of the appellants who were not apprehended by PWs nor they were handed over to the police; that PW Nos. 12 to 18 did not give the exact date and time when the appellants allegedly came to them and made the confession about their guilt. This piece of evidence produced by the prosecution does not lend any support to its case as it has been held by the precedent law that the evidence of extra-judicial confession is weakest type of evidence which can only be believed when it is corroborated by any other independent evidence. The record does not bear any such corroborative evidence.

19. PW-6 to PW-8 provided evidence of recovery of crime weapons which was allegedly taken into possession by the Investigating Officer on the disclosure made by them and on their pointation. It is very strange to think that for eight long years, the appellants had kept their crime weapons in their safe custody for presenting the same to the police as and when they were arrested in the case. During the eight years and till the time of their arrest, the appellants had ample opportunities to get rid of their weapons but they kept them intact for producing the same before the police. This fact alone casts serious doubt upon the recoveries effected by the police at the instance of the appellants. This piece of prosecution evidence is not worth believing.

20. As far as the medical evidence is concerned, the deceased had received single fire-arm injury on his neck which according to the prosecution case was inflicted by Fayyaz Maqsood appellant. We failed to find out any evidence of causing such fatal blow by the appellant except the extra-judicial confession made by him and the statement of his co-accused Ashiq Ali (PW-21) who in order to save his own skin and become an approver in this case. From the available record, it can easily be considered that the appellant Fayyaz Maqsood has been made a scapegoat to prove the fact that he had killed Sarfraz. The other co-accused were also having fire-arms with them at the time of occurrence but why Fayyaz Maqsood has been selected for the purpose, it is not explained in the prosecution evidence. Furthermore, as per F.I.R., complainant had seen single person escaping through main gate

of house at the report of fire shot. This means that single shot was given to deceased by single unknown person but that is not Fayyaz Maqsood for the reason that as per statements of PW-21 and PW-23, five persons committed murder. This is another nail which has been fixed in the coffin of prosecution case.

21. There is also an interesting aspect of the case *i.e.* recovery of Honda-125 motor-cycle at the instance of Abdul Qayyum appellant. Allegedly, the said motor-cycle was taken by the appellant when they decamped from the place of occurrence on 8.10.1996. The appellant had kept the stolen property for long eight years in his custody but no one checked him nor claimed the same. Furthermore, the motor-cycle was sent to the Forensic Science Laboratory which determined that it was not that motor-cycle which was stolen on the night of occurrence as the engine and chasis numbers differed from the one stolen on the night of occurrence. The motor-cycle allegedly recovered appears to have been planted.

22. After re-appraising the evidence, we are of firm view that the prosecution has miserably failed to prove charge against the appellants by not producing convincing, trustworthy and coherent evidence, as such convictions and sentences awarded to the appellants by the learned Trial Court cannot be upheld.

23. For the foregoing reasons, the appeal of the appellants is allowed and the convictions and sentences awarded to them by the learned Trial Court *vide* judgment dated 16.5.2006 are set aside. Crl. Revision No. 563 of 2006 filed by Muhammad Khalid complainant seeking enhancement in sentence in respect of Ali Sabir, Abdul Qayyum and Muhammad Tariq appellants in the circumstances having no merit is dismissed. All the four accused-appellants are acquitted from the charge and shall be set at liberty forthwith, if not required in any other case.

24. The death sentence awarded to Fayyaz Maqsood appellant is not **CONFIRMED** and Murder Reference No. 319 of 2006 is answered in **NEGATIVE**.

Criminal appeal allowed.

2012 P.Cr.R. 1016

[Lahore]

Present: **SYED MUHAMMAD KAZIM RAZA SHAMSI, J.**

Riaz Ahmad

Versus

Ameer Hussain and others

Crl. Misc. No. 14145-BC of 2010, decided on 20th February, 2012.

BAIL CANCELLATION---(Cross-version)

Criminal Procedure Code (V of 1898)---

---S. 497(5)---Pakistan Penal Code, 1860, Ss. 302/148/149---Matter of cancellation of bail---Cross-version---Validity---Parties had accused of initiating attack upon each other---Challan was pending in Court---Both the parties had filed their criminal complaints against each other---Court was yet to decide the matter independently on basis of evidence produced by parties---No interference was warranted in bail granting order---Bail cancellation petition dismissed.

(Para 4)

[It was a case of two versions. Challan was already pending in the Court. Cancellation of bail was refused].

For the Petitioner: **Rai Usman Ahmad, Advocate.**

For the State: **Muhammad Ishaq, DPG.**

For the Complainant: **Tahir Iqbal Tarar, Advocate.**

Date of hearing: **20th February, 2012.**

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J. --- Riaz Ahmad the petitioner a complainant of the cross-version recorded in F.I.R. No. 311, dated 30.5.2010 registered under Sections 302/148/149, PPC at Police Station, Lundianwala, District Faisalabad prays for the cancellation of bail granted to respondents Nos. 1 and 2 by the learned Additional Sessions Judge, Jaranwala, District Faisalabad *vide* order dated 15.11.2010 alleging that specific role of causing fatal injury to Abbas has been attributed to the respondents which fact has been ignored by the learned Trial Court while admitting petitioner's bail.

2. Petition has been opposed by the learned Deputy Prosecutor General assisted by the learned counsel for the complainant on the ground that challan in the case has been submitted in the Court and bail was granted to the respondents on the basis that the case was of two versions and a person was killed from both sides and at present stage aggressiveness of parties cannot be determined.

3. The submissions made by the learned counsel for the parties have been considered and record perused.

4. Admittedly, the present petitioner Muhammad Riaz is an accused in the above-said F.I.R. The perusal of the record shows that both the parties have accused of initiating attack upon each other. At this stage, when the challan is pending in the Court and both the parties have filed their criminal complaints against each other, any comment upon the factual controversy pending determination between the parties may prejudice the case of either of them. Learned Court is yet to decide the matter independently on the basis of evidence produced by the parties as well as the merit of the case. In these circumstances, I do not find any reason for interference in the bail granting order to the respondents. The petition in hand thus, having no merit is dismissed.

Bail cancellation petition dismissed.

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K.L.R. 2012 Criminal Cases 58

[Lahore]

Present: **SYED MUHAMMAD KAZIM RAZA SHAMSI, J.**

Shakeel Ahmad

Versus

The State and another

Criminal Miscellaneous No. 17587-B of 2011, decided on 19th January, 2012.

CONCLUSION

(1) The relief of anticipatory bail is an extraordinary relief which can be granted to a person, who comes to Court with clean hands.

(a) Bail---

---Contumacious conduct of accused---**Held:** There is no bar for refusing bail to such like person whose conduct is contumacious and who is willing to play with the Court.

(Para 5)

BAIL (MISAPPROPRIATION) --- (Contumacious conduct of accused)

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

---S. 498---Pakistan Penal Code, 1860, S. 406---Allegation regarding misappropriation of amount---Bail before arrest matter---Contumacious conduct of accused---**Held:** Petitioner had misused process of Court for his own advantage and posed himself to be on bail in a different F.I.R.---Relief of anticipatory bail is an extraordinary relief which cannot be granted to a person who comes to the Court with unclean hands---Assessment of record was sufficient to prove that petitioner had not approached either lower Court or High Court with clean hands---There was no bar for refusing bail to such like person, whose conduct was contumacious and who was willing to play with Courts---Bail before arrest refused.

(Paras 5,6)

[Petitioner playing hide and seek with Court had misused the concession of interim relief. High Court disallowed pre-arrest bail in offence under Section 406, P.P.C.].

Shoaib Zafar, Advocate with petitioner.

Muhammad Ishaque, D.P.G. with Liaqat Ali, A.S.I.

For the Complainant: **Nadeem Shibli, Advocate.**

Date of hearing: **19th January, 2012.**

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J. --- Crl. Misc. No. 104-M/2012

This is an application for placing certain documents on the record of this criminal miscellaneous petition. For the reasons narrated therein the same is allowed subject to all just and legal exceptions.

Main Petition

The petitioner Shakeel Ahmad through the instant criminal miscellaneous petition seeks anticipatory bail in case arising out of F.I.R. No. 1423/2011, dated 15.10.2011 registered under Section 406, P.P.C. with Police Station Madina Town, Faisalabad, which contained the allegation of misappropriation of Rs. 17,80,000/-, which amount was obtained by the petitioner after selling the house of the complainant of the case and refused to return the same.

2. It is contended by the learned counsel for the petitioner that the F.I.R. was lodged with an unexplained delay of six years; that there is no evidence on the record about the selling of the house by the petitioner; that the disputed house existed in the name of the son of the complainant, who executed a general power of attorney and agreement to sell in favour of the petitioner after receiving consideration; that subsequently the son of the complainant sold the disputed house to one Aurangzeb, who lodged an F.I.R. against the complainant of this case as well as her son; that in order to resolve the controversy between the parties the petitioner agreed to pay Rs. 7 lacs to the complainant, which was payable till 20.10.2011 but the complainant with *mala fide* intention lodged the instant F.I.R. prior to that date; that the petitioner never filed any pre-arrest bail petition before Mr. Abdul Majeed, learned Addl. Sessions Judge, Faisalabad, which the complainant's party itself filed to cause loss to the petitioner and that the offence under Section 406, P.P.C. is not made out from the facts of the case.

3. The petition has been opposed by the learned D.P.G., assisted by the learned counsel for the complainant, who has commented upon the conduct of the petitioner in the prosecution of the case. He submitted that due to contumacious conduct of the petitioner he is not entitled for the concession of extraordinary relief of anticipatory bail.

4. Parties heard and record perused.

5. After examining the record of the case, I feel that instead of deciding this petition on merits the conduct of the petitioner is relevant to be discussed and the petition can be decided on this score. In this connection there is an order dated 04.01.2012 on the file passed by Mr. Abdul Majeed, learned Addl. Sessions Judge, Faisalabad, wherein he has highlighted the contumacious conduct of the petitioner in the prosecution of the bail matter. According to the facts on the record the pre-arrest bail filed by the petitioner in the instant F.I.R. was dismissed by Mr. Muhammad Akram Sheikh, Addl. Sessions Judge, Faisalabad *vide* order dated 14.11.2011 but the petitioner was not arrested by the Police. The complainant of the case through application dated 23.11.2011 procured an order of issuance

of non-bailable warrants of arrest against the petitioner, in return of which the petitioner lodged an F.I.R. against the complainant of this case on 16.12.2011. On 22.12.2011 the petitioner provided a certificate to the Investigating Officer of the case showing that the petitioner was granted *ad-interim* pre-arrest bail in case F.I.R. No. 1423/2011 till 04.01.2012. Due to this certificate the I.O. did not arrest the petitioner. When the matter came to the notice of the complainant she filed an application for cancellation of the bail petition in the Court of Mr. Abdul Majeed, Addl. Sessions Judge where it transpired that the bail petition in case F.I.R. No. 123/2011 registered under Section 406, P.P.C. with Police Station Madina Town, Faisalabad was filed. The Court further noted, that the affidavit appended with the bail petition contained F.I.R. No. 1423 but the front page of the bail application contained F.I.R. No. 123. This shows that the petitioner deceitfully obtained an interim order of bail from the Court on 22.12.2011 by mentioning wrong number of the F.I.R. Although, the petitioner has denied that he had filed any bail application before the learned Addl. Sessions Judge but he could not place on record any such evidence proving that the petition was not filed by the petitioner. In the meanwhile the petitioner had also approached this Court by filing W.P. No. 23906-Q/2011, which was disposed of by this Court *vide* order dated 29.10.2011 with the direction to the S.P. (Investigation) for conducting honest transparent investigation in the matter. The afore-noted facts clearly show that the petitioner had misused the process of Court for his own advantage and posed himself to be on bail in a different F.I.R. than the one under consideration. The relief of anticipatory bail is an extraordinary relief, which cannot be granted to a person, who comes to the Court with unclean hands. The facts narrated above are sufficient to prove that the petitioner has not approached either the Court of learned Addl. Sessions Judge or High Court with clean hands. There is no bar for refusing bail to such like person, whose conduct is contumacious and who is willing to play with the Courts. In these circumstances this Court is not inclined to lend any benefit to the petitioner for his own wrongs.

For the foregoing reasons, the petition is dismissed.

Bail before arrest refused.

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[Lahore]

Present: **SYED MUHAMMAD KAZIM RAZA SHAMSI, JJ.**

Khalid Anwar

Versus

Ex-Officio Justice of Peace and others

Writ Petition No. 5931 of 2012, decided on 4th May, 2012.

CONCLUSION

(1) *Ex-Officio* Justice of Peace to examine the police report as well as other relevant material on record while deciding complaint u/Ss. 22-A/22-B, Cr.P.C. for registration of criminal case.

REGISTRATION OF CASE, DIRECTION BY EX-OFFICIO JUSTICE OF PEACE---(Concealment of facts/police report)

Constitution of Pakistan, 1973---

---Art. 199---Criminal Procedure Code (V of 1898), Ss. 22-A/22-B---Occurrence of robbery---Gold alongwith cash amount was allegedly taken away from house of complainant---Criminal complaint---*Ex-Officio* Justice of Peace issued direction to concerned SHO for registration of case---Impugned order---It was asserted that police report negated alleged occurrence and impugned direction was based on extraneous consideration---Concealment of facts/police report---Petitioner had concealed material facts---Police report received by Justice of Peace disclosed that petitioner and his named brother were also involved in criminal cases---Said report entered on a call at 'Rescue 15' showed that occurrence alleged by complainant/petitioner had never taken place nor any robbery was committed---It was further reported that due to litigation, petitioner had made a fake occurrence and tried to involve innocent persons thereon---**Held:** *Ex-Officio* Justice of Peace did not examine the police report as well as other relevant material on record and had also misapplied and misconstrued case-law on the subject---Impugned order was set aside by High Court/complaint of petitioner stood dismissed---Writ petition allowed.

(Paras 7,8,9)

[Justice of Peace had, without examination of appended documents, directed for registration of F.I.R. regarding proposed offence of dacoity. Whereas complainant and his brother were reportedly involved in a number of criminal cases and the alleged occurrence was negated. High Court allowed writ petition].

For the Petitioner: **Syed Karamat Ali Shah Naqvi, Advocate.**

For the Respondent No. 3/Petitioner in W.P. No. 6122/2011: **Barrister Muhammad Ahmad Pansota, Advocate.**

Wali Muhammad Khan, AAG.

Date of hearing: **4th May, 2012.**

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J. --- Writ Petitions Nos. 5931 and 6122 of 2012 are being decided jointly as both are directed against an order dated 3.3.2012 passed by the learned *Ex-Officio* Justice of Peace, Lahore issuing direction to the SHO of Police Station concerned for registering the case. Writ Petition No. 6122/2012 seeks implementation of the aforesaid order whereas through the former petition a prayer for setting aside the said order has been made.

2. Abid Hussain Chohan, petitioner in W.P. No. 6122/2012, on 18.2.2012 alleged, in his application filed under Sections 22-A and 22-B, Cr.P.C. that at 1.00 p.m. on the said date three persons armed with weapons trespassed into his shop and started firing, thereafter they took away 150 tolas gold alongwith cash of Rs. 5,00,000/-. Some other gold articles were also looted by the assailants.

3. In this petition the complainant did not name any person for the commission of the offence but in the same breath he made another application holding his own worker Khalid Anwar as the accomplice of the robbers and prayed for the registration of the case against him and three unknown persons. Learned *Ex-Officio* Justice of Peace *vide* order dated 3.3.2012 issued direction to the concerned SHO for registration of the case.

4. It is contended by the learned counsel for the petitioner Khalid Nawaz that the occurrence as alleged in the application did not take place as is evident from Rapat No. 42, dated 18.2.2012 recorded at Police Station, Choong; that the report requisitioned by the learned *Ex-Officio* Justice of Peace from the Police Station also negates the commission of offence, therefore, the direction issued by the learned *Ex-Officio* Justice of Peace is based upon extraneous considerations and is not in consonance with law. It is further contended by the learned counsel that the brother of Abid Hussain Chohan namely Zahid Chohan is involved in 19 criminal cases and his family is having the history of criminal litigation. He prayed for setting aside of the order passed by the learned *Ex-Officio* Justice of Peace.

5. On the other hand, the contentions have been rebutted by the learned counsel appearing on behalf of Abid Hussain Chohan with the assertion that the order passed by the learned *Ex-Officio* Justice of Peace is quite in consonance with law as the Police has no authority to conduct any inquiry prior to the registration of the case.

6. Parties heard and record perused.

7. No doubt the contention of the learned counsel Abid Hussain Chohan that an inquiry cannot be conducted by the police before the registration of the case is correct but it is evident from the record that the petitioner had concealed material facts in his application and if no report is summoned from the local police, the registration of the case on the simple application of the petitioner may cause harassment to innocent persons and would also be abuse of process of law. It has been experienced that the general public is so untruthful that it misuses the legal provisions by concealing real facts. The law promulgated to check these misdeeds of the complainant is so ineffective and involves lengthy procedure for punishing a person for lodging false application that has strengthened untruthful persons to mould law in their own favour. The benefit of ineffectiveness of law cannot be extended to the persons like Abid Hussain Chohan, who with malice concealed material facts from the Court while seeking relief for registration of the case. The police report requisitioned by learned *Ex-Officio* Justice of Peace discloses that the petitioner Abid Hussain Chohan is also involved in the cases of theft and dishonouring of the cheques whereas his brother too did not enjoy good reputation and is an accused in about 19 cases. Furthermore, at the time of alleged occurrence a call was made at Rescue '15' upon which the police reached at the spot and Muhammad Afzal, Sub-Inspector, Incharge Police Post, Sher Shah Colony recorded Rapat No. 42 on the same day showing that the occurrence alleged by Abid Hussain Chohan had never taken place nor any robbery was committed in his shop. It was further reported that due to litigation with one Ejaz Ahmad the petitioner has made a fake occurrence and tried to involve innocent persons therein.

8. The facts noted in the preceding paras are sufficient to believe that the learned *Ex-Officio* Justice of Peace did not examine the police report as well as other

relevant material on the record and had also misapplied and misconstrued the case-law cited in his order. The order of learned *Ex-Officio* Justice of Peace, as such, is not sustainable in the eyes of law and is liable to be set aside.

9. For the foregoing reasons, W.P. No. 5931/2012 is allowed and the order dated 3.3.2012 of learned *Ex-Officio* Justice of Peace is declared illegal and of no legal consequence. The same is set aside, resulting into the dismissal of the application filed by Abid Hussain Chohan under Sections 22-A and 22-B, Cr.P.C. The natural outcome of this finding is the dismissal of connected W.P. No. 6122/2012.

Petition allowed.

2013 C L C 532

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi, J

MUHAMMAD RAMZAN and others----Petitioners

Versus

DIRECTOR-GENERAL WILDLIFE and others----Respondents

Writ Petition No.4401 of 2010(BWP), decided on 7th November, 2012.

Punjab Wildlife (Protection, Preservation, Conservation and Management) Act, (II of 1974)---

----S. 2(b)---Constitution of Pakistan, Arts.199 & 18---Notification SOP (WL) 12-13/2001-11, dated 4-5-2010---Constitutional Petition---Unreasonableness, determination of---Petitioners, who were wholesale dealers of quails impugned notification whereby license fee under Punjab Wildlife (Protection, Preservation, Conservation And Management) Act, 1974 was increased---Contention of petitioners was that said increase was unreasonable and against their Fundamental Rights---Contention of Authority was that existing fees, in the present case, were not revised since year 1997 and lower fee may result in excessive demand for license and it was the duty of the Government to preserve rare species from extinction--- Validity--- While determining unreasonableness, the material on the basis of which a notification had been issued, was to be taken notice of and such material would determine whether impugned notification had been issued by the competent authority fairly or was based on mala fide---Authority had not realized that its license-holders would be adversely affected in case of increase in the fees, who were essentially stakeholders---Stance of competent authority did not reflect that any stakeholder was ever taken into consideration---Principle of audi alteram partem made it mandatory for any Authority to provide an opportunity to a person who was going to be affected adversely by its judgment or order---Petitioners also enjoyed fundamental Right of freedom of trade under Art.18 of the Constitution---Impugned notification was unjust and unfair and also violative of Fundamental Right and against the principles of natural justice---High Court set aside impugned notification and observed that competent authority was at liberty to enhance license fee after providing opportunity of hearing tothe stakeholders---Constitutional petition was allowed, in circumstances.

Hafiz Shahid Nadeem Kahloon for Petitioners.

Saeed Ahmad Chaudhry, A.A.-G. with Mujahid Kaleem, District Wildlife Officer, Bahawalpur.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.--- This petition, filed under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, seeks a declaration of ineffectiveness in respect of Notification No.SOP(WL)12-13/2001-11, dated 4-5-2010 issued by Government of Punjab, Forest, Wildlife and Fisheries Department through its

Secretary on the ground that the notification is perverse, without lawful authority and has been issued in violation of Article 18 of the Constitution of 1973.

2. This petition has arisen in the circumstances that the petitioners are the wholesale dealers of Quails in Bahawalpur Division for a period spread over more than 10 years. In respect of this dealership they have obtained licences from the Wildlife Department as defined in section 2(b) of the Punjab Wildlife (Protection, Preservation, Conservation and Management) Act II of 1974. The licences were issued by the competent authority after having received requisite fee levied under rules framed under the Act and subsequently enhanced in the year 1997 from Rs.500/- to Rs.2500/- and in 2010 vide impugned notification from Rs.2500/- to Rs.25000/- per annum. This enhancement in the licence fee has given rise to the cause of action to the petitioners to assail the same through the instant constitutional petition.

3. It is the case of the petitioner that impugned notification is not only unreasonable but also amounts to snatch their livelihood and while issuing this notification they were not heard or consulted, which was necessary element because they are going to be affected adversely. It is also argument of the learned counsel that the notification has been issued in violation of fundamental rights as guaranteed by the Constitution.

4. In this respect para-wise comments were requisitioned from the respondents, who contended that the fee has been enhanced as presently the people, are armed with latest weapons and have modern vehicles to reach at a far-flung areas, which was previously inaccessible; that there was a danger of the extinction of the rare species and that the petitioners are not poor persons as they are indulged in the business of dealing with precious birds. It was further submitted by the learned Law Officer appearing on behalf of the respondents that the notification impugned through the instant petition is neither arbitrary nor suffers from unreasonableness, rather the same has been issued keeping in view the financial power of the subject, who are fond of hunting and purchasing valuable birds.

5. I have considered the relevant submissions made by the learned counsel for the parties and have also gone through the record minutely. The petitioners have assailed the impugned notification on the ground that it is unreasonable, oppressive, violative of fundamental rights as well as of principle of natural justice. The impugned notification thus is being considered in view of these submissions of the learned counsel.

6. So far as the question of determination of unreasonableness is concerned, in this respect it is the settled principle that while determining the unreasonableness the material on the basis of which a notification has been issued, is to be taken notice of. That material would determine whether the notification has been issued by the competent authority fairly, justly or it is based upon the mala fide. In the instant case the material, which has been considered by the competent authority before issuing the impugned notification, appears to be that existing fees were not revised since 1997, the charge of the fees at lower side may result in excessive demands of hunting licences and that it is the foremost duty of the Government to preserve extinction of rare species. Although this material relied upon by the authority

while issuing the notification is advancing the cause for which purpose Act (ibid) has been promulgated but the authority in this connection did not realize that its licence-holders would be adversely affected in case of increase in the fees, which are essentially stakeholders. This opinion formulated by the authority on the basis of the material thus does not reflect that any stakeholder in this respect was ever taken into confidence or had been provided with an opportunity to place his viewpoint in respect of the increase in the fees. At this stage the principle of audi alteram partem comes into play, which makes it mandatory for any authority to provide an opportunity to a person, who is going to be affected adversely by its judgment or order.

7. Similarly the petitioners enjoy the fundamental right of freedom of trade, business or profession as enshrined in Article 18 of the Constitution of the country. The petitioners are, as per their assertions in their petition, are earning their bread and butter from the profession for which valid licences had been issued to them under the law, thus they may be deprived of their livelihood by increasing the licence fee at an exorbitant rate. The notification issued by the Government, on the one hand, advances the cause of promulgation of the Act itself but on the other hand it has decreased the number of licence-holders as is apparent from a report submitted by the Deputy Director Wildlife, Bahawalpur Range Bahawalpur, thus has substantially reduced the Government revenue as the persons remained involved in the business have been forced to leave profession and trade due to rise in the licence fee. In 2010 only 63 licences were issued by the Authority as compared to the year 2007 when 359 licences were issued. In this backdrop, it can be observed that the impugned notification is not only unjust and unfair but is also violative of fundamental rights and against the principle of natural justice, therefore, it cannot hold field any more.

8. For the foregoing reasons, this petition is allowed and the impugned notification dated 4-5-2010 is declared illegal, unlawful and of no legal consequences, accordingly is struck down. It may be observed at this stage that the competent authority is at liberty to enhance the licence fee after providing an opportunity of hearing to the stakeholders i.e. the licence holders, who have been affected by the impugned notification.

KMZ/M-343/L Petition allowed.

2013 C L C 944

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi, J

MUHAMMAD JAVED IQBAL----Petitioner

Versus

ADDITIONAL SESSIONS/DISTRICT JUDGE-I, LAHORE and 2 others----Respondents

Writ Petition No.1784 of 2011, decided on 16th January, 2013.

West Pakistan Family Courts Act (XXXV of 1964)---

----S. 5, Sched.---Constitution of Pakistan, Art.199---Constitutional petition---Suit for recovery of maintenance allowance and dowry articles was decreed concurrently---Plea of non-delivery of dowry articles---Contention of the husband was that only a Nikkah had taken place between the parties and there was no "rukhsati"; and as such no dowry articles were delivered to the husband---Validity---Nikkahnama showed that no one attended the ceremony from the husband's side nor any name was mentioned regarding appointment of "vakeel" from the husband's side; which indicated that at the time of nikah, the husband was all alone---No evidence was available to establish that the family members of the husband attended the ceremony and evidence established that the husband, a day after the nikah, left to resume his job in another city---When the husband after solemnization of nikah went back to his duties to another city, question of delivery of dowry articles did not arise and wife could not produce receipt regarding purchase of dowry articles---Two months after the nikkah, the parties divorced and during this time the husband had not returned to his wife; which proved non-delivery of dowry articles---Courts below had failed to examine the documentary evidence on record and therefore, the findings were liable to be set aside---High Court set aside findings of courts below and dismissed suit for recovery of dowry---Constitutional petition was allowed, in circumstances.

Mst. Allah Rakhi v. Tanvir Iqbal and others 2004 SCMR 1739 rel.
Ms. Ayesha Zahoor for Petitioner.
Muhammad Iqbal Ghani for Respondent No.3.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.--- This petition filed under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 is directed against judgment and decree dated 19-10-2010 passed by the learned Addl. District Judge, Lahore, whereby the appeal filed by respondent No.3 was partially allowed by enhancing the value of dowry articles from Rs.180,000/- to Rs.350,000/-.

2. Brief facts of the case are that Mst. Sadia, respondent No.3, filed two suits for recovery of her maintenance allowance and return of dowry articles valuing Rs.740,500/- mentioning that her marriage was solemnized with the defendant on 5-1-2008 and at the time of her marriage dowry articles valuing Rs.740,500/- were given to her by her parents, which were in possession of the defendant, who refused to return the same as well as refused to pay the maintenance allowance. The suit was contested by the defendant with the assertion that the Nikah between the parties was solemnized in the house of the plaintiff where the petitioner stayed for two days and then returned to his job at Rawalpindi. He further alleged that no `Rukhsati' had ever taken place therefore, the question of delivery of the dowry articles did not arise at all. It is the stance of the defendant that he had divorced the plaintiff of the case on 22-3-2008, thus prayed for the dismissal of both suits.

3. Learned Judge Family Court after framing of issues and recording the evidence of the parties held the defendant responsible to pay maintenance allowance to respondent No.3 at

the rate of Rs.2000/- per month till 'Iddat' period and decreed the suit for return of dowry articles to the tune of Rs.180,000/-.

4. Both the parties preferred appeals against the judgment and decree granted by the Family Court where the appeal of the petitioner was dismissed while the appeal of respondent No.3 was partially allowed and the quantum of value of dowry articles was enhanced to the tune of Rs.350,000/-.

5. Learned counsel for the petitioner while opening the arguments submitted that the Courts below have misread the documentary evidence available on the record as well as the record was not properly appreciated to reach at a conclusion that the dowry articles were delivered to the petitioner. It is added that the documentary evidence indicates that no `Rukhsati' of respondent No.3 had taken place as the Nikah of the petitioner was solemnized in the house of respondent No.3 on 5-1-2008, whereafter the petitioner resided in that house for one day and thereafter left for his job at Rawalpindi. It is maintained that the Courts below have not noticed the documents Exh.D.3 and Exh.D.4, which specifically prove that the petitioner had attended his office w.e.f. 7-1-2008 onward. It is further contended that the respondent failed to establish her dowry list as she was not able to produce any receipt regarding the purchase of the dowry articles thus concluded that in the absence of proof of purchase of dowry articles the delivery of those articles to the petitioner shrouded in mystery. Learned counsel has also referred to various pieces of evidence of the parties to establish that at the time of Nikah only the petitioner was present and none from his family members had joined Nikah ceremony as it was a love marriage and Nikah was arranged in the house of the respondent. Learned counsel in this backdrop prayed for the acceptance of this petition and dismissal of the suit filed by respondent No.3 for recovery of her dowry articles.

6. Learned counsel for respondent No.3 has argued that there is overwhelming evidence available on the record proving that the dowry articles were duly delivered in the home village of the petitioner, which evidence the petitioner could not rebut convincingly and this fact was duly appreciated by the Courts below while granting decree of return of dowry articles. In this connection learned counsel has referred to the Nikahnama for showing that the family members of the petitioner had participated in Nikah ceremony. He also discussed statements of DW.1 and DW.2 in this regard. He also maintained that the petitioner himself established the delivery of dowry articles by putting suggestions to the respondent's witnesses, therefore, he is now estopped to allege that no dowry article was given to the respondent by her parents at the time of her marriage. He prayed for the dismissal of the petition.

7. Parties heard and record perused.

8. The examination of the oral as well as documentary evidence led by the parties on the record depicts that the petitioner has raised an objection that the marriage between the parties was of love marriage and the Nikah was solemnized in the house of respondent and that the petitioner after solemnization of his Nikah returned to his job at Rawalpindi after two days of her marriage. It was also the stance of the petitioner that no dowry articles were delivered to the petitioner. The petitioner in order to establish his plea of Nikah at the home

of respondent has relied upon Nikahnama. When this document has been examined, it shows that no one attended the marriage from the side of the petitioner nor any name of the witness is mentioned in Columns Nos.9 and 10 regarding the appointment of the 'Vakeel' on behalf of the petitioner. This document clearly indicates that at the time of Nikah the petitioner was present all alone and none of his family members had participated in the proceedings. It further goes to prove the plea of the petitioner that his marriage with the respondent was a love marriage. To rebut this piece of evidence the respondent could not place on record any evidence establishing that the family members of the petitioner had participated in the Nikah ceremony. Further the plea of the petitioner that after Nikah, he returned to his job is evident from the documents Exh.D.3, which is the Attendance Registrar, which shows that the petitioner was present at his place of duty on 1-1-2008 till 4-1-2008 and from 7-1-2008 till 31-1-2008 where he performed his duties. Only two days have been left in this period including the date of 5-1-2008 on which date the Nikah between the parties was solemnized, which fact has not been denied by either of the parties. This document further shows that after staying with his wife in her house the petitioner joined his duties on 7-1-2008. The respondent could not produce any evidence to rebut this strong piece of evidence. The objection of the learned counsel that this document was not provided to the respondent during the trial proceedings cannot be heard at this stage as the respondent has never raised objection regarding non-supply of the document. This document was exhibited by the Court on the statement of the learned counsel under objection but details of the objections were not mentioned by the respondent as to why this document could not be exhibited. When it is so that the petitioner after solemnization of his Nikah went back to his duties at Rawalpindi then the question of delivery of dowry articles to the petitioner does not arise in any manner. This fact of non-delivery of dowry articles is further strengthened from another fact that the petitioner could not produce any receipt regarding purchase of dowry articles listed in Ex.PB. The case of Mst. Allah Rakhi v. Tanvir Iqbal and others (2004 SCMR 1739) provides guidance in this respect. It is the duty of the respondent at least to produce the receipts regarding purchase of valuable articles mentioned in her list but she could not place documentary evidence in this respect on the record. There is another factor available on the record, which proves non-delivery of dowry articles which is that after two months of marriage the respondent was divorced and till that time he did not return to his wife. This fact is evident from certificate Exh.D.4 that the petitioner did not avail any casual leave or leave on any other ground except gazetted holidays. The Courts below while decreeing the claim of the respondent did not examine this documentary evidence available on the record thus the findings recorded on the relevant issues are based upon misreading and non-reading of evidence. In this backdrop it would not wrong to set aside the findings of the Courts below.

9. For the foregoing reasons, this petition is allowed and the judgments and decrees handed down by the Courts below are declared of no legal effect. The judgments of the learned Family Court as well as of appellate Court are accordingly set aside resulting into dismissal of the suit for recovery of dowry articles filed by respondent No.3. No order as to costs.

KMZ/M-46/L Petition allowed.

2013 C L D 435

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi, J

NOOR AHMAD---Petitioner

Versus

MUHAMMAD SHAHID PARVAIZ---Respondent

Civil Revision No.115 of 2012, decided on 18th June, 2012.

Stamp Act (II of 1899)---

----S. 35--- Inadmissibility of instruments not duly stamped---Scope---Defect of deficiency of stamps on a promissory note or bill of exchange --- Effect--- No instrument chargeable with duty should be admitted in evidence, unless such instrument was stamped and only those documents could be admitted in evidence which were stamped in the manner provided by law---Exceptions to said rule had been narrated in the proviso to S.35 of the Stamp Act, 1899---Document valued less than 25 paisas should not be chargeable with duty and a bill of exchange or promissory note were required to be duly stamped and would not be admitted in evidence if they were not duly stamped---Legislature had internationally kept out making up a deficiency in the payment of stamp duty in respect of bill of exchange or promissory note; from the Stamp Act, 1899---Defect of deficiency of stamps on a promissory note was incurable and remained to be inadmissible in evidence; which was the ultimate purport of the S.35 of the Stamp Act, 1899.

1996 SCMR 575; Masood Anwar v. Sabir Khan PLD 2006 Pesh. 208 and Munir Ahmad Kahloon v. Rana Muhammad Yousaf PLD 2003 Lah. 173 distinguished.

Chaudhry Khalid Mehmood v. Chaudhry Said Muhammad 2005 CLD 1864 rel.

Javed Ahmad Khan for Petitioner.

Ch. Abid Ali for Respondent.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---This civil revision petition filed under section 115, C.P.C. is directed against an order dated 14-1-2012 passed by the learned Additional District Judge, Sahiwal whereby the application filed by the petitioner under Order VII, rule 11, C.P.C. seeking rejection of the plaint was dismissed.

2. The respondent/plaintiff had prayed for a decree of Rs.15,00,000 against the defendant/petitioner on the basis of a pro-note allegedly executed by the petitioner/defendant on 24-1-2009.

3. A contesting written statement was filed by the defendant denying from the execution of the pro note. Subsequently, through a separate application, the defendant prayed for the rejection of plaint on the ground that the alleged pro note was deficiently stamped which defect is not cureable under section 35 of the Stamp Act, 1899 as such, the suit is liable to

be dismissed. The application was contested by the plaintiff and the learned trial court after hearing both the parties, dismissed the application relying upon the case reported as 1996 SCMR 575 and directed the plaintiff of the suit to make up the deficiency in the payment of stamp duty along with the penalty of 5%.

4. Learned counsel for the petitioner while relying upon the provision of section 35 of Act (ibid), argued that by virtue of clause (a) of the proviso of the section, a bill of exchange or promissory note, have been excluded from admitting in evidence on the payment of the duty with which the same document is chargeable, therefore, the view taken by the learned trial court in ordering to make up the deficiency in the payment of stamp duty is against the spirit of law. He also distinguished the judgment relied upon by the learned trial court in this connection by asserting that the case so referred by the learned trial court deals with the matter of an agreement to sell which is quite distinguishable with the facts of instant case. He in support of his arguments has relied upon the case of Chaudhry Khalid Mehmood v. Chaudhry Said Muhammad (2005 CLD 1864). He prayed for the acceptance of his application and rejection of the plaint on this score.

5. Learned counsel for the respondent by seeking the help of the cases reported as Masood Anwar v. Sabir Khan (PLD 2006 Peshawar 208) and Munir Ahmad Kahloon v. Rana Muhammad Yousaf (PLD 2003 Lahore 173) submitted that the payment of stamp duty is a matter between a citizen and the State and an adversary could not be permitted to capitalize on a technicality which otherwise was not fatal to the suit. It is forcefully argued that the illegality if any, committed by the respondent in relying upon an under stamp pro-note is not fatal defect rather it can be cured by the orders of the court.

6. I have considered the cases referred by the learned counsel for the parties vis-a-vis the provisions of section 35 of Stamp Act, 1899.

7. Certainly the case of Sir Buland (1996 SCMR 575) deals with the payment of stamp duty in respect of an agreement to sell which according to the provision of section 35 of the Act (ibid) can be cured in the manner provided in the law but the case in hand is distinguishable on this score that a pro-note is being dealt with here. Similarly, the cases of Munir Ahmad Kahloon and Masood Anwar do not rescue thepetitioner as in those cases proviso sub-clause (a) of the proviso to section 35 has not been dilated upon nor the cases have been decided with this angle.

8. Reverting to proposition involved in the case in hand, plain reading of section 35 provides that no instrument chargeable with duty shall be admitted in evidence, unless such instrument is stamped. This wording used in the section itself clarifies that only those documents could be admitted in evidence which are stamped in the manner provided in the law. To this general rule exceptions have been narrated in sub-clause (a) to sub-clause (e) in the proviso narrated with section. Sub-clause (a) is relevant for the purpose of the instant case which is read as under:--

> "any such instrument not being an instrument chargeable with a duty {not exceeding twenty five paisa} only, or a bill of exchange or promissory note, shall, subject to all

just exceptions, be admitted in evidence on payment of the duty with which the same is chargeable....." (Emphasis has been provided).

9. The plain study of the above-said provision reveals that the documents, the value of which does not exceed twenty five paisa or a bill of exchange or promissory note have been excluded from the application of the main paragraph, meaning thereby that if a document is valued less than 25 paisa shall not be chargeable with duty and a bill of exchange and promissory note are required to be duty stamped and shall not be admitted in evidence, if they are not duly stamped.

10. The legislature in view of above interpretation of section, appears to have intentionally kept out of making up a deficiency in the payment of the stamp duty in respect of bill of exchange or promissorynote for the reasons which cannot be dilated upon by the courts on the principle that the wisdom of the legislature cannot be challenged in any manner. This exclusion of these two types of documents fromtendering the same in evidence if the same are deficiently stamped has been considered by the Division Bench of this court in the case of Chaudhry Khalid Mahmood (supra) wherein it is observed candidly in the following words:--

> "This means that the defect of deficiency of stamps on a pro note is incurable and it remains to be inadmissible in evidence. This is the ultimate purport of section 35 of the Stamp Act, 1899 when construed along with the first proviso."

11. In view of this interpretation of section, it appears that the learned trial court did not examine the relevant provision of law properly while dismissing the application of the petitioner as such, the order is liable to be recalled.

12. For the foregoing reasons, this revision petition is allowed by setting aside the impugned order as a result of which the application filed by the petitioner is allowed with costs as prayed for.

KMZ/N-51/L Petition allowed.

2013 C L D 2270

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi, J

TARIQ HAMEED and 2 others---Petitioners

Versus

ADDITIONAL SESSIONS JUDGE and 5 others---Respondents

Writ Petition No.789 of 2012, decided on 2nd July, 2013.

(a) Interpretation of statutes---

----Special law has overriding effect over general law.

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

----S. 7 (b)---Penal Code (XLV of 1860), Ss. 380 & 406---Criminal Procedure Code (V of 1898), S.22-A---Constitution of Pakistan, Art.199--- Constitutional petition---Special law---Banking offence---Registration of case---Petitioner availed finance facility from respondent bank and also pledged bags of rice---Bank alleged that petitioner had misappropriated or stolen the rice bags and sought direction from Ex-Officio Justice of Peace for registration of F.I.R.---Validity---Financial Institutions (Recovery of Finances) Ordinance, 2001, was a special law and had overriding effect over the provisions of Penal Code, 1860---When Financial Institutions (Recovery of Finances) Ordinance, 2001, itself provided procedure for dealing with matters of civil as well as criminal nature, only Banking Court constituted under Financial Institutions (Recovery of Finances) Ordinance, 2001, had jurisdiction to take action upon criminal acts performed by parties---Provision of S.7(b) of Financial Institutions (Recovery of Finances) Ordinance, 2001, created a prohibition in respect of lodging of criminal case under the provisions of Penal Code, 1860---Ex-Officio Justice of Peace was not within his jurisdiction when he ordered for registration of case against petitioners under the provisions of Penal Code, 1860---Bank had no authority to file application under S.22-A, Cr.P.C., nor Ex-Officio Justice of Peace had any jurisdiction, in presence of Banking Court, to order for registration of case against petitioners---High Court set aside the order passed by Ex-Officio Justice of Peace---Petition was allowed in circumstances.

Murshid Ali and 4 others v. S.H.O. Police Station Saddar, Khanewal and another 2011 PCr.LJ 1763; Mian Asim Farid and another v. Industrial Development Bank of Pakistan and 4 others 2005 PCr.LJ 766 and Malik Tariq Mehmood v. Messrs Askari Leasing Ltd. PLD 2009 Lah. 629 ref.

Shaukat Ali and others v. The State and others 2012 CLD 1 and Industrial Development Bank of Pakistan and others v. Mian Asim Fareed and others 2006 SCMR 483 distinguished.

Ch. Muhammad Abdul Qayyum for Petitioners.
Wali Muhammad Khan, A.A.-G.
Hassan Iqbal Warriach for Respondent No.5.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Tariq Hameed etc. being borrowers had secured a finance facility from Habib Bank Limited, a banking company, Trust Plaza, Gujranwala after providing all securities in respect of the facility they obtained. In this connection the bags of rice were also pledged with the banking company. Later on the company by filing an application under section 22-A, Cr.P.C. prayed for registration of the case against the petitioners, upon which application vide order dated 7-12-2011 the requisite direction was issued. The order passed by the learned Ex-Officio Justice of Peace,

Wazirabad, District Gujranwala is the subject matter of instant petition, which has been filed under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973.

2. The moot point involved in this case is whether the ordinary police in presence of section 7(b) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 has jurisdiction to register the case under Pakistan Penal Code, 1860 against a borrower of a banking company for breaching the contract or any other offence committed during the period of availing finance facility. This situation has arisen when the pledged stock had been attached by the learned Banking Court and from its legal custody misappropriation of the bags of rice had taken place. Learned counsel for the petitioner, in support of the fact that the ordinary police has no jurisdiction to register the F.I.R., has relied upon the cases reported as Murshid Ali and 4 others v. S.H.O., Police Station Saddar, Khanewal and another (2011 PCr.LJ 1763), Mian Asim Farid and another v. Industrial Development Bank of Pakistan and 4 others (2005 PCr.LJ 766) and Malik Tariq Mehmood v. Messrs Askari Leasing Ltd. (PLD 2009 Lahore 629).

3. On the other hand, learned counsel for respondent No.5 has also relied upon the cases of Shaukat Ali and others v. The State and others (2012 CLD 1) and Industrial Development Bank of Pakistan and others v. Mian Asim Fareed and others (2006 SCMR 483).

4. After examining the cases cited at the bar it is found that the order passed by this Court in the case of Mian Asim Fareed (2005 PCr.LJ 766) was set aside by the apex Court in the judgment reported as 2006 SCMR 483. A close examination of the judgment cited by the learned counsel for respondent indicates that this Court as well as apex Court had drawn a distinction between the matter of registration of the case and taking of cognizance in the case. Both these cases cited by the learned counsel for the respondent relate to the quashing of the F.I.R. where a criminal case had already been lodged against the person but in the instant case the matter is that the order of learned Ex-Officio Justice of Peace issuing direction for registration of the case has been assailed with the contention that the local police has no jurisdiction to take action under the provisions of Pakistan Penal Code, 1860, therefore, in my view the judgments cited by the learned counsel for the respondent are not applicable to the facts and circumstances of the case.

5. It is a rule of prudence as well as of interpretation of statute that special law shall have overriding effect over the general law, thus keeping in view this interpretation it can be said that the Financial Institutions (Recovery of Finances) Ordinance, 2001 being a special law shall have the overriding effect over the provisions of Pakistan Penal Code, 1860, particularly when the Ordinance (ibid) has itself provided the procedure for dealing with the matters of civil as well as criminal nature. In this connection when the provisions of section 7(b) of the Ordinance, 2001 are examined it comes to light that only Banking Court constituted under that Ordinance has jurisdiction to take actions upon the criminal acts performed by the parties. This specific provision, as provided by the Ordinance, has created a prohibition in respect of lodging of the criminal case under the provisions of Pakistan Penal Code thus the learned Ex-Officio Justice of Peace was not within his jurisdiction when he had ordered for registration of the case against the petitioners under the provisions of Pakistan Penal Code. Another matter regarding the competency of the order passed by

the Court on the application of the respondent is that respondent No.5 could not file an application under section 22-A, Cr.P.C. before the learned Ex-Officio Justice of Peace for the reason that the Banking Court in accordance with its own order had attached the bags of rice and had taken the same stock into its legal custody thus if any theft or misappropriation of that stock has been committed then it is the Court itself to initiate proceedings against the culprits and this jurisdiction cannot be bestowed upon the Manager of the branch of banking company to pray for the relief before the Court of ordinary jurisdiction in supersession of the available forum. It is also noticeable that uptil now the suit for recovery filed by the banking company had been decreed in its favour and an execution petition against the petitioners is pending before the Court.

6. The resume of the above discussion is that respondent No.5 had no authority to file an application under section 22-A, Cr.P.C. before learned Ex-Officio Justice of Peace nor the learned Ex-Officio Justice of Peace had any jurisdiction, in the presence of the Banking Court, to order for registration of the case against the petitioner.

7. In view of afore-noted circumstances, this petition is allowed and the impugned order is set aside resulting into dismissal of the application filed by respondent No.5 under section 22-A, Cr.P.C.

MH/T-14/L Petition allowed.

2013 M L D 823

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi, J

Mst. JAMEELA BIBI---Petitioner

Versus

STATION HOUSE OFFICER and others---Respondents

Criminal Miscellaneous No.2221-H of 2012, decided on 15th November, 2012.

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

----S. 491---Habeas corpus petition for recovery of minor from father---Jurisdiction of High Court under S. 491, Cr.P.C.---Scope---Jurisdiction of High Court under S. 491, Cr.P.C. for recovery of minor was to be exercised sparingly and might be undertaken only in exceptional and extra-ordinary cases---No exceptional and extraordinary circumstances warranting institution of present petition were found---Mother (petitioner) neither gave date of her divorce nor mentioned the exact and correct date of removal of minor from her lawful custody---Present petition apparently had been filed just to extort money from the father of the minor in the form of allowance of minor---Petition for recovery of minor was dismissed in circumstances.

Mst. Nadia Perveen v. Mst. Almas Noreen and others PLD 2012 SC 758 rel.

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

----S. 491---Guardians and Wards Act (VII of 1890), S.12---Habeas corpus petition for recovery of minor from father---Jurisdiction of High Court under S.491, Cr.P.C.---Scope---Jurisdiction of High Court under S.491, Cr.P.C. for recovery of minor was to be exercised sparingly and such exercise might be undertaken only in exceptional and extra-ordinary cases of real urgency, keeping in view that even a Guardian Judge had the requisite power of recovery of minors and regulating their interim custody.

Mst. Nadia Perveen v. Mst. Almas Noreen and others PLD 2012 SC 758 rel.

Ms. Safia Naurain Chaudhry for Petitioner.

Muhammad Ishaq, Deputy Prosecutor General and Muhammad Sarwar, A.S.-I. with record.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---By filing instant application under section 491, Cr.P.C. the petitioner Mst. Jameela Bibi prays for recovery of her minor son, namely, Muhammad Bilal, aged about 10-years from the custody of respondent No.2, father of the minor with an assertion that her son was removed from her custody forcibly.

2. On the application, S.H.O. of the Police Station concerned was directed to recover the minor and produce him in the court who reported that the residence of minor is within the jurisdiction of Police Station Hujra Shah Muqeem, Okara, thus, S.H.O. of the said police station be directed for compliance. In the meanwhile, learned Deputy Prosecutor General has cited the case of "Mst. Nadia Perveen v. Mst. Almas Noreen and others"(PLD 2012 Supreme Court 758) to say that petition under section 491, Cr.P.C. is not maintainable when custody of a grownup child is involved in the matter. Learned counsel for the petitioner could not make out any ground for relief prayed in the instant petition.

3. The case-law cited by learned Deputy Prosecutor General has been examined in which it has been observed by the apex Court that jurisdiction of a High Court under section 491, Cr.P.C. for recovery of minors is to be exercised sparingly and such exercise may be undertaken only in exceptional and extraordinary cases and real urgency keeping in view that even a Guardian Judge has the requisite power of recovery of minors and regulating their interim custody. When the instant petition has been examined in the light of case-law, I could not, find any exceptional and extraordinary circumstances warranting institution of instant petition. The petitioner has not given the date of her divorce nor is able to mention exact and correct date of removal of minor from her lawful custody. From the petition, it appears that the petitioner just wants to extort money in the form of maintenance allowance of minor from the respondent for which reason she has applied for custody of her son. The petitioner has also given incorrect date of removal of minor from her custody as is apparent from Para-5 which indicates date of removal as 5-12-2012 which date has yet, not reached. In view of this position while following the dictum of Hon'ble Supreme Court, I do not find

any reason to direct the police officials to recover the minor from the custody of respondent No.2. However, the petitioner is at liberty to seek her remedy before the learned Guardian Judge in appropriate proceedings.
4. For the foregoing reasons, the petition being not maintainable is dismissed.
MWA/J-24/L Petition dismissed.

2013 M L D 1231

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi, J

ABDUL JALIL---Petitioner

Versus

ADDITIONAL DISTRICT JUDGE and others---Respondents

Writ Petition No.12146 of 2011, decided on 9th October, 2012.

Criminal Procedure Code (V of 1898)---

----Ss. 22-A & 22-B---Constitution of Pakistan, Art. 199---Constitutional petition---Allotment of land by its owner challenged---Justice of Peace giving directions for registration of case despite owner of land not objecting to the allotment---Legality---Complainant (respondent) alleged that disputed land had been gifted by its owner to a madrassa (religious school) but the accused (petitioner) subsequently took the owner of land to the Patwari and managed to get the mutation attested in his (accused's) name in respect of the land---Complainant filed application under Ss. 22-A and 22-B, Cr.P.C before Justice of Peace whereby Station House Officer (S.H.O.) was directed to record the version of the complainant---Validity---Owner of land transferred the same to the accused vide impugned mutation---Said mutation was attested in a public meeting by Tehsildar and both the parties were identified by Nazim of the Union Council and others---When there was a document of title in favour of a person, attested in a public meeting then it could not be said that the mutation was obtained fraudulently or by coercion---Owner of land had not come forward with the allegation that impugned mutation was got attested from him fraudulently and he also did not challenge the same before revenue authority---Justice of Peace, in such circumstances, was duty bound to hear both parties before issuing any direction to police for registration of case---Justice of Peace acted upon the application of complainant without looking into real facts---Constitutional petition was allowed, impugned order of Justice of Peace was set aside and application of complainant under Ss.22-A and 22-B, Cr.P.C. was dismissed.

Abdul Sattar Chaudhry for Petitioner.
Wali Muhammad Khan, Assistant Advocate-General Punjab.
Rai Muhammad Usman for Respondent No.3.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Abdul Jalil petitioner has assailed the legality of order dated 17-1-2011, passed by the learned Ex-Officio Justice of Peace, Nankana Sahib whereby S.H.O. of the Police Station concerned was directed to record the version of the petitioner Rana Atta Ullah Khan (respondent No.3 herein).

2. Rana Atta Ullah Khan in an application filed under section 22-A/B, Cr.P.C. submitted that one Naseer Ahmad had gifted his land measuring one kanal to Madrassa Taleem and Tehfeez-ul-Quran and construction was undertaking over that plot in the supervision of Hafiz Muhammad Ali. It was further alleged that in the year 2007, the said Naseer Ahmad was taken by Abdul Jalil and others to Patwari Halqa and got the mutation attested in their names in respect of land allotted to Madrassa. It was alleged that commission of cognizable offence is made out, thus prayed for a direction in this connection. The learned Ex-Officio Justice of Peace accepted the application and issued direction as prayed for.

3. Parties heard.

4. Naseer Ahmad, had transferred the land in favour of Abdul Jalil vide Mutation No.1666 dated 10-9-2004. The said mutation was attested in the public meeting by Tehsildar and both the parties were identified by Malik Zahoor Ahmad, Nazim, Union Council and others. In such like situation, when there is a document of title in favour of a person, attested in a public meeting then it cannot be said that the mutation was obtained by coercion or fraudulently. It was Naseer Ahmad, who may approach the civil court with the allegation that the mutation in question was got attested from him fraudulently and by practicing fraud but he did not come to the court for this purpose. He has also not challenged the mutation before the revenue authority on the similar grounds. The learned Ex-Officio Justice of Peace in these circumstances, is duty bound to hear both the parties before issuing any direction to the local police for registration of case which not only save the party from agony but would also be helpful in reducing the frivolous, litigation. The court has wholly acted upon the application of the respondent without looking into real facts, therefore, the order is not sustainable in the eyes of law.

5. In view of the above, this petition is allowed and the impugned order is declared of no legal effects and is set aside accordingly. Pursuant to this, application filed by respondent No.3 under section 22-A/B, Cr.P.C. is also dismissed.

MWA/A-145/L Petition allowed.

2013 M L D 1497

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi, J

SABIR ALI and another---Petitioners

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.2705-B of 2013, decided on 22nd March, 2013.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), Ss. 458, 395, 397 & 412---Qanun-e-Shahadat (10 of 1984), Art. 22---Lurking house-trespass or house-breaking by night after preparation for hurt, assault or wrongful restraint, dacoity, robbery or dacoity, with attempt to cause death or grievous hurt, dishonestly receiving property stolen in the commission of dacoity---Bail, grant of---F.I.R. against unknown persons---Non-conducting of test identification parade---Non-recovery of incriminating articles---Effect---Accused persons allegedly trespassed into the house of complainant and after tying down the inmates of the house took away cash, mobile phone and other articles---Complainant alleged that he traced the accused persons through International Mobile Station Equipment Identity (IMEI) number of the stolen mobiles regarding which he also collected data---Initially F.I.R. was lodged against unknown persons, thus it had become essential for the police to trace out the assailants and conduct their identification parade---Contention of complainant that he tracked down the accused himself [through (IMEI) number of the stolen mobiles] was against the spirit of law, as it was the duty of the police to track down the suspect, therefore, no legal value could be attached to such effort of the complainant---Even otherwise tracking record (collected by the complainant) had not been made part of the police file nor had the police collected the same from the concerned authority---Although one piece of artificial jewelry was recovered at the instance of the accused, but such recovery did not provide incriminating evidence against the accused persons---Nothing on record showed that accused persons had criminal antecedents, thus they appeared to be first time offenders---Accused persons were admitted to bail in circumstances.

A.D. Nasim for Petitioners.
Muhammad Ishaq, Deputy Prosecutor General for the State along with Muhammad Din A.S.-I.
Ch. Azam Nazeer Tarar and Ch. Muhammad Arshad Ramay for the Complainant.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Sabir Ali and Shaukat Ali, seek their release on bail in case. F.I.R. No. 616 of 2011, dated 22-12-2011, registered at Police Station City Pakpattan, under sections 395, 397, 458 and 412, P.P.C..

2. As per allegations contained in the crime report, some un-known persons had trespassed into the house of the complainant and after tying down the inmates of the house had taken away cash, mobile phone and other articles.

3. The learned counsel for the petitioner contends that petitioner namely Sabir Ali was earlier allowed bail by the learned Judicial Magistrate, which was re-called by the learned Additional Sessions Judge, which order is not legally justified, as according to the record, the complainant failed to nominate the petitioner in the crime report nor any identification parade was conducted in respect of the petitioner. He adds that the mobile phones were fakely planted upon the petitioners to show involvement of the petitioners in the case and that no

proper description of the assailants has been provided in the crime report: he maintains that the name of the petitioners have been incorporated in the F.I.R. after about one year of the occurrence through the supplementary statement, which statement did not disclose any source of information about the involvement of the petitioners in the instant case.

4. The learned D.P.G. with the assistance of the learned counsel for the complainant has controverted this submission and states that the complainant himself traced out petitioners through IMEI No. of the mobile regarding which the data was also collected. Further contends that there is no ill-will of the complainant for falsely involving them in the instant case.

5. Parties heard and record perused.

6. There is no denial of the fact that initially F.I.R. has been lodged against some unknown persons thus in such situation it had become essential for the police to trace out the assailants and get their identification test. This submission of the counsel that the complainant himself had tracked down, the assailants, is against the spirit of law, as it is the duty of the police to itself track down the suspect and no legal value can be attached with the effort made by the private complainant for tracing the culprits. The tracking record has also not been made part of the police file nor the police had collected the same from the concerned authority to say that the petitioners were traced when they were using the stolen mobile phones. One "Kara", of an artificial in nature, was recovered at the instance of the petitioner, which does not provide any incriminating evidence against them. The petitioners are facing incarceration since 27-11-2012, whose trial has not been concluded as yet. There is nothing on the file to show that the petitioners are the history sheeters thus appears to be the first offenders. In this backdrop the petitioners are entitled for the release on bail.

7. For the fore going reasons, this petition is allowed and the petitioners are admitted to bail subject to their furnishing bail bonds in the sum of Rs.1,00,000 each with one surety each in the like amount to the satisfaction of the learned trial Court.

MWA/S-37/L Bail granted.

2013 M L D 1522
[Lahore]
Before Syed Muhammad Kazim Raza Shamsi, J
JAFFAR---Petitioner
Versus
The STATE and others---Respondents

Criminal Miscellaneous No.61-Q of 2011, decided on 19th June, 2013.

Criminal Procedure Code (V of 1898)---

---Ss. 265-K & 202---Penal Code (XLV of 1860), Ss. 302, 148 & 149---Qatl-e-amd, rioting armed with deadly weapons, unlawful assembly---Private complaint, withdrawal of---Scope---Complainant lodged an F.I.R. against the accused and co-accused persons for the murder of her son---Complainant also lodged a private complaint against accused and co-accused persons for the same charge---All the co-accused of the private complaint were acquitted by Trial Court, while accused was declared as proclaimed offender---Subsequently on arrest of accused, he was tried by the Trial Court, where the complainant and eye-witnesses of the occurrence made statements on oath to the effect that accused was implicated for the offence due to misunderstanding and doubts---Accused, in such background filed an application before the Trial Court under S. 265-K, Cr.P.C. seeking his acquittal, however the same was dismissed by the court on the ground that after following the procedure under S. 202, Cr.P.C., private complaint was converted into a State case, which could not be withdrawn by the complainant---Legality---Complainant and prosecution witnesses had certified that accused had been involved in the case due to some misunderstanding and that his involvement in the offence was doubtful---After such evidence, which was main stay of the prosecution, Trial Court was left with no option but to acquit the accused from the charge as there was no possibility of his conviction in the case---When ocular account was not supporting its own case, then on corroborative pieces of evidence a person could not be convicted for any offence---Trial Court had committed grave illegality in refusing application of accused---Application of accused under S. 265-K, Cr.P.C. was accepted, in circumstances, and he was acquitted from the charge of murder.

Nazar Abbas Syed for Petitioner.
Muhammad Ishaque, D.P.-G. for the State.
Ms. Shamaila Arshad for Respondents.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---In an occurrence taken place at 10/11 p.m. on 4-7-2007 Faisal Imran and Qamar Abbas were allegedly killed by the petitioner Jaffar and his co-accused and in this connection an F.I.R. was lodged under sections 302, 148 and 149, P.P.C. by the complainant Mst. Bibi. Subsequently she was also resorted to file a private criminal complaint against Jaffar and his eight accomplices on the charge of murder of her son and out of nine accused respondents of the private complaint learned trial Court on 3-2-2011 acquitted eight of the accused persons while Jaffar petitioner was declared proclaimed offender.

2. Subsequently on his arrest Jaffar petitioner was tried by learned Court where Mst. Bibi complainant and her witnesses Abid Khan and Muhammad Younas made their statements on oath that Jaffar petitioner has been booked in the case due to misunderstanding and doubts thus they did not support contents of the complaint. In this background Jaffar petitioner filed an application under section 265-K, Cr.P.C. seeking his acquittal from the charge on the ground that after the statement of the star witness of the prosecution/complainant the charge has rendered groundless and there is no probability of his conviction in the case.

3. This application of the petitioner was dismissed by the learned trial Court vide order dated 30-6-2011 on the ground that after following the procedure under section 202, Cr.P.C. the private complaint is converted into a State case, which cannot be withdrawn by the complainant and the complainant had thrice implicated the petitioner as her main culprit. This order is the subject matter of the instant proceedings filed under section 561-A, Cr.P.C. seeking acquittal of the petitioner from the charge.

4. On the petition in hand the parties have been heard and record perused. The examination of the record indicates that the complainant Mst. Bibi in support of her private criminal complaint had produced her witnesses Abid Khan and Muhammad Younas and had also made her statement as P.W.1 in the case certifying that the petitioner is not her accused whose name has been mentioned in the case due to some misunderstanding and his involvement in the case is doubtful. After this evidence, which is main stay of the prosecution, the Court left with no option except to acquit the petitioner from the charge as on the basis of this piece of evidence there is no probability of the conviction of the petitioner in the case. The eye-witnesses account in a case is the major evidence of the prosecution while rest of the evidence is based upon the opinion of the medical officer, recovery of the crime weapon etc., are corroborative pieces of evidence, which have to be proved through the ocular account and when ocular account is not supporting its own case then on the basis of corroborative pieces of evidence a person cannot be convicted for any offence. Learned trial Court has committed grave illegality in refusing the application filed by the petitioner, which order is not sustainable in the eyes of law.

3. For the foregoing reasons, the petition is allowed and petitioner Jaffar is acquitted from the charge of murder by accepting his application filed under section 265-K, Cr.P.C. He has submitted the surety bond for his appearance in the Court, which shall stand cancelled and the sureties are relieved of their liability.

MWA/J-14/L Petition allowed.

2013 P Cr. L J 179
[Lahore]
Before Syed Muhammad Kazim Raza Shamsi, J
MUHAMMAD SHARIF SHAHANI---Appellant
Versus
The STATE and another---Respondents

Criminal Appeal No.29 of 2012, heard on 28th June, 2012.

(a) Emigration Ordinance (XVIII of 1979)---

----Ss. 17, 18 & 22---Prevention and Control of Human Trafficking Ordinance (LIX of 2002), S.3---Inducing a person for sending him abroad for employment and receiving money from him for that purpose, human trafficking---Appreciation of evidence---Accused

was involved in 21 cases of similar nature and in all cases he had been convicted and sentenced---Said cases were decided against the accused on thebasis of his confessional statement recorded in each of the case---Contentions of counsel for accused was that prosecution evidence was not turning up and that accused was induced to make confession with the undertaking that he would be sentenced for the period which he had already undergone; were misconceived for the reason that if prosecution witnesses were not turning up, then accused had an option to seek his acquittal by filing an application under the relevant provisions of law, which opportunity he did not avail before the Trial Court---Submission of accused that he was induced to make statement, was not evident from the record; as he while making the confessional statement, had pleaded that leniency in awarding the punishment be taken--- Trial Court keeping in view the pendency of 21 cases of similar nature against accused, deemed it appropriate to award the sentence, which was neither illegal nor was harsh in any manner---No case for interference was made out in circumstances, however, it being too harsh to direct to run all the sentences consecutively, that part of the judgment of the Trial Court was modified, with the observation that the sentences awarded to accused would run concurrently.

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

----S. 544-A---Compensation---Trial Court had awarded Rs.800,000 as compensation to the complainant under S.544-A, Cr.P.C.; such like compensation was the expenses which the complainant had suffered for producing the witnesses, and for his own offences in the court on the dates fixed---In the present case, witnesses did not turn up in the court to make statements, no compensation, in circumstances, could be granted under S.544-A, Cr.P.C.

Raja Khalid Asghar for Appellant.
Sh. Ghias-ul-Haq, Standing Counsel along with Kashif Hussain Alvi, S.-I., FIA Multan with record for the State.

Date of hearing: 28th June, 2012.

JUDGMENT

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---This criminal appeal filed under section 24-A of the Emigration Ordinance, 1979, is directed against judgment dated 15-12-2011, passed by the learned Special Judge (Central), Multan whereby the appellant was convicted under section 17 of the Emigration Ordinance, 1979 with sentence of R.I. for three years and fine of Rs.25,000, in default whereof to undergo three months' S.I. and under section 22 of the Emigration Ordinance, 1979, imprisonment for seven years with fine of Rs.50,000, in default of payment of fine to undergo six months' S.I. Theappellant has further been burdened to pay Rs.800,000 under section 544-A, Cr.P.C. to the aggrieved persons, in default whereof to undergo six months' S.I. It was directed that all the sentences shall run consecutively with benefit of section 382-B, Cr.P.C.

2. The appellant has been charged for inducing the complainant for sending him to Masqat for employment being an overseas employment promoter and receiving Rs.800,000 for the

purpose. In this connection, F.I.R. No.32 dated 1-4-2010, was registered with Police Station FIA, Multan under sections 17, 18 and 22 of the Emigration Ordinance, 1979 and section 3 of the Prevention and Control of Human Trafficking Ordinance, 2002.

3. After investigations, the case was sent to the court for trial where the appellant was formally charge-sheeted who during the pendency of the proceedings made a confessional statement seeking leniency in awarding the sentence and the learned court after recording his confessional statement convicted and awarded sentence to the appellant in the above terms.

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

5. It is noticed from the record that the appellant is involved in 21 cases of similar nature and in all the cases, he has been convicted and sentenced in the afore-noted manner. The cases were decided against the appellant on the basis of his confessional statement recorded in each of the case registered against him. The contentions of the learned counsel for the appellant that prosecution evidence was not turning up and that the appellant was induced to make confession with the undertaking that he would be sentenced for the period which he had already undergone, are misconceived for the reason that if the prosecution witnesses were not turning up then the appellant had an option to seek his acquittal by filing an application under the relevant provisions of law which opportunity he did not avail before the learned trial Court. The second submission that he was induced to make statement is not evident from the record as the appellant while making the confessional statement had pleaded that leniency in awarding the punishment be taken. It was within the control of the appellant to reply question No.3 in terms that he be released from the case on the basis of sentence he had already undergone but instead of making this assertion in the answer to question, he sought leniency in awarding the punishment. After this submission of the appellant, it was within the discretion of the learned court to award any sentence which it deemed appropriate. The learned trial Court keeping in view the pendency of 21 cases of similar nature had deemed it appropriate to award the sentence in the above terms which is neither illegal nor is harsh in any manner. The learned court could have taken the proceedings in accordance with law in recording confessional statement of the appellant against which no appeal is maintainable, therefore, the appellant has no case for interference.

6. Furthermore, it is noticed from the order of the learned trial Court that while awarding sentence, it was directed that the same would run consecutively. To my mind, it is too, harsh to direct to run all the sentences, consecutively, therefore, this part of the judgment of the learned trial Court is modified with the observation that the sentences awarded to the appellant shall run concurrently. Another factor which is noticed from the impugned judgment is award of Rs.800,000 as, compensation to the complainant of the case under section 544-A, Cr.P.C. Law quoted by the learned trial Court in this respect shows that such like compensation is the expenses which the complainant had suffered for producing the witnesses and for his own appearance in the court on the dates fixed. In the instant case, it is noted from the case diary that the witnesses did not turn up in the court to make statements, therefore, in my opinion, no compensation can be granted under section 544-A, Cr.P.C.

Likewise, the amount has not been determined after asking details of expenses from complainant, therefore, this part of the judgment of the learned trial Court is also set aside holding that the complainant is not entitled for having the compensation asordered under section 544-A, Cr.P.C.

7. For the foregoing reasons, the instant appeal is partly allowed by modifying the judgment of the learned trial Court in the above terms.

HBT/M-267/L Appeal partly allowed.

2013 P Cr. L J 226
[Lahore]
Before Syed Muhammad Kazim Raza Shamsi, J
RIZWAN ZAFAR---Petitioner
Versus
The STATE and others---Respondents

Criminal Miscellaneous No.15294-B of 2012, decided on 21st November, 2012.

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

----S. 497(2)---Penal Code (XLV of 1860), Ss. 302/148/149/109---Qatl-e-amd, rioting armed with deadly weapons, unlawful assembly, abetment---Bail, grant of---Further inquiry---Implication on basis of belated supplementary statement---Prosecution had not denied that two unknown persons also participated in the occurrence---Accused was introduced in the present case through a supplementary statement, which was recorded with a delay of about three months, thus there was every possibility that name of accused had been introduced in the case after due deliberation and consultation---Complainant party had admitted in the F.I.R. that there was animosity between the parties---Identification parade lost its efficacy in the presence of the supplementary statement as said parade was conducted after the nomination of the accused in the case---No specific injury on the person of the deceased had been attributed to accused---Question as to whether fires made by accused hit the deceased and whether they proved fatal, were to be dealt with by the Trial Court---Police had declared six of the nominated accused as innocent because of which prosecution story regarding participation of accused in the occurrence came under a cloud---Case was one of further inquiry---Accused was admitted to bail accordingly.

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

----S. 161---Implication of accused on basis of supplementary statement---Scope---Time and date of recording supplementary statement was to be established beyond any shadow of doubt as in the absence of such proof there was chance of false implication of a person in the criminal case, that too after deliberation and consultation.

Khalid Javed and another v. The State 2003 SCMR 1419 rel.
Rana Ijaz Ahmad Khan for Petitioner.
Muhammad Ishaque, D.P.-G. with M. Yousaf, S.-I. for the State.
Muhammad Asghar Gill for the Complainant.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Rizwan Zafar petitioner seeks his release on bail in case F.I.R. No.600, dated 25-10-2011, registered under sections 302, 109, 148 149, P.P.C. with Police Station Batapur, Lahore.

2. As per contents of the F.I.R. one Muhammad Younas has lodged a criminal case against the complainant Muhammad Abdullah, his father Bashir and cousin Muhammad Akram at Police Station Batapur and on 25-10-2011 at about 11-30 a.m. when they were returning to Jallo More after appearing in the Court, three persons came from their rear side and started beating Bashir Ahmad and Akram. These persons were identified by the complainant and his 'Taya' Bashir and Akram and when they reached near them Asghar Ali, Jamat Ali and Shahzad alias Jeera made fires. Asghar's fire hit on the chest of Bashir Ahmad while the fire of Jamat Ali landed at Akram's chest. The complainant and his 'Taya' had witnessed the occurrence taking refuge behind the trees when they saw that Muhammad Younas, Ameer Ali and Nisar Ahmed along with two unknown persons reached there and started indiscriminate firing upon Bashir Ahmad and Akram. As a result of the firing, Bashir Ahmad and Akram lost their lives. The motive for the occurrence statedly was criminal litigation between the parties. On this report F.I.R. has been lodged against the nominated as well as two unknown persons at the relevant Police Station.

3. It is argued by the learned counsel for the petitioner that admittedly the petitioner is not named in the crime report nor his description has been cited therein. According to the learned counsel the petitioner was introduced in the instant case on 3-2-2012 through a supplementary statement but in that statement also no specific role of causing any injury to the deceased persons has been attributed to him. Added further that six nominated accused persons have been declared by the Police as not involved in the occurrence and in this respect a private criminal complaint was lodged in the Court without naming the present petitioner. He has raised his eye brow over the institution of amended private criminal complaint wherein the petitioner has been named but without any specific role. According to the learned counsel in the amended complaint till date the cursory evidence has not been recorded. He termed the case of the petitioner as one covered by the provisions of section 497(2), Cr.P.C., thus prayed for the grant of bail.

4. The petition has been opposed by the learned DPG, assisted by the learned counsel for the complainant who has laid much stress over the number of deceased as well as injuries received by them. He submitted that two deceased persons had received 21 injuries and the recovery of pistol .9 mm at the instance of the petitioner supports this fact that the petitioner had also caused injuries to the deceased because 4 empties of pistol .9 mm were collected from the place of occurrence. According to the learned counsel the petitioner was duly identified by the P.Ws. in the identification parade thus participation of the petitioner in the

occurrence is duly supported by the statements of the P.Ws. as well as medical evidence. He prayed for the dismissal of the bail application.

5. Parties heard and record perused.

6. It is not denied by the prosecution that two unknown persons had also participated in the occurrence and that the petitioner was introduced in the case through a supplementary statement. The legal value of the supplementary statement recorded by the Police has been discussed by the Apex Court in the case of Khalid Javed and another v. The State (2003 SCMR 1419) by saying that the time and date of recording such statement is to be established beyond any shadow of doubt as in the absence of such proof there would be chance of false implication of a person in the criminal case, that too after deliberation and consultation. In the instant case the occurrence had taken place on 25-10-2011 whereas the supplementary statement has been recorded on 3-2-2012 with a delay of about three months, thus there is every possibility that the name of the petitioner has been introduced in the case after due deliberation and consultation. This fact gets further support from the admission of the complainant made in the F.I.R. that the complainant party had animosity of murders. Similarly, the identification parade conducted on 9-2-2012 in the presence of the supplementary statement recorded on 3-2-2012 lost its efficacy as the parade was conducted after the nomination of the petitioner in the case. It is also noticed with great concern that no specific injury has been attributed to the petitioner, which he caused either of the deceased persons and resulted into his death. According to the prosecution Asghar Ali and Jamat Ali opened the fire at the chest of the deceased person, who fell on the ground, whereafter the other assailants including the petitioner resorted to indiscriminate firing. Which fire was of the present petitioner and whether it proved fatal to the life of the deceased is the matter of evidence, which would be taken care of by the Court seized with the matter. By the declaration of innocence, in respect of six nominated accused, by the Police the story of the prosecution has come under clouds regarding the participation of the petitioner in the occurrence. The examination of the case from all angles tentatively leads to a conclusion that the guilt of the petitioner needs to be determined and the case squarely falls within the ambit of section 497(2), Cr.P.C. To my mind the petitioner is entitled for the concession of bail.

7. In view of the above, instant petition is allowed and Rizwan Zafar petitioner is admitted to bail on furnishing of bail bonds in the sum of Rs.100,000 (Rupees One lac only) with one surety in the like amount to the satisfaction of the learned trial Court.

MWA/R-46/L Bail granted.

2013 P Cr. L J 660
[Lahore]
Before Syed Muhammad Kazim Raza Shamsi, J
Mst. SAMINA BEGUM---Petitioner
Versus
The STATE and another---Respondents

Writ Petition No.21595 of 2011, decided on 7th March, 2012.

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

----S. 154---Penal Code (XLV of 1860), S.302---Qatl-e-amd---Separate F.I.R., registration of---Scope---Where F.I.R. does not reflect true facts of a case, separate F.I.R. can be lodged.

Wajid Ali Khan Durani and others v. Government of Sindh and others 2001 SCMR 1556 and Mst. Anwar Begum v. Station House Officer, Police Station Kalri West, Karachi and 12 others PLD 2005 SC 297 rel.

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

----Ss. 154, 22-A & 22-B---Penal Code (XLV of 1860), S.302---Constitution of Pakistan, Art.199---Constitutional petition---Qatl-e-amd---Separate F.I.R., registration of---Grievance of the complainant petitioner was that the police in connivance with the accused persons had distorted the real facts and during investigation had made the case as one of suicide instead of culpable homicide, which had been witnessed by the complainant and her children who were present at the time of occurrence in the house of her daughter---Application filed by the complainant in that respect had sufficiently made out a case for registration of separate F.I.R., as police had declared that the death of the daughter of the complainant had occurred due to her suicide---Where F.I.R. did not reflect true facts of a case, separate F.I.R. could be lodged---Ex-Officio Justice of Peace had failed to notice the aforesaid facts while declaring the request of the complainant for registration of F.I.R.---Order of Ex-Officio Justice of Peace was consequently set aside with the direction to S.H.O. concerned to record the statement of the complainant petitioner and to proceed with it in accordance with law---Constitutional petition was allowed accordingly.

Wajid Ali Khan Durani and others v. Government of Sindh and others 2001 SCMR 1556; Mst. Anwar Begum v. Station House Officer, Police Station Kalri West, Karachi and 12 others PLD 2005 SC 297 and Mushtaq Hussain and another v. The State 2011 SCMR 45 rel.

Aaliya Neelum for Petitioner.
Wali Muhammad Khan, Assistant Advocate-General Punjab along with Muhammad Ashraf, S.-I. with record for the State.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---The petitioner Mst. Samina Begum, in an application filed under section 22-A/B, Cr.P.C. before the learned Additional Sessions Judge/Ex-Officio Justice of Peace, Kharian District Gujrat alleged that her daughter Arooj Begum was married with one Zubair Ahmad. On 27-6-2011, at about 6-30 a.m. in the morning, Arooj Begum made a phone call to her brother Raja Akraash Akram requesting him to take her back to her parents' house otherwise her husband Zubair Ahmad, Muhammad Irfan, Musarrat Nazir, Ghazanfar, Shazia and Fazal Begum would kill her. Raja Akraash Akram passed on this information to his parents. Subsequently, at about 12-30 p.m. Raja Akraash Akram, his sister Umeraash and Mst. Samina Begum their mother, reached at the house of Zubair Ahmad and found that the above named persons were abusing Arooj Begum and giving beating to her. When the petitioner etc. restrained them from beating her daughter, they were insulted and asked to leave the house. In the meanwhile, Zubair Ahmad, brought a pistol .30-Bore and made fires upon his wife Arooj Begum one of which hit at her temporal region. It was further mentioned in her application that the occurrence was narrated to the police which got signatures of Raja Akraash Akram on the plain papers and recorded concocted F.I.R. No.178 of 2011, to save the skin of the real culprits. She prayed for registration of separate F.I.R. on her statement.

2. The learned Additional Sessions Judge/Ex-Officio Justice of Peace, Kharian District Gujrat, vide order dated 12-9-2011, dismissed the application holding that the petitioner is aggrieved by the investigations conducted by the police in the above said F.I.R. which has also been recommended for cancellation, thus, the petitioner is at liberty to file criminal complaint regarding the alleged occurrence.

3. The learned counsel for the petitioner while relying upon cases reported as "Wajid Ali Khan Durani and others v. Government of Sindh and others" (2001 SCMR 1556) and "Mst. Anwar Begum v. Station House Officer, Police Station Kalri West, Karachi and 12 others" (PLD 2005 Supreme Court 297) contended that separate F.I.R. can be lodged upon the statement of the petitioner as the police by distorting the real facts had lodged an F.I.R. on the statement of her son who is minor.

4. On the other hand, the learned Assistant Advocate-General while rebutting the submissions, argued that the learned Ex-Officio Justice of Peace had rightly observed that alternate remedy of filing criminal complaint is available to the petitioner, thus, the instant petition is liable to be dismissed.

5. Parties heard. Record perused.

6. The case-law relied upon by the learned counsel for the petitioner manifest that in a case where F.I.R. does not reflect true facts, separate F.I.R. can be lodged. In the instant case, the grievance of the petitioner is that the police in connivance with the accused persons distorted the real facts. During the investigations, the police made the case as one of suicide instead of culpable homicide which was witnessed by the petitioner and her children who were present at the time of occurrence in the house of her daughter. The application filed in this respect by the petitioner sufficiently makes out a case forregistration of separate F.I.R.

as the police had declared that the death of Arooj Begum had occurred due to her suicide. The learned Additional Sessions Judge/Ex-Officio Justice of Peace, Kharian did not notice these facts while declining the request of the petitioner for the registration of F.I.R.

7. Keeping in view the precedent law including the one reported as "Mushtaq Hussain and another v. The State" (2011 SCMR 45), it is a fit case in which direction for registration of separate F.I.R. can be ordered. The instant petition is accordingly allowed and the order passed by the learned Additional Sessions Judge/Ex-Officio Justice of Peace, Kharian dated 12-9-2011, is set aside. Resultantly, the SHO, Police Station Galliana Tehsil Kharian District Gujrat is directed to record the statement of the petitioner and to proceed with it in accordance with law.

NHQ/S-53/L Petition accepted.

2013 P Cr. L J 684

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi, J

KHALID ANWAR---Petitioner

Versus

EX-OFFICIO JUSTICE OF PEACE, LAHORE and 3 others---Respondents

Writ Petitions Nos.5931 and 6122 of 2012, decided on 4th May, 2012.

Criminal Procedure Code (V of 1898)---

----Ss. 22-A, 22-B---Constitution of Pakistan, Art.199---Constitutional petitions---Order of Justice of Peace for registration of case without examining the police report and relevant material on record---Two constitutional petitions were filed, one by the complainant seeking implementation of said order while the second petition was filed by the accused for setting aside the same---Allegation against the accused was that he was an accomplice to a robbery committed at the complainant's shop---Contentions of the accused were that the alleged occurrence did not take place as was evident from the rapat recorded by the police; that report requisitioned by the Justice of Peace from the police also negated the commission of the offence; that direction issued by Justice of Peace for registration of case was based upon extraneous considerations and was not in consonance with the law, and that the complainant and his family were involved in many criminal cases and had a history of criminal litigation---Validity---Record revealed that complainant had concealed material facts in his application before the Justice of Peace and if no report was summoned from the police, the registration of case on the simple application of the complainant might cause harassment to the innocent persons and would also be abuse of process of law---Law promulgated to check the misdeeds of the complainant was ineffective and involved lengthy procedures for punishing a complainant but the benefit of such ineffectiveness of the laws could not be extended to persons like the present complainant, who with malice concealed material facts from the court while seeking registration of case---Complainant himself was

involved in different criminal cases and his brother was an accused in many cases---Rapat of the incident was recorded by the police on the same day, wherein it had been mentioned; that neither the alleged occurrence took place nor any robbery was committed in the complainant's shop, and that the complainant had tried to involve innocent persons because of an ongoing litigation---Justice of Peace did not examine the police report and other relevant material on the record and had also misapplied and misconstrued the case-law cited in his order---Constitutional petition filed by the accused was allowed and order of Justice of Peace was set aside, while the constitutional petition filed by the complainant was dismissed.

Syed Karamat Ali Shah Naqvi for Petitioner.

Barrister Muhammad Ahmad Pansota for Respondent No.3 (in Writ Petition No.5931 of 2012) and for Petitioner (in Writ Petition No.6122 of 2012)

Wali Muhammad Khan, A.A.-G.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Writ Petitions Nos.5931 and 6122 of 2012 are being decided jointly as both are directed against an order dated 3-3-2012 passed by the learned Ex-Officio Justice of Peace, Lahore issuing direction to the SHO of Police Station concerned for registering the case. Writ Petition No.6122 of 2012, seeks implementation of the aforesaid order whereas throughthe former petition a prayer for setting side the said order has been made.

2. Abid Hussain Chohan, petitioner in Writ Petition No.6122 of 2012, on 18-2-2012 alleged, in his application filed under sections 22-A and 22-B, Cr.P.C., that at 1-00 p.m. on the said date three persons armed with weapons trespassed into his shop and started firing, thereafter they took away 150-Tolas gold along with cash of Rs.500,000. Some other gold articles were also looted by the assailants.

3. In this petition the complainant did not name any person for the commission of the offence but in the same breath he made another application holding his own worker Khalid Anwar as the accomplice of the robbers and prayed for the registration of the case against him and three unknown persons. Learned Ex-Officio Justice of Peace vide order dated 3-3-2012 issued direction to the concerned SHO for registration of the case.

4. It is contended by the learned counsel for the petitioner Khalid Nawaz that the occurrence as alleged in the application did not take place as is evident from Rapat No.42, dated 18-2-2012 recorded at Police Station, Choong; that the report requisitioned by the learned Ex-Officio Justice of Peace from the Police Station also negates the commission of offence, therefore, the direction issued by the learned Ex-Officio Justice of Peace is based upon extraneous considerations and is not in consonance with law. It is further contended by the learned counsel that the brother of Abid Hussain Chohan namely Zahid Chohan is involved in 19 criminal cases and his family is having the history of criminal litigation. He prayed for setting aside of the order passed by the learned Ex-Officio Justice of Peace.

5. On the other hand, the contentions have been rebutted by the learned counsel appearing on behalf of Abid Hussain Chohan with the assertion that the order passed by the learned Ex-Officio Justice of Peace is quite in consonance with law as the Police has no authority to conduct any inquiry prior to the registration of the case.

6. Parties heard and record perused.

7. No doubt the contention of the learned counsel Abid Hussain Chohan that an inquiry cannot be conducted by the Police before the registration of the case is correct but it is evident from the record that the petitioner had concealed material facts in his application and if no report is summoned from the local Police, the registration of the case on the simple application of the petitioner may cause harassment to innocent persons and would also be abuse of process of law. It has been experienced that the general public is so untruthful that it misuses the legal provisions by concealing real facts. The law promulgated to check these misdeeds of the complainant is so ineffective and involves lengthy procedure for punishing a person for lodging false application that has strengthened untruthful persons to mould law in their own favour. The benefit of ineffectiveness of law cannot be extended to the persons like Abid Hussain Chohan, who with malice concealed material facts from the Court while seeking relief for registration of the case. The Police report requisitioned by learned Ex-Officio Justice of Peace discloses that the petitioner Abid Hussain Chohan is also involved in the cases of theft and dishonouring of the cheques whereas his brother too did not enjoy good reputation and is an accused in about 19 cases. Furthermore, at the time of alleged occurrence a call was made at Rescue '15' upon which the Police reached at the spot and Muhammad Afzal Sub-Inspector, Incharge Police Post Sher Shah Colony recorded Rapat No.42 on the same day shown that the occurrence alleged by Abid Hussain Chohan had never taken placenor any robbery was committed in his shop. It was further reported that due to litigation with one Ejaz Ahmad the petitioner has made a fake occurrence and tried to involve innocent persons therein.

8. The facts noted in the preceding paras are sufficient to believe that the learned Ex-Officio Justice of Peace did not examine the Police report as well as other relevant material on the record and had also misapplied and misconstrued the case-law cited in his order. The order of learned Ex-Officio Justice of Peace, as such, is not sustainable in the eyes of law and is liable to be set aside.

9. For the foregoing reasons, Writ Petition No.5931 of 2012 is allowed and the order dated 3-3-2012 of learned Ex-Officio Justice of Peace is declared illegal and of no legal consequence. The same is set aside, resulting into the dismissal of the application filed by Abid Hussain Chohan under sections 22-A and 22-B, Cr.P.C. The natural outcome of this finding is the dismissal of connected Writ Petition No.6122 of 2012.
MWA/K-14/L Order accordingly

2013 P Cr. L J 816
[Lahore]
Before Syed Muhammad Kazim Raza Shamsi, J
SARDAR KHAN---Petitioner
Versus
The STATE and another---Respondents

Criminal Miscellaneous No. 15312-B of 2012, decided on 4th December, 2012.

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

----S. 497---Bail---Dismissal of first two bail petitions---Ground available to accused for grant of bail at the time of first two bail petitions only taken by him at the time of filing third bail petition---Effect---Such ground raised for grant of bail would be deemed to have been asserted at the time of arguing the first two bail petitions, which was considered by the court and repelled.

The State through Advocate-General, N.-W.F.P. v. Zubair and 4 others PLD 1986 SC 173 rel.

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

----S. 497---Penal Code (XLV of 1860), Ss. 302, 148, 149 & 109---Qatl-e-amd, rioting armed with deadly weapons, unlawful assembly, abetment---Bail, refusal of---Provisions of S.109, P.P.C.---Repugnancy to injunctions of Islam---Scope---Accused allegedly hatched a conspiracy for the murder of deceased persons---Contention of accused was that Shariat Appellate Bench of the Supreme Court had already declared S.109, P.P.C. repugnant to the injunctions of Islam so far as it made an abettor in case of murder and other offences against the human body liable to the same punishment as was prescribed for the murder regardless of the various degrees of abetment---Validity---Provisions of S.109, P.P.C. were part and parcel of codified law---Legislature in the light of the objections of the Shariat Appellate Bench had already made amendments in S.109, P.P.C.---Ground of obsoletion of S.109, P.P.C. raised by accused was not available to him---Accused was not entitled to concession of bail---Bail petition of accused was dismissed accordingly.

Federation of Pakistan through Secretary, Ministry of Law and another v. Gul Hasan Khan PLD 1989 SC 633; Federation of Pakistan and another v. N.-W.F.P. Government and others PLD 1990 SC 1172; Manzoor Ahmad and another v. State 1997 PCr.LJ 850 ref.
Wajid Ali v. Mumtaz Ali Khan and another 2000 MLD 1172 rel.

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

----S. 109---Abetment---Abettor, liability of---Scope---Abettor was liable to same punishment just as the main accused including that of death but not as Qisas but as Ta'zir.

Muhammad Zuhair Khalid Chaudhry for Petitioner.

Muhammad Ishaq, Deputy Prosecutor-General for the State.
Inayat Ullah Cheema and Javed Imran Ranjha for the Complainant.
Manzoor Hussain, S.-I. with record.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---By filing a petition in hand, Sardar Khan, petitioner seeks his release on post-arrest bail in case F.I.R. No.1 dated 1-1-2012 registered at Police Station Phalia District Mandi Baha-ud-Din under sections 302, 148, 149, 109, P.P.C.

2. A charge of murder has been reported in the above said F.I.R. and the role attributed to the present petitioner is that he hatched a conspiracy for the murder of Pervaiz Iqbal and Asad Ullah Khan who wasseen and heard the petitioner as well as co-accused Khizar Hayat and Salmon, planning for the murder while sitting in the house of one Tariq.

3. Earlier Criminal Miscellaneous Petition No.5158-B of 2012 filed by the present petitioner along with Khizar Hayat was withdrawn whereafter second post-arrest bail petition bearing Criminal Miscellaneous No.7436-B of 2012 was filed which was dismissed on 23-8-2012. The second petition was dismissed after discussing merits of the case. Admittedly, the petitioner never approached the apex Court for his release on bail and has filed the petition in hand with the prayer of his release.

4. Learned counsel for the petitioner argued that by virtue of case titled "Federation of Pakistan through Secretary, Ministry of Law and another v. Gul Hasan Khan" reported as PLD 1989 Supreme Court 633, the Shariat Appellate Bench of apex Court had declared that section 109, P.P.C. is repugnant to the Injunctions of Islam so far as it makes an abettor in the case of murder and other offences against human body liable to the same punishment as is prescribed for the murder or for such offences regardless of the various degrees of abetment. He further referred another judgment of Shariat Appellate Bench recorded in "Federation of Pakistan and another v. N.-W.F.P. Government and others" reported as PLD 1990 Supreme Court 1172, whereby the view taken in the earlier case ibid was affirmed and it was further observed that the above said provisions of law as contained in section 109, P.P.C. shall cease to have effect w.e.f. 12th day of Rabi-ul-Awwal 1411 A.H. In this connection, learned counsel for the petitioner has further referred to the case titled "Manzoor Ahmad and another v. State" reported as 1997 PCr.LJ 850 whereby pre-arrest bail was confirmed by this court on the ground that provisions of section 109, P.P.C. have been declared repugnant to the Injunctions of Islam. By referring these cases, learned counsel argued that the provisions of section 109, P.P.C. are no more effective, therefore, the same cannot be charged against the petitioner. The learned counsel has also attempted to touch merits of the case by asserting that offence under section 109, P.P.C. is not made out from the bare reading of the statement of P.W.8 and that the petitioner is 85-years old man who is also suffering from heart diseases. It is further maintained that treatment of diseases suffered by the petitioner is not possible within the jail premises, thus, on this ground also, he prayed for grant of bail.

5. The request of petitioner has vehemently been controverted by learned Deputy Prosecutor-General assisted by learned counsel for the complainant and it is argued that in the case of "Wajid Ali v. Mumtaz Ali Khan and another" (2000 MLD 1172) the Division Bench of this Court had observed with concern that the judgment rendered by Shariat Appellate Bench of the Apex Court has been misunderstood and misinterpreted to say that the provisions of section 109, P.P.C. are no more available. It is argued that after the decision in the case of Federation of Pakistan ibid, section 109, P.P.C. has been amended by virtue of Criminal Law (Third Amendment) Ordinance, X of 1992 and proviso has been added to the section, thus the order of Shariat Appellate Bench has been complied with and now a person accused of hatching conspiracy can be charged under section 109, P.P.C. It is further submitted by the learned counsel that as per the case of "The State through Advocate-General, N.-W.F.P. v. Zubair and 4 others" (PLD 1986 Supreme Court 173) the ground alleged by the petitioner for seeking bail is not available as the said ground was available at the time of institution of earlier two bail petitions and it would be deemed that those grounds were asserted but could not find favour with the court. He has seriously opposed maintainability of this third petition on the basis of said case.

6. I have considered the submissions made by learned counsel for the parties and thoroughly examined the record.

7. Admittedly, it is third petition filed by Sardar Khan seeking his release on bail. The ground taken by the petitioner for his release is that the provisions of section 109, P.P.C. have been declared repugnant to the Injunctions of Islam, therefore, treating it a legal argument, the relief as prayed may be granted. The proposition placed by learned counsel for the petitioner before the court has no substance for the reasons firstly that this ground was available to the petitioner at the time of filing of earlier two bail applications but it was not alleged or pressed in the court, therefore, according to ratio of Zubair's case, it would be deemed that the ground was asserted by learned counsel for the petitioner at the time of arguing the first two petitions which was considered by the court and repelled the same. The second reason for not entertaining the instant petition is that the Legislature in the light of decision of Shariat Appellate Bench had added a proviso to section 109, P.P.C., thus compliance as required in the afore-noted two cases, has been made and the provisions of section 109, P.P.C. are the part and parcel of the codified law. Further, the case of Wajid Ali supra has further clarified the proposition with the observation that an abettor is liable to same punishment just as the main accused including that of death but not as Qisas but as Ta'zir. It was further observed by this court in Wajid Ali's case that the learned lower court (where the respondent of that case was admitted to bail on the similar ground alleged by learned counsel for the petitioner) had misappreciated and misinterpreted the judgments of apex Court to say that the provisions of section 109, P.P.C. have become obsolete. Thus on both these accounts, prayer made in the instant petition cannot be allowed.

8. Needless to say that the ground of age is also not available to the petitioner at present in view of Zubair's case. The crux of the afore-noted discussion is that the ground of obsoletion of section 109, P.P.C. and urging the said ground as a fresh one are not available to the present petitioner, therefore, he is not entitled for concession of bail.

9. For the foregoing reasons, the petition bereft of merits is dismissed.

MWA/S-7/L Bail refused.

2013 P Cr. L J 1177
[Lahore]
Before Syed Muhammad Kazim Raza Shamsi, J
Malik MUHAMMAD SADIQ---Petitioner
Versus
STATION HOUSE OFFICER and others---Respondents

Writ Petition No.2948 of 2012, decided on 9th February, 2012.

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

----Ss. 22-A, 22-B & 154---Constitution of Pakistan, Art. 199---Constitutional petition---Duties of Justices of the Peace---Scope---Petitioner had challenged the order of the Ex-Officio Justice of Peace by which he directed Station House Officer (SHO) to look into the matter and to proceed in accordance with law---Contention of petitioner was that Ex-Officio Justice of Peace without applying his legal mind to the facts narrated in the application under Ss.22-A & 22-B, Cr.P.C. had issued direction against the petitioner, that civil matter was pending between the parties in civil court---Validity---Orders of the type issued by the Ex-Officio Justice of Peace was disapproved by High Court as same were non-speaking in nature---Such ambiguous orders left an aggrieved person at the mercy of a police official for examining the act complained of, when same police official had not earlier entertained the application of the complainant for taking proceedings under S.154, Cr.P.C., who was subsequently constrained to knock the doors of the court---Order of Justice of Peace was set aside and he was directed to re-consider the application of the petitioner and if from the contents of the application any cognizable case was made out, he was to issue directions in clear terms to SHO concerned for registration of the case---Constitutional petition was disposed of accordingly.

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

----Ss. 22-A, 22-B & 154---Constitution of Pakistan, Art. 199---Constitutional petition---Duties of Justices of Peace---Scope--- Law cast a duty upon the Justice of Peace for considering the contents of the petition filed under Ss. 22-A & 22-B, Cr.P.C., to examine the material available on record for determining if any cognizable offence was made out therefrom or not, and if need be to examine the complainant/petitioner as well---Justice of Peace could also seek a report from the SHO of the police station concerned in the matter---In appropriate cases, person against whom a direction for registration of case was sought, could also be summoned in the court for showing cause as to why direction for registration of case should not be issued against him--- Calling of aggrieved person was based on the analogy that SHO before submitting report to the Court, summons both parties and after

hearing them dispatches same to the court with his own finding, thus, if report of SHO was considered, in which both parties had already been heard, then there was no harm in calling any party in court for arriving at a just conclusion---Such practice, if adopted, would advance the principle of natural justice, i.e. audi alteram partem---Justice of Peace should apply his legal mind to facts and circumstances of matter under his consideration, determine the cognizability of an offence himself even if he had to examine the complainant or summon the respondent and then to make clear and unambiguous direction, for taking proceedings under S.154, Cr.P.C., which he should implement himself instead of taking help of police official.

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

----Ss. 22-A, 22-B & 154---Constitution of Pakistan, Art. 199---Constitutional petition---Duties of Justices of Peace---Scope---Practice of Justice of Peace to refer the matter to the police authorities for implementation of their directions for registration of a case when petitioner again complains through separate application about indifferent attitude of SHO towards implementation of directions, was deprecated by the High Court with the observation that adoption of such practice had increased the work load of the higher judiciary, and it was the Justice of Peace who was competent and equally enjoyed jurisdiction to call upon the SHO of police station concerned , where direction was sent to him for implementation, to appear in person in court for showing cause as to why he had not complied with the orders---Courts had to be assertive and should jealously watch implementation of their orders, and matters could not be left at the will of persons, who were already reluctant in performing their duties, bestowed upon them by the law---Judicial officer who failed to implement his own order, could be treated as an inefficient judicial officer, which observation may be reflected in his annual confidential report by his initiating authority.

Ch. Nemat Ali Nagra for Petitioner.
Wali Muhammad Khan, Assistant Advocate-General Punjab on Court's call.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---This Constitutional petition is directed against an order dated 30-1-2012, passed by the learned Additional Sessions Judge/Ex-Officio Justice of Peace, Lahore whereby SHO had been directed to look into the matter and to proceed in accordance with law.

2. Muhammad Khalid, respondent No.2, by filing application under section 22-A/B, Cr.P.C. secured above said order against the petitioner.

3. It is contended that the learned Additional Sessions Judge/Ex-Officio Justice of Peace, Lahore without applying its legal mind to facts narrated in the petition had issued direction against the petitioner particularly when civil matter is pending in civil court between the parties who are brothers inter se.

4. The order passed by the learned Justice of Peace has been examined, which discloses that the learned Ex-Officio Justice of Peace had directed SHO to look into the matter and to proceed thereon in accordance with law. Such like orders have never been approved either by this Court or by apex Court as same are non-speaking in nature. By passing such ambiguous order an aggrieved person has been left at the mercy of a police official for examining the act complained of. It has been ignored by the court that same person had not entertained the application of complainant for taking proceedings under section 154, Cr.P.C., who was constrained to knock the doors of the court.

5. Law casts holy duty upon the learned Justice of Peace for examining the petition and other material available on record for determining if any cognizable offence is made out therefrom or not. In this connection, learned Justice of Peace is bound by law to take into consideration contents of petition filed under section 22-A and 22-B, Cr.P.C. as well as to examine the complainant/petitioner if needed. He may seek a report from the SHO of Police Station concerned in the matter. No doubt spirit of promulgating provisions of section 154, Cr.P.C. is that report should not be entered/registered after holding preliminary enquiry but this provision of law has grossly been misused by first informants, who just to satisfy their ego or to take revenge from its opponent, lay false information. Even such first information is also provided in cases involving civil disputes like one relating to execution of an agreement to sell and business transaction etc., as such in order to sift the chaff from grain, it has become imperative for Court to have a report from Police Station. Further in appropriate cases, the person against whom a direction for registration of case is sought, may also be summoned in the Court for showing cause as to why direction for registration of case should not be issued against him. The calling of aggrieved person is based on analogy that SHO before submitting report to Court, summons both parties and after hearing them dispatches same to Court with his own finding thus if that report of SHO, is considered, in which both parties have already been heard then there is no harm in calling that party in the Court for arriving at just conclusion. This would help in curbing multiplicity of litigation and work load could be managed besides saving precious public time. This practice if adopted would advance the principle of natural justice i.e. audi alteram partem.

6. It has further been experienced that learned Justice of Peace now-a-days have adopted a practice of referring the matters to police authorities for implementation of their directions for registration of case, when petitioner again complains through separate application, complains indifferent attitude of SHO towards implementation of direction. This practice adopted by Courts has increased, tremendously, workload in higher judiciary. It is Justice of Peace, who is competent and equally enjoys jurisdiction to call upon SHO of Police Station concerned, where direction was sent for implementation, to appear in person in Court for showing cause as to why he did not comply with the orders and to take coercive measures against him till the direction is implemented. The Courts should be assertive and should jealously watch implementations of their own orders. The matter cannot be left at sweet-will of persons, who are already reluctant in performing their duties, bestowed upon them by law. If a Judicial Officer fails to implement his own order, then he could be treated as an inefficient Judicial Officer, which observation may be reflected in his annual confidential report by his initiating authority.

7. Thus crux of the discussion is that a Justice of Peace should apply his legal mind to facts and circumstances of matters under his consideration, determine cognizability of an offence himself even if he has to examine complainant or to summon respondent and then to make clear and unambiguous direction, for taking proceedings under section 154, Cr.P.C. which he shall himself implement instead of taking help of officials of police hierarchy.

8. In view of the above, the order of learned Justice of Peace is set aside and he is directed to re-consider the application of the petitioner and if from the contents of the application any cognizable case is made out, he should issue direction in clear terms to the SHO concerned for registration of the case. The petition is disposed of accordingly.

MWA/M-56/L Order accordingly.

2013 P Cr. L J 1261
[Lahore]
Before Syed Muhammad Kazim Raza Shamsi, J
SAEED AHMAD MUGHAL---Petitioner
Versus
The STATE and others---Respondents

Criminal Miscellaneous No. 5727-B of 2013, decided on 24th May, 2013.

Criminal Procedure Code (V of 1898)---

----S. 498---Penal Code (XLV of 1860), S. 489-F---Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001), Ss. 7 & 20---Dishonestly issuing a cheque---Ad interim pre-arrest bail, confirmation of---Allegations against the accused were that he, while securing house building finance facility from the complainant-Bank issued 14 cheques for liquidating his liability which cheques were dishonoured when presented for encashment---While securing house building finance facility from the complainant-Bank the accused had also executed mortgage-deed in favour of the complainant-Bank undertaking that in case he failed to liquidate his liability the same could be satisfied through foreclosure or by selling the mortgaged property---Bank, at the time of execution of such mortgage deed in one sitting also took 14 cheques from the accused-borrower for liquidation of the liability---Issuance of the cheques did not indicate the dishonest intention of the accused to avoid his liability when his property stood mortgaged with the Bank and it was mandatory as per provisions of S.489-F, P.P.C. that cheque must have been issued with dishonest intention---In the present case, such dishonest intention was not apparent from the signing of the cheques by a person at the time of availing finance facility and even otherwise the Bank had sufficient security with it in the form of mortgage deed for the repayment of the loan taken by the accused---Financial Institutions (Recovery of Finances) Ordinance, 2001, was complete code in itself and provided procedure for any misdeed done by defaulting borrower including the criminal acts performed by him and S.7 of the

Ordinance covered both civil and criminal acts of defaulting party by providing prosecution under S.20 of the Ordinance--- Police had no jurisdiction to register F.I.R. in case relating to finance facility availed by the borrower from banking company--- Banking Court was the right forum for banking company for redressal of the default committed by the borrower--- Accused/borrower had mortgaged his property with the banking company, therefore, lodging the case with the police by the banking company against the borrowed was without lawful authority and spoke a lot about the mala fide of the banking company---Petition for confirmation of bail was allowed in circumstances.

Petitioner in person.
Muhammad Ishaque, D.P.-G. with M. Yaqoob, S.-I. for the State.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Saeed Ahmad Mughal petitioner seeks anticipatory bail in case F.I.R. No.823, dated 29-5-2007 registered at Police Station Defence Area, Lahore under section 489-F, P.P.C.

2. Briefly stated the allegations against the petitioner are that he while securing house building finance facility in 2005 from the respondent/complainant PICIC Bank had issued 14 cheques for liquidating his liability, which cheques were drawn on Faisal Bank Limited. Financial institution when presented the cheques, issued by the petitioner, for encashment the same were dishonoured. Accordingly aforesaid F.I.R. has been lodged against the petitioner.

3. Parties heard and record perused.

4. As per the documents available on the file while securing house building finance facility from the respondent/complainant the petitioner had also executed a mortgage deed in favour of the respondent-bank undertaking that in case he failed to liquidate his liability the same can be satisfied through foreclosure or by selling the mortgaged property. At the time of execution of that mortgage deed in one sitting the respondent/complainant had also taken 14 cheques from the petitioner/borrower for the liquidation of the liability. The issuance of the cheques at one time does not indicate the dishonest intention of the petitioner to avoid his liability particularly when his property also stood mortgaged with the bank. It is mandatory as per provisions of section 489-F, P.P.C. that a cheque must have been issued with dishonest intention but in case in hand this dishonest intention is not apparent from the signing of the cheques by a person at the time of availing any finance facility. Even otherwise the bank has sufficient security with it in the form of mortgage deed for the repayment of the loan taken by the petitioner. Furthermore, Financial Institutions (Recovery of Finances), Ordinance, 2001 is a complete code in itself and provides procedure for any misdeed done by a defaulting borrower including the criminal acts performed by him and section 7 of the Ordinance (ibid) covers it squarely which covers both civil and criminal acts of defaulting party by providing prosecution under section 20 of the Ordinance, 2001. The local Police in this manner has no jurisdiction to register even an F.I.R. in case relating to finance facility availed by the borrower by a banking company, rather it is the banking

company, which may move a learned Banking Court with a complaint about the default committed by the borrower. So it can be said now that the Police in these circumstances has no authority to book a borrower in a case in which a complaint is lodged by a banking company in respect of non-liquidating of finance facility by its borrower. In the instant case since the petitioner is a borrower and he has also mortgaged his property with the banking company, therefore, lodging the case with the local police by the Banking company against the petitioner is without lawful authority and also speaks a lot about the mala fide of the banking company, which in order to get its money back has adopted a shortcut and also attempted to short circuit the procedure. The Courts in these circumstances usually come to the rescue of a person as in case of refusal to confirm pre-arrest bail of the petitioner he may not only suffer humiliation at the hands of the banking company rather would also be bound to suffer harassment.

5. In view of the above, this petition is allowed and ad interim pre-arrest bail already granted to the petitioner Saeed Ahmad Mughal is confirmed on furnishing of bail bonds in the sum of Rs.10,00,000 (Rupees One Million only) with two sureties in the like amount to the satisfaction of learned trial Court.

AG/S-56/L Bail confirmed.

2013 P Cr. L J 1500
[Lahore]
Before Syed Muhammad Kazim Raza Shamsi, J
MUHAMMAD WARIS ALI---Petitioner
Versus
The STATE and others---Respondents

Criminal Miscellaneous No. 13037-B of 2012, decided on 10th October, 2012.

Criminal Procedure Code (V of 1898)---

----Ss. 195(c) & 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--Ad interim pre-arrest bail, confirmation of---Fake document presented in court. during proceedings---Lodging of complaint against accused---Scope---Accused had allegedly submitted a fake sale deed in court as surety bond to secure his pre-arrest bail in an F.I.R. lodged by the complainant---Accused contended that complainant had no locus standi to lodge present case against him for presenting a fake sale deed, rather it was the court which had to lodge the complaint under S.195(c), Cr.P.C.---Validity---Court had to decide whether the complainant had the locus standi to set the criminal law machinery into motion against the accused or whether same was to be done by the Court itself---Bail petition was allowed accordingly and ad interim pre-arrest bail already granted to accused was confirmed.

Muhammad Suleman and others v. Abdul Razzaque and others PLD 2005 Lah. 386; Ghulam Shabbir and 6 others v. The State and another 1990 PCr.LJ 97; Abdul Nabi and another v. Syed Mukhtar and another 2003 PCr.LJ 1242; Noor Muhammad and others v. Sardar All and The State 1990 PCr.LJ 1079; Muhammad Ijaz and another v. The State 2008 YLR 778 and Musaddaq Abbasi v. Abdul Hameed Mughal and another 2008 YLR 1526 fol.

Abdul Hakeem v. The State 1994 SCMR 1103; Muhammad Shafi v. Deputy Superintendent of Police (Malik Gul Nawaz) Narowal and 5 others PLD 1992 Lah. 178; Industrial Development Bank of Pakistan and others v. Mian Asim Fareed and others 2006 SCMR 483; Zulfiqar Ali v. Arshad Mahmood, Magistrate 1st Class, Kabirwala and 2 others 2005 YLR 1316 and Muhammad Bashir alias Bokla and 8 others v. Superintendent of Police City Division, Lahore and 9 others 2007 PCr.LJ 864 distinguished.

Shahzad Ali Dhillon for Petitioner.
Muhammad Ishaque, D.P.-G. with Mubarik, S. -I. for the State.
Rana Shahzad Khalid for the Complainant.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Muhammad Waris Ali, petitioner, seeks anticipatory bail in case F.I.R. No.1106, dated 5-8-2012, registered under sections 420, 468, 471, P.P.C. with Police Station, Islampura, Lahore.

2. The crime report was registered on the written application of Shanawar Shahzad mentioning that he had lodged F.I.R No.195 of 2012 under section 489-F, P.P.C. with the Police Station New Anarkali, Lahore in which Muhammad Waris Ali secured ac,l interim pre-arrest bail on 30-6-2012 and while submitting surety bonds he submitted a fake sale deed of Noor Ahmad, Muhammad Saleem and Jhangir Hussain. He further mentioned that the sale deed was got verified from Sub-Registrar, Ravi Town. Lahore, who reported that the sale deed was a fake document? He pleaded that the accused by practicing fraud upon the Court had used a fake sale deed for obtaining his ad interim pre-arrest bail. At this stage, it is worth mentioning that subsequently the pre-arrest bail of Muhammad Waris Ali was confirmed by the learned trial Court and the bail bonds submitted by the petitioner after that order were found in order.

3. Parties have been heard at length, who have referred to various judgments of this Court as well as of the apex Court in relation to the points raised by the learned counsel for the petitioner that the complainant Shahnawar Shahzad has no locus standi to lodge the case against the petitioner, rather it was the Court to lodge the complaint under section 195(c) of Cr.P.C. The stance of the complainant counsel is that the complainant Shahnawar Shahzad being an aggrieved person had all legal authority to lodge the F.I.R. After examining various judgments, I have found that it is a matter, which would be decided by the learned trial Court whether the complainant had locus standi to set into motion the criminal machinery against the petitioner or it was the Court itself, where the surety bonds. with fake documents were produced, is to lodge the complaint. Prima facie, after examining cases

reported as Muhammad Suleman and others v. Abdur Razzaque and others (PLD 2005 Lahore 386), Ghulam Shabbir and 6 others v. The State and another (1990 PCr.LJ 97), Abdul Nabi and another v. Syed Mukhtar and another (2003 PCr.LJ 1242), Noor Muhammad and others v. Sardar Ali and the State (1990 PCr.LJ 1079), Muhammad Ijaz and another v. The State (2008 YLR 778) and Musaddaq Abbasi v. Abdul Hameed Mughal and another (2008 YLR 1526). I subscribe to the view taken_ by the learned counsel for the petitioner whereas the cases cited by the learned counsel for the complainant reported as Abdul Hakeem v. The State (1994 SCMR 1103); Muhammad Shaft v. Deputy Superintendent of Police (Malik Gul Nawaz) Narowal and 5 others (PLD 1992 Lahore 178), Industrial Development Bank of Pakistan and others v. Mian Asim Fareed and. others (2006 SCMR 483), Zulfiqar Ali v. Arshad Mahmood, Magistrate 1st Class, Kabirwala and 2 others (2005 YLR 1316) and Muhammad Bashir alias Bokla and 8 others v. Superintendent of Police City Division, Lahore and 9 others (2007 PCr.LJ 864) do not support the version taken by the complainant. The cases, relied upon by the learned counsel for the complainant admittedly not applicable to the facts of the instant case, rather in the case of Muhammad Shafi(supra) it has been observed by the Full Bench of this Court that section 195, Cr.P.C. is an exception to the general rule that any person may set the criminal law in motion, its consequence being to take away the right of redress of persons. It is further observed in the precedent case that the offences have been selected for the Court's control because of their direct impact on the judicial process. In this view of the matter, the petitioner is entitled for the concession of bail.

4. For the foregoing reasons, the petition is allowed and ad interim pre-arrest bail already granted to the petitioner Muhammad Waris Ali is confirmed on furnishing of bail bonds in the sum of Rs.200,000 (Rupees Two Lacs only) with two sureties each in the like amount to the satisfaction of learned trial Court.

MWA/M-300/L Bail confirmed.

2013 P Cr. L J 1723
[Lahore]
Before Syed Muhammad Kazim Raza Shamsi, J
NASEEM ULLAH---Petitioner
Versus
The STATE and another---Respondents

Criminal Miscellaneous No.684-B of 2013, decided on 1st April, 2013.

Criminal Procedure Code (V of 1898)---

----S. 497(2)---Penal Code (XLV of 1860), Ss. 302, 324, 148 & 149---Qatl-e-amd, attempt to commit qatl-e-amd, rioting armed with deadly weapons, unlawful assembly---Bail, grant of---Further inquiry---Case of cross-versions---Observation made by High Court while refusing bail in a cross-version F.I.R. benefiting the accused---Scope---According to the F.I.R. lodged by accused, one "M" had made the fatal fire shot, whereas cross-version

F.I.R. alleged that accused made the same---Bail application of person "M" was dismissed by High Court with the observation that causing of injury to deceased by the accused was unimaginable as they were both from the same party, and that one fatal fire shot could not be attributed to two persons---Plea of accused that benefit of said observation should go to him---Validity---Deceased had received only one fire shot---Question as to who made the fatal fire shot was a matter of trial and fell within the domain of Trial Court--- Accused was not recommended for prosecution by the police---Crime weapon had not been recovered from the accused---Case against accused fell within the ambit of S.497(2), Cr.P.C.---Accused was admitted to bail accordingly.

Nasir ud Din Khan Nayyar for Petitioner.
Muhammad Ishaque, D.P.-G. with Abdul Rehman, ASI for the State.
Shahid Shaukat for the Complainant.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Naseem Ullah petitioner by filing the petition in hand seeks his release on post-arrest bail in the cross-version recorded in case F.I.R. No.226, dated 6-3-2012, registered under sections 302, 324, 148 and 149, P.P.C. with Police Station Ferozewala, District Sheikhupura.

2. This is second post-arrest bail application of the petitioner, who had withdrawn his first petition from this Court on 7-6-2012 after arguing the case at some length. This petition has been filed on the groundthat this Court while deciding Criminal Miscellaneous No.14846-B of 2012 vide order dated 5-12-2012 had disallowed bail to Muhammad Hanif, an accused of the above said F.I.R., observing that causing of injury to Ghulam Murtaza by the complainant of the F.I.R. (Naseem Ullah) is unimaginable as the deceased Ghulam Murtaza was his (complainant) party man. It is the submission of the learned counsel for the petitioner that deceased Ghulam Murtaza had received single fire shot and according to the version of the present petitioner said injury was caused by Muhammad Hanif to which the bail has been refused by this Court while in the cross-version the same injury has been attributed to the present petitioner as such the benefit of the observation made in the bail application of Muhammad Hanif goes to the present petitioner.

3. The facts of this case briefly stated are that Naseem Ullah at about 11-00 a.m. reported to the S.H.O. Police Station concerned that he along with Anwar, Noor Muhammad and Ghulam Murtaza had come to Sessions Court at Ferozewala to attend a case and when he came out of the Court room, Muhammad Bashir, Muhammad Hanif and Umair Asif along with two others encircled them while Umair accused had caused 'Jappha' to Ghulam Murtaza and Muhammad Hanif on direction of Muhammad Bashir fired at Ghulam Murtaza hitting on the right side of his head. Rest of the accused also gave beating to the other men of the party of the complainant and also resorted to the aerial firing. Against these allegations Muhammad Hanif having attribution of fatal fire applied for post-arrest bail, which was dismissed as stated above.

4. Muhammad Bashir one of the accused of the F.I.R. shown to be armed with pistol in the F.I.R., made his cross-version in the aforesaid F.I.R. attributing the fire to the present petitioner Naseem Ullah to Ghulam Murtaza and also another fire made at the complainant of the case hitting on his right shin. It was stated by the cross -versioner that after firing at him (Muhammad Bashir) Naseem Ullah had fired at his own man Ghulam Murtaza.

5. Learned counsel for the petitioner has vehemently argued the fresh ground with the submission that when this Court had given its opinion that Muhammad Hanif had fired at Ghulam Murtaza then the same fire cannot be attributed to the present petitioner and the benefit of this is to be extended to the petitioner. He added that in this manner, the fire attributed to the petitioner at Ghulam Murtaza needs further probe. He has also taken the benefit of the findings recorded by the Investigating Officer, who did not recommend the prosecution of the petitioner and during interrogation he was unsuccessful in recovering any crime weapon at the instance of the petitioner. In this background learned counsel for the petitioner prayed for the grant of bail.

6. The petition has been opposed vehemently by the learned DPG, assisted by the learned counsel for the complainant and has commented upon the character of the petitioner by submitting that he has the criminal history as huge number of criminal cases have been registered against the petitioner Naseem Ullah, thus there is every likelihood that after having the relief of bail from this Court, he may tamper with prosecution evidence. It is further argued that in fact the fire was made by the petitioner at his own party man in order to equalize the injury caused by him to the cross-versioner thus the petitioner is not entitled for any relief.

7. Parties heard and record perused.

8. According to the contents of the F.I.R. Muhammad Hanif had made a fatal shot at Ghulam Murtaza and according to the story narrated by the cross-versioner the same fire to Ghularn Murtaza was made by present petitioner. This Court while refusing bail to Muhammad Hanif observed that one fire cannot be attributed to two persons and further that it is very rare phenomenon that a person had made fire at his own party man to equalize the injuries caused by him to the other person. This position remains intact up-till now when it is found that the deceased had received one fire and according to cross-version the said fire was made by the petitioner whereas the stance of the petitioner is that Muhammad Hanif, the party man of cross-versioner had fired at the deceased. This question as to whose fire proved fatal to the life of deceased Ghulam Murtaza is the matter of trial and at this stage no comment can be made lest it may not prejudice the case of either party. In this connection suffice it to say that it falls within the domain of learned trial Court to determine whether Muhammad Hanif is responsible for the death of Ghulam Murtaza or it is Naseem Ullah, present petitioner. Further non-recommendation of prosecution by the Police in respect of the present petitioner as well as non-recovery of crime weapon, are the supportive facts to this observation.

9. So far as the contention of learned counsel for the complainant that the petitioner is the history sheeter having many cases at his credit is concerned, it is stated that as per version

of the learned counsel for the petitioner in most of the cases the petitioner has been acquitted while in other cases he was not recommended for prosecution. Without indulging into this controversy, it is found that the petitioner has never been convicted in the cases referred by the learned counsel for the complainant nor the learned counsel has bothered to place on record any such result to prove his stance. The other objection of the learned counsel for the complainant is that after withdrawal of his first petition, second petition can only be entertained on the fresh ground is untenable for two reasons, firstly that at the time of withdrawal of first bail petition by the petitioner on 7-6-2012, the order dated 5-12-2012 passed in the bail petition of Muhammad Hanif was not in field and secondly that the judgment of the apex Court delivered on 3-1-2013 in the case of Muhammad Siddique v. The State and another (Criminal Petition No.896-L of 2012) is prospective in its operation and cannot be applied retrospectively. Keeping in view the facts that the case of the present petitioner squarely falls within the ambit of section 497(2), Cr.P.C. and he is found to be entitled for the concession of bail.

10. For the foregoing reasons, the petition is allowed and Naseem Ullah petitioner is admitted to bail on furnishing of bail bonds in the sum of Rs.500,000 (Rupees Five Lac only) with two sureties each in the like amount to the satisfaction of learned trial Court.

MWA/N-20/L Bail granted.

2013 P Cr. L J 1886
[Lahore]
Before Syed Muhammad Kazim Raza Shamsi, J
Mst. PARIS BIBI---Appellant
Versus
The STATE and others---Respondents

Criminal Appeal No.356-J of 2010, heard on 14th November, 2012.

Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-e-amd---Appreciation of evidence---Wajtaker witness and extra-judicial confession---Accused was alleged to have murdered her husband and only evidence against her was her extra-judicial confession and Wajtaker witness---Trial Court convicted the accused under S.302(b), P.P.C. and sentenced her to imprisonment for life---Validity---Wajtaker witness had to prove and explain his presence at the time and place when he saw the assailants after commission of offence but such witness remained unsuccessful in establishing his presence at the time when he had seen accused persons entering into the house of deceased---Ocular account of prosecution witnesses, as well as extra-judicial confession and Wajtaker indicated that witnesses attempted to improve their case in very desperate manner, which statements also suffered from material contradictions---Evidence led by complainant was neither sufficient nor convincing and confidence-inspiring for proving allegation of murder by accused beyond any shadow of doubt---Such evidence could not be taken into consideration for holding accused responsible for the murder of her

husband---High Court set aside the conviction and sentence awarded to accused by Trial Court and she was acquitted of the charge---Appeal was allowed in circumstances.

2003 SCMR 1419 rel.
Malik Saeed Hassan and Nazar Abbas Syed for Appellant.
Muhammad Ishaque, D.P.-G. for the State.
Ch. Nazir Ahmad Ranjha for the Complainant.

Date of hearing: 14th November, 2012.

JUDGMENT

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Mst. Paris Bibi, Ilyas, Liaqat, Zakir, Umar Hayat, Amir Shahzad, Mst. Zeenat and Yaqoob had faced trial in the private criminal complaint lodged by one Hakim Ali under sections 302, 148 and 149, P.P.C. and at the conclusion of the trial except Mst. Paris Bibi rest of the accused persons were acquitted of the charge by the learned Addl. Sessions Judge, Chiniot by way of judgment dated 30-8-2010. Mst. Paris Bibi was convicted under section 302(b), P.P.C. and was sentenced to imprisonment for life for the murder of one Mumtaz with further direction topay Rs.300,000 as compensation to the legal heirs of the deceased, in default whereof to undergo simple imprisonment of six months. Benefit under section 382-B, Cr.P.C. was also extended to her.

2. Mst. Paris Bibi assailed her conviction and sentence by filing Jail Appeal whereas Hakim Ali complainant had filed a petition for Special Leave to Appeal bearing No.271 of 2010 against the acquittal of the other accused persons, which appeal was dismissed for non-prosecution on 24-6-2011 and in this connection no application for restoration of the appeal was filed uptil today. Further the complainant Hakim Ali had also filed a criminal revision petition against Mst. Paris Bibi praying for enhancement of sentence awarded to her. This criminal revision petition has not been numbered in view of the office objection, which till today has not been removed and the file was lying in the office unattended. The file of criminal revision petition has also been taken up along with the criminal appeal filed by Mst. Paris Bibi, which revision petition may be numbered by the office after the decision of the appeal of Mst. Paris Bibi.

3. Hakim Ali on 7-9-2008 at about 5-50 a.m in the morning made a complaint to Muhammad Sharif, Sub-Inspector of Police Station Barana, District Chiniot stating that at 3-00 a.m. in the night he along with his cousin Mumtaz deceased were sleeping in their residence and there was light of lantern in the courtyard when he heard the shrieks and woke up. In the lantern light he saw Mst. Paris, Ilyas, Liaqat and Umar Hayat had held Mumtaz while Mst. Paris and Ilyas were strangulating him with a rope. Liaqat Ali was holding the head of Mumtaz while Zakir and Umar Hayat were holding his legs. When the complainant went ahead to rescue, the accused threatened him that he would also be given same treatment. At the report of noise of the complainant Muhammad Khan and Noor P.Ws. attracted at the spot and witnessed the occurrence. Mumtaz succumbed to the injuries at the spot. Motive for the occurrence was that Mumtaz deceased had divorced Mst. Paris

his wife due to which grudge she along with her companions murdered Mumtaz. On this report formal F.I.R. was registered at the Police Station.

4. After completion of the investigations the names of Umar Hayat, Zakir, Liaqat and Ilyas were placed in Column No.2 of the report while Mst. Paris, Amir Shahzad and Muhammad Yaqoob were mentioned in Column No.3 and Mst. Zeenat Bibi was mentioned in Column No.4 of the report.

5. The complainant of the case being dissatisfied with the Police investigations filed separate private criminal complaint against the accused as mentioned in the opening para of this judgment, in which the respondents were summoned to face the trial.

6. The complainant examined nine P.Ws. in support of the charges while Muhammad Sharif Sub-Inspector was examined as C.W.1 in the case. The prosecution evidence thereafter was closed, which was duly confronted to the respondents who denied from the charge and controverted the evidence recorded against them. Mst. Paris Bibi in her statement recorded under section 342, Cr.P.C. while answering to a question "why the case was registered against her and why the PWs deposed against her?" stated that the P.Ws. were inimical towards her. Her husband had contracted second marriage and he died in mysterious circumstances. The complainant party wanted to usurp the property of her husband, which was going to be inherited by her and her children. She further narrated that the complainant party deprived her and her children from household articles including house, cattle and agricultural land and they are in possession of above said property after the murder of her husband. She did not make statement on oath and in her defence produced a copy of F.I.R. No.487 of 1997 as Exh.DD and closed her evidence.

7. Since the other accused were acquitted from the charge by the learned trial Court vide impugned judgment, therefore, I do not feel any necessity to give their defence version made by them in their statements recorded under section 342, Cr.P.C.

8. P.W.6 Dr. Inam Jelani conducted autopsy over the dead body of Mumtaz deceased and noticed following injuries at his person.

"Contusion was present 15 x 2 c.m on front of the neck. Cranium, Spinal Codes, scalp, skull and vertebrae were NAD. Membranes, Brain were NAD."

According to his opinion the death was caused due to cardiopulmonary arrest which was due to asphyxia resulting from strangulation, which was due to injury No.1 and sufficient to cause death in ordinary course of nature. He described the probable time elapsed between the injuries and death was immediate and between the death and postmortem was 8 to 12 hours.

9. It is contended by the learned counsel for the appellant Mst. Paris Bibi that the prosecution had alleged the motive for the occurrence against the appellant that she was divorced by the deceased Mumtaz and due to which she murdered him, which motive is not supported by any evidence proving the divorce. He argued that Mst. Paris Bibi is having

children out of the wedlock of Mumtaz and she was never divorced and this motive has been cooked up just to deprive her from the legacy of her husband. He further argued that out of eight accused persons seven were acquitted by the learned trial Court disbelieving the evidence and only Mst. Paris Bibi has been indicted on the basis of the evidence, which was neither convincing nor confidence inspiring. He added that the evidence of extra-judicial confession suffers from legal infirmities whereas the evidence of 'Wajtakar' is no evidence in the eyes of law as the P.Ws. of 'Wajtakar' evidence did not explain their presence at the spot. He maintained that the alleged occurrence had taken place at 3-00 a.m. in the night, which was unseen occurrence and the appellant has been implicated in this case just for depriving her from her 'Shari' share to be inherited by her from the property of her husband. Learned counsel while summing up his arguments prayed for the acceptance of the appeal and acquittal of the appellant as the prosecution has failed to prove the case against her beyond any shadow of doubt.

10. The appeal has been contested by the learned Deputy Prosecutor-General, assisted by learned counsel for the complainant, by arguing that there was overwhelming evidence on the record connecting the appellant with the commission of the murder of her husband Mumtaz and the learned trial Court had rightly believed that evidence and recorded her conviction.

11. After having heard the learned counsel for the parties and perusing the record, it is observed that after registration of the F.I.R. the complainant Hakim Ali kept quiet for about one year and 23 days, whereafter he proceeded to file the private criminal complaint, that too with the addition of new accused persons, for which delay in lodging the complaint, Hakim Ali has not given any plausible reason. The learned trial Court had taken proceedings in the complaint case and after recording the evidence acquitted seven persons. Those accused persons were acquitted by the learned trial Court on the basis of the available evidence on the record, which cannot be made basis for the conviction of Mst. Paris Bibi. It has been noticed that according to the allegation contained in the complaint the appellant Mst. Paris Bibi and Ilyas (since acquitted) were strangulating the deceased Mumtaz with rope. It is in the evidence that Ilyas accused has been let off by the Police as he was not found involved in the occurrence as alleged in the F.I.R. as well as in the complaint. When two persons are charged for strangulating the deceased with the rope and one of them is found not involved in the occurrence then whole story of the prosecution against the other accused becomes doubtful and needs independent corroboration. It is not the prosecution version that the role of two accused had any distinguishing feature, thus involvement of the appellant in view of this evidence becomes dubious. Further the rope with which the appellant had allegedly strangulated her husband was not recovered on the pointation of the appellant, rather it was found lying at the spot by the Investigating Officer and was taken into possession. This fact further raises eyebrows whether it was the same rope with which the death was caused. Similarly the evidence of extra-judicial confession does not inspire confidence in any manner and liable to be brushed aside for the reason that apparently it was a joint confession, which has no value in the eyes of law. P.W.3 Sikandar could not explain the exact words of confession made by Mst. Paris, Amir Shahzad, Zeenat and Yaqoob. There is also no independent corroboration of this confessional statement,

which is otherwise treated as weakest type of evidence and can only be considered when it is supported by any other independent evidence.

12. According to statement of Hakim Ali P.W.1 the motive for the occurrence was that Mumtaz deceased had divorced Mst. Paris due to which grudge, she with the help of her co-accused murdered her husband. This statement of the P.W.1 remained uncorroborated on the file, so much such the complainant failed to place on record any documentary proof of the divorce pronounced by the deceased. In view of scanty evidence on the point of motive, I am not persuaded to believe the same as a reason to kill the deceased. The evidence of 'Wajtakar' consisted upon the statement of P.W.8 is not cogent evidence for the reason that P.W.8 did not explain his presence at the spot at 3-00 a.m. in the night nor any other independent evidence has been produced in support of the statement of P.W.8. In this respect guideline has been provided by the Apex Court in the judgment reported as 2003 SCMR 1419. According to that judgment the witness has to prove and explain his presence at the time and place when he saw the assailants after commission of the offence. In the instant case P.W.8 remained unsuccessful in establishing his presence at the time when he had seen the accused persons entering into the house of the deceased.

13. General survey of the statements of P.W.1 and 2 the witnesses of the ocular account as well as the witnesses of extra-judicial confession and 'Wajtakar' indicates that the witnesses have attempted to improve their case in a very desperate manner, which statements also suffer from material contradictions when are compared inter se.

14. The above analysis of the evidence led by the complainant in support of the charges leads to irresistible conclusion that the same is neither sufficient nor convincing and confidence-inspiring for proving the allegation of murder of Mumtaz against Mst. Paris Bibi beyond any shadow of doubt. This evidence cannot be taken into consideration for holding Mst. Paris Bibi responsible for the murder of her husband. Mst. Paris Bibi, in these circumstances, has earned her acquittal.

15. For the foregoing reasons, the appeal filed by Mst. Paris Bibi is allowed and convicting and sentencing judgment impugned in this appeal is set aside. Mst. Paris Bibi is acquitted from the charge. She shall be set at liberty forthwith, if not required in any other criminal case.

16. The application seeking suspension of sentence in these circumstances has rendered infructuous and is disposed of accordingly while the criminal revision petition seeking enhancement in the sentence filed by Hakim Ali complainant is also dismissed having no merits. Office may number the criminal revision petition.

MH/P-4/L Appeal allowed.

P L D 2013 Lahore 12

Before Syed Muhammad Kazim Raza Shamsi, J

MOHSAN ALI---Petitioner

Versus

ADDITIONAL SESSIONS JUDGE, FAISALABAD and another---Respondents

Criminal Miscellaneous No.64-Q of 2011, decided on 18th October, 2012.

Criminal Procedure Code (V of 1898)---

----Ss. 28, 30, 561-A & Sched.-II---Penal Code (XLV of 1860), Ss.337-A(i), 337-L(2), 365, 147 & 148---Trial---Court, jurisdiction of---Addition of offence---Investigating officer prepared his investigation report and submitted challan before Magistrate (First Class) for trial but the Magistrate while taking cognizance observed that offence under S.367 P.P.C. was made out and he had no jurisdiction to try the same---Magistrate sent reference to Sessions Judge, who entrusted the same to Additional Sessions Judge for trial---Plea raised by accused was that in Sched.-II of Cr.P.C., offence under S.367, P.P.C. was triable by Court of Session and Judicial Magistrate could take cognizance of the case---Validity---Provisions of S.30, Cr.P.C. excluded applicability of S. 28, Cr.P.C. in clear terms by making exception to it inrespect of courts mentioned in Column 8 of Schedule-II of Cr.P.C.---Magistrate First Class with powers under S.30, Cr.P.C. had jurisdiction to try all those offences, which were not punishable with death---Judicial Magistrate by sending reference to Sessions Judge for entrusting case to Court of Session, as offence under S.367, Cr.P.C. was not triable by it, was an illegal exercise of jurisdiction by the court concerned---High Court set aside order of Judicial Magistrate as well as that of Sessions Judge by which case was entrusted to Additional Sessions Judge for trial---High Court withdrew the case from court of Additional Sessions Judge and entrusted the same to Magistrate S. 30, Cr.P.C. for conclusion of trial---Petition was allowed in circumstances.

Allah Wasaya and others v. Sikandar Hayat and others 2012 SCMR 193 and Noor Hussain v. The State PLD 1996 SC 88 ref.

Ch. Muhammad Yousaf for Petitioner.
Muhammad Ishaque, D.P.G. for the State.
Zafar Ullah Cheema for Respondent No.2.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Shaukat Ali, respondent No.2, had set into motion criminal machinery by lodging F.I.R. No.1253, dated 26-9-2006 registered under sections 365, 341, 337-A-I(i), 337-L(ii), 147 and 148, P.P.C. at Police Station Nishatabad, District Faisalabad against 13 persons.

2. Initially investigations in the case were conducted by Muhammad Ashraf, Sub-Inspector, but subsequently Basharat Ali Sub-Inspector took over the investigations without sanction of District Standing Board as required by Article 18(6) of the Police Order, 2002. He not

only declared all the accused of the F.I.R. involved in the occurrence but also added offence under sections 342 and 367 P.P.C. against the culprits.

3. This change of investigations was challenged in Writ Petition No.3676 of 2007 by Muhammad Afzal and this Court on 29-5-2007 accepted the petition and declared the investigations conducted by Basharat Ali, Sub-Inspector, unlawful and of no legal effect and restored the investigations conducted by Muhammad Ashraf, Sub-Inspector.

4. The Police thereafter submitted report under section 173 Cr.P.C. to the learned Area Magistrate under sections 337-A(i), 337-L(ii), 148 and 149 P.P.C., who while taking cognizance of the matter observed that from the perusal of the record, offence under section 367 P.P.C. is made out and the Court had no jurisdiction to try the case, thus sent the Reference to the learned District and Sessions Judge, Faisalabad for making over the case to some other Court for trial. Subsequently, the learned District and Sessions Judge transferred the case to Mr. Muzammal Qureshi, Magistrate section 30, Faisalabad who framed thecharged against the accused persons under sections 342, 337-A(i), 337-L(ii), 148 and 149, P.P.C. On the arrest of co-accused Zafar Iqbal, Ramzan and Safarish Ali, Police sent supplementary challan wassubmitted to the Court of learned Area Magistrate under sections 367, 342, 337-A(i), 337-L(ii), 148 and 149 P.P.C., who sent the Reference to the learned Sessions Judge with the prayer that the offence under section 367, P.P.C. as per Second Schedule of Code of Criminal Procedure 1898 was exclusively triable by the Court of Session thus prayed for making over the same to the Court of competent jurisdiction. It appears from the record that perhaps the learned Sessions Judge accepted the request of Area Magistrate and entrusted the trial of the case to Mr. Haji Ahmad, Addl. Sessions Judge, Faisalabad, who proceeded to frame charge in the offences including offence under section 367, P.P.C. Subsequently, one of the accused Mohsin Ali filed a transfer application before the learned Sessions Judge, Faisalabad with the prayer that the learned Magistrate had inadvertently sent the Reference to the learned Sessions Judge, which was wrongly entrusted to the Court of Addl. Sessions Judge, thus prayed for sending the case for trial to the learned Judicial Magistrate. This application was declined by the learned Sessions Judge on the ground that the charge has been framed in the Court, thus lacks jurisdiction to transfer the case. This gave rise to instant petition, in which parties have been heard at length and record as well as case-law cited at bar examined.

5. The moot point in the instant petition as argued by the parties is that in the Second Schedule attached with the Code, ibid, offence under section 367 P.P.C. is triable by a Court of Session and in this situation a Judicial Magistrate can take cognizance of the case, which is exclusively triable by the Court of Session according to Schedule. Learned counsel for the petitioner while relying upon the cases of "Allah Wasaya and others v. Sikandar Hayat and others" (2012 SCMR 193) and "Noor Hussain v. The State" (PLD 1996 SC 88) contended that although as per Schedule attached with the Code (supra) the offence under section 367, P.P.C. is triable by a Court of Session but a Judicial Magistrate enjoys powers and there is no bar to decide a criminal case not involving sentence of death. According to the learned counsel, the learned Judicial Magistrate under section 30 has the jurisdiction to decide the case in hand.

6. This proposition has been disputed by the learned D.P.-G. as well as learned counsel for respondent No.2 with the assertion that under section 28(3) of Code (supra) the Court designated in 8th column of the 2nd Schedule of the Code (ibid) can try the offence and according to 2nd Schedule offence under section 367 P.P.C. is triable by a Court of Sessions, therefore, the learned Sessions Judge has rightly entrusted the matter to the Court of learned Addl. Sessions Judge for commencing the trial.

7. Firstly, I would like to discuss the applicability of section 367 P.P.C. in the facts and circumstances of the case, which has been ignored by the Courts as well as Police officials while sending supplementary challan by adding offence under section 367 P.P.C. As stated in the preceding paras, the matter was brought into the notice of this Court through Writ Petition N.3676 of 2007 and this Court vide order dated 28-5-2007 had declared the investigations conducted by Basharat Ali, Sub-Inspector in the case, of no legal effect and unlawful. With this declaration of this Court all the investigations conducted by Sub-Inspector Basharat Ali became non-existent on the record including addition of the offence under section 367 P.P.C., therefore, there left no jurisdiction with the Police to send the supplementary challan to the Court under section 367 P.P.C. This fact has not been noted by Mr.Awais Muhammad Khan, learned Judicial Magistrate, Faisalabad while sending the Reference to learned Sessions Judge vide order dated 4-11-2010. Similarly Mr. Akhlaq Hussain Raja, learned Sessions Judge entrusted the case to the Court of learned Addl. Sessions Judge in a mechanical manner without examining the record of the case. The learned Magistrate had categorically mentioned in the Reference that as offence under section 367 P.P.C. has been added, therefore, it has no jurisdiction to commence the trial, which fact should have been noticed by the learned Sessions Judge before entrusting the case to the Court of Session. It appears that both the Officers remained negligent in exercising their jurisdiction. Further when this fact of order of this Court was brought to the notice of learned Sessions Judge by filing a transfer application, he even then did not bother to examine the order of this Court and illegally dismissed the transfer application. Proper way in this situation firstly was to ponder upon the point agitated before the Court and if it was not done then the Court while dismissing the transfer application on the ground that the learned Addl. Sessions Judge has framed the charge in the case, could send the Reference to this Court for transfer of the case. The learned Sessions Judge did not perform either of two options and dismissed the petition without application of his judicial mind.

8. Now the question left for determination is whether offence under section 367, P.P.C. is triable by the Court of Session or by a Magistrate lst Class having the powers under section 30 of Cr.P.C. The answer to this question is contained in the cases of Allah Wasaya and Noor Hussain (supra). It was observed by the Hon'ble Supreme Court in both precedent cases that the quantum of punishment does not itself take away the powers of taking cognizance or trying a case which should have been done under section 187 of the Sea Customs Act itself. It is further observed that the limit on the power of awarding punishment does not affect the competence of a Court to try a case. The Magistrate is duly competent to try the case but all that he cannot do is to impose a sentence which is in excess of his powers. In the case of Allah Wasaya (supra), it was observed by the apex Court that in terms of section 30 of Cr.P.C. a Magistrate of 1st Class could try all offences except those punishable with death. In this case the offence charged against the culprits was under

section 336, P.P.C., which was triable by Court of Session as per 2nd Schedule of Code (supra). These. judgments make one thing clear that mere quantum of punishment is not enough to take away the jurisdiction of the Court to try the offence. In this connection section 30 of the Code (supra) clearly manifests that the Magistrate of 1st Class may try all the offences the punishment of which does not involve sentence of death. In this respect it is further observed that 2nd Schedule of the Code, according to section 28(3) governs the cases triable by the Courts of different kind. This section cannot be read in isolation to section 30, which contains non obstante clause making an exception that a Magistrate can try all offences not punishable with death. This provision of the section 30 Cr.P.C excludes applicability of section 28 in clear terms by making an exception to it in respect of Courts mentioned in the column 8 of 2nd Schedule. Accordingly, a Magistrate 1st Class with powers under section 30 Cr.P.C. has the jurisdiction to try all those offences, which are not punishable with death. In view of this legal position, one can say safely that the order passed by the Judicial Magistrate on 4-11-2010 by sending Reference to learned Sessions Judge for entrusting the case to the Court of Session as offence under section 367, P.P.C. not triable by it, is an illegal exercise of jurisdiction by the Court concerned. Further the learned Sessions Judge had exercised its jurisdiction mechanically by entrusting the trial of the case to the Court of Addl. Session Judge without examining the fact that a Magistrate section 30 may try all the offences except those involving death sentence.

9. For what has been discussed above, this petition is allowed and order dated 4-11-2010 passed by the learned Judicial Magistrate as well as of the learned Sessions Judge entrusting the case to the Court of Addl. Sessions Judge are set aside. The case F.I.R. No.1253 of 2006 in the circumstances is withdrawn from the Court seized with the matter and is entrusted to learned Senior Civil Judge, Faisalabad having the power of Magistrate Section 30 for conclusion of the trial of the case expeditiously. Since the matter is pending in the Court, for the last six years, therefore, learned Senior Civil Judge shall conclude the trial before proceeding on winter vacations.

MH/M-314/L Petition allowed.

P L D 2013 Lahore 61

Before Syed Muhammad Kazim Raza Shamsi, J

NAUSHER ALI---Petitioner

Versus

MUHAMMAD AHMAD and others---Respondents

Criminal Revision No.184 of 2011, decided on 11th September, 2012.

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

----Ss. 173 & 200---Penal Code (XLV of 1860), Ss. 302/337-J/34---Qatl-e-amd, causing hurt by means of a poison, common intention---Dismissal of private complaint on basis of unproved summary evidence---Legality---Allegation against accused persons (respondents)

was that they had killed the deceased (complainant's brother) by administering poison to him---Police during investigation found the accused persons as innocent and recommended case for cancellation, which prompted the complainant to lodge a private complaint---Trial Court after recording summary evidence of complainant dismissed his private complaint without summoning accused persons on the ground that on basis of summary evidence there would be no probability of conviction of accused persons--- Validity--- After recording evidence of complainant Trial Court was not left with the option to dismiss the private complaint on the basis that there was no probability of conviction of accused persons as such exercise could be undertaken by the court subsequently on the application of accused persons---Trial Court passed a verdict after relying on unproved summary evidence, therefore, said verdict did not enjoy any sanction of law---Such exercise of jurisdiction by the court could be termed as an illegal act---Revision petition was allowed, impugned order of Trial Court was set aside and the court was directed to hold the trial of the complaint case and to stop proceedings in the challan case till the decision of the complaint case.

Noor Elahi v. The State and 2 others PLD 1966 SC 708 and Mst. Haleema Bibi v. The State and another 2008 YLR 1144 rel.

Syed Ghulam Murtaza v. Baber Akbar 1991 PCr.LJ 720 and Abdul Rehman and others v. The State PLD 1983 SC 73 distinguished.

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

----Ss. 173 & 200---'Challan case' and 'complaint case'---Mode of trial---Preference---Question was as to which case was to be tried first---Where a person was dissatisfied with the findings of the police in respect of the allegations levelled in his crime report, criminal complaint lodged by him would be put to trial first, while the proceedings in the challan case would be stopped till the decision of the complaint case--- Such preference would be given provided the complainant had filed the complaint against the same set of accused with the same allegation as mentioned by him in the F.I.R.

Noor Elahi v. The State and 2 others PLD 1966 SC 708 and Mst. Haleema Bibi v. The State and another 2008 YLR 1144 rel.
Abdul Khaliq Safrani for Petitioner.
Ghulam Sabir Kaifi for Respondents Nos. 1 and 2.
Muhammad Ishaque, DPG for the State.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---By filing instant criminal revision petition under sections 435 and 439, Cr.P.C. the petitioner has assailed the legality of an order dated 14-2-2011 passed by the learned Addl. Sessions Judge, Jaranwala, District Faisalabad whereby the criminal complaint filed by the petitioner was dismissed.

2. The facts giving rise to the instant petition briefly stated are that on the complaint of the petitioner F.I.R. No.358 of 2008 was registered under sections 302, 337-J and 34, P.P.C. with Police Station Jaranwala, District Faisalabad with the allegation that on the information received by the complainant about death of his brother Muhammad Yousaf he visited the place of his residence and found the dead body containing bruises and blood was oozing from his nose. On query the respondents confessed their guilt of murdering Muhammad Yousaf by administering poison to him.

3. The Police after investigating the matter declared all the accused as innocent and recommended the case for cancellation when the petitioner being dissatisfied with the investigations of the Police prompted to lodge a private criminal complaint. The cancellation report was presented before the learned Judicial Magistrate for discharge of the accused but the learned Magistrate did not agree with the same vide order dated 28-11-2010, where-after the challan was submitted in the Court.

4. Learned trial Court after recording the summary evidence of the complainant proceeded to dismiss the complaint without summoning respondents on the ground that on the basis of summary evidence produced in the Court there would be no probability of the conviction of the accused persons. From the record, it appears that the trial Court proceeded to take cognizance upon the report submitted under section 173, Cr.P.C.

5. Learned counsel for the petitioner argued that in view of the rule laid down in Noor Elahi v. The State and 2 others (PLD 1966 SC 708) it was the duty of the learned trial Court to take proceedings in the complaint case and to stop further proceedings in the challan case but the learned trial Court had ignored the ratio of the cited case. He further argued that by not complying with the ratio of aforementioned case the trial Court had deprived the petitioner from his right to cross-examine the witnesses to be produced in the complaint case.

6. Learned counsel for the respondents while supporting the impugned order submitted that this Court has very little jurisdiction to reopen the question of fact in the revisional jurisdiction, therefore, the petition in hand is liable to be dismissed. In this connection, learned counsel has relied upon the cases of Syed Ghulam Murtaza v. Baber Akbar (1991 PCr.LJ 720) and Abdul Rehman and others v. The State (PLD 1983 SC 73).

7. I have considered the submissions made by the learned counsel for the parties and perused the record. The objection raised by the learned counsel for the respondents, after examining the case-law, is found to be without substance for the reason that the learned Court while passing the impugned order has committed grave illegality, which has vitiated the proceedings, therefore, this Court has jurisdiction under sections 435/439, Cr.P.C. to examine the impugned order. No doubt each and every order is not revisable but in the instant case the learned trial Court has violated the law as well as precedents to be adhered to in such situations. Further the cases referred to by the learned counsel for the respondents are distinguishable on facts as such with due reverence cannot be made applicable to the instant case.

8. Evidently the petitioner being dissatisfied with the investigations conducted by the Police in the case lodged by him had preferred a criminal complaint in which the Court proceeded to record summery evidence including the statement of the petitioner thus had applied its judicial mind to the facts of the case. After undertaking this exercise the learned trial Court had left with no option to dismiss the complaint on the basis that there was no probability of the conviction of the respondents. This exercise can be undertaken by the Court subsequently on the application of the accused persons asserting that there was a remote chance of their conviction. By relying upon unproved summery evidence, the learned trial Court passed a verdict which does not enjoy sanction of law. This exercise of jurisdiction by the learned trial court can be termed as an illegal act of the Court for the reason that it was held in 'Noor Elahi's case' (supra) and subsequently followed in the case of Mst. Haleema Bibi v. The State and another (2008 YLR 1144) that where a person is dissatisfied with the findings of the Police in respect of the allegations levelled in his crime report a criminal complaint lodged would be put to the trial while the proceedings in the challan case would be stopped till the decision of the complaint case provided the same complainant had filed complaint against the same set of accused with same allegation as were mentioned by him in his F.I.R. Learned Court by not adopting legal procedure has exercised the jurisdiction with material irregularity, therefore, the impugned order is not sustainable in the eyes of law.

9. For the foregoing reasons, this petition is allowed and the impugned order dated 14-2-2011 passed by the learned Addl. Sessions Judge, Jaranwala, District Faisalabad is set aside and the learned trial court is directed to hold the trial of the complaint case and to stop the proceedings in the challan case till the decision of the complaint case, which challan case may be dealt with by prosecution in accordance with law.

MWA/N-60/L Petition allowed.

P L D 2013 Lahore 92

Before Syed Muhammad Kazim Raza Shamsi, J

FAISAL ZAWAR---Petitioner

Versus

THE STATE and others---Respondents

Criminal Revision No.735 of 2012, decided on 15th November, 2012.

Juvenile Justice System Ordinance (XXII of 2000)---

----S. 7---Application claiming juvenility filed after framing of charge---Scope---Accused claimed that he was aged about 16 years at the time of occurrence of offence, and filed an application before Trial Court for declaring him as a juvenile after getting his ossification test---Complainant opposed said application and relied upon birth certificate of accused, which showed that he was more than 18 years of age at the time of the incident---Trial Court dismissed application filed by accused holding that same was filed at a belated stage

i.e. after framing of charge---Validity---Accused had filed an application for his ossification test at the stage when only charge had been framed against him, thus such stage could not be treated as a belated one for the reason that prosecution evidence was summoned after framing of charge, which was yet to be produced in court---Document produced by accused showed that he was less than 18 years of age at the time of occurrence, while according to documentary evidence produced by complainant, accused was aged about 19 years at the time of occurrence---Determination of said documents in accordance with the provisions of Qanun-e-Shahadat, 1984 might have consumed much more time compared to the time that would be consumed in getting a report from the Medical Board--- Normal course for the Trial Court was to secure a medical report from the concerned authorities for just decision of the case---Trial Court had exercised its jurisdiction with material irregularity---Revision petition was allowed, impugned order passed by Trial Court was set aside and application filed by accused for having his ossification test was accepted with a direction to the Trial Court to obtain a report from a validly constituted Medical Board.

Muhammad Akram v. Muhammad Haleem alias Hamayun and others 2004 SCMR 218 and Sultan Ahmed v. Additional Sessions Judge-I, Mianwali and 2 others PLD 2004 SC 758 ref.

Muhammad Aslam and others v. The State and another PLD 2009 SC 777 distinguished.
Nassir Ahmad Awan for Petitioner.
Muhammad Ishaq, Deputy Prosecutor General.
Ch. Fiaz Ahmad Singhairah for Respondent No.2.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---The petitioner Faisal Zawar having been charged with murder of one Muhammad Ali son of respondent No.2/complainant, is facing trial in case F.I.R. No.88 dated 2-3-2012 registered under sections 302 and 34, P.P.C. with Police Station City Kamalia District Toba Tek Singh and during trial proceedings, he filed an application with the learned trial court for declaring him as juvenile after getting his ossification test as required by section 7 of the Juvenile Justice System Ordinance, 2000. He claimed his age about 16-years at the time of occurrence as his date of birth has been shown as 8th December, 1996.

2. The application was resisted by learned counsel for the complainant on the ground that accused of the case was having the age of more than 18-years and in this connection he relied upon a birth certificate issued by the Chief Officer, Municipal Corporation showing date of birth of suspect as 2nd of March, 1993.

3. The learned trial court after having heard the parties dismissed the application holding that the same was filed at the belated stage that is at the stage after framing of charge.

4. Feeling aggrieved by the order of learned trial court, the same has been assailed by filing instant revision petition under sections 435 and 439, Cr.P.C.

5. It is contended by learned counsel for the petitioner that challan in the case was received in the court on 17-3-2012, in which charge was framed on 10-5-2012 when the instant application was filed by the petitioner which is not at the belated stage as observed by the learned trial court. He submitted that in order to avoid documents placed on record across the bar, it would be appropriate to have a report from the Medical Board about age of the petitioner. In this connection, the learned counsel has relied upon "Muhammad Akram v. Muhammad Haleem alias Hamayun and others" (2004 SCMR 218) and "Sultan Ahmed v. Additional Sessions Judge-I, Mianwali and 2 others" (PLD 2004 Supreme Court 758).

6. The learned counsel for respondent No.2 while controverting the arguments submitted that as per dictum of the Apex Court recorded in case "Muhammad Aslam and others v. The State and another" (PLD 2009 Supreme Court 777) the plea of juvenileness mandatorily be taken during investigations of the case thus when the plea was not raised in that proceeding, then the petitioner is estopped from raising said plea after framing of the charge.

7. I have considered the submissions made by learned counsel for the parties and have examined the case-law cited at the bar.

8. In the case referred to by learned counsel for respondent No.2, accused of that case had raised plea of his being juvenile at the stage when his statement under section 342, Cr.P.C. was going to be recorded. That stage could be treated as a belated one as the whole trial has been concluded and after recording statement of the accused, only judgment was to be pronounced by the court. In the instant case, it is not the situation as the petitioner had filed a clear application for his ossification test at the stage when only charge has been framed against him, thus, this stage cannot be treated as belated one for the reason that prosecution evidence was summoned after framing of the charge which was yet to be produced in the court. There is a dispute between the parties about age of the petitioner. According to document produced by the petitioner, the petitioner was having the age of less than 18-years at the time of occurrence but according to documentary evidence produced by respondent No.2, he was having the age of about 19-years when the occurrence had taken place. The determination of these documents in accordance with the provisions of Qanun-e-Shahadat Order, 1984, may consume much time than the time to be consumed in having report from the Medical Board. So in this backdrop, I feel that normal course for the learned trial court was to secure a medical report from the concerned authorities for just decision of the case. Thelearned trial court in view of this legal position, has exercised the jurisdiction with material irregularity, therefore, the impugned order is liable to be set aside.

9. For the foregoing reasons, this petition is allowed and order dated 24-5-2012 passed by the learned Additional Sessions Judge, Kamalia District Toba Tek Singh is set aside resulting into acceptance of application filed by the petitioner for having his ossification test. The learned trial court is directed to obtain a report from validly constituted medical board determining the age of the petitioner whereafter further proceedings in the trial may be taken up.

MWA/F-35/L Petition allowed.

P L D 2013 Lahore 249

Before Syed Muhammad Kazim Raza Shamsi, J

AMIR MASIH---Petitioner

Versus

The STATE and others---Respondents

Criminal Miscellaneous No.1042-B of 2013, decided on 8th March, 2013.

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

----Ss. 497, 498 & 369---Bail order, review of---Scope---Order passed in a bail application/petition was not reviewable by the same court.

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

----S. 369---Power of court to review its own judgment---Scope---Section 369, Cr.P.C. clearly restrained the court from reviewing its own judgment and orders except if some clerical or typographical error was found therein.

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

----Ss. 561-A, 369, 424 & 430---Inherent power of High Court to review, revoke or alter its own order/judgment---Scope---High Court, in rare and exceptional cases, had the inherent power to revoke, review or alter its on earlier decision in the case which was not governed by Ss.369, 424 and 430, Cr.P.C. with a view to give effect to any order under Cr.P.C. or to prevent abuse of process of any court or otherwise to secure ends of justice.

Gulzar Hassan Shah v. Ghulam Murtaza and 4 others PLD 1970 SC 335 and Saleem Akhtar v. The State PLD 1980 Lah 127 rel.

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

----Ss. 497 & 498---Bail order, nature of---Scope---Orders passed by court in bail application filed under Ss. 497 or 498, Cr.P.C. was not equal to judgment, which was the result of conducting a full-fledged trial of a criminal case.

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

----Ss. 497 & 426---Bail application---Application for suspension of sentence---Exercise of discretion---Principles---Provisions of S.497 & 426, Cr.P.C. were analogous provisions and in the absence of any guideline, the principles which governed S.497, Cr.P.C. might guide the exercise of discretion under S.426, Cr.P.C.

Mazhar Ahmed v. The State and another 2012 SCMR 997 and Shamshad Hussain v. Gulraiz Akhtar PLD 2007 SC 564 rel.

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

----S. 497---Second bail petition, filing of---Petitioner to show "fresh ground" or "necessity"---Scope---Withdrawal of first bail application when same was not decided on merits---Bar on filing second bail application---Scope---Plea that it had become common practice that when a court was going to announce order of dismissal of a bail petition, the petitioner (accused) usually withdrew the same for availing second chance of filing bail; that a second bail application filed in such circumstances could not be entertained unless and until a fresh ground was urged---Validity---Although filing of successive bail applications after withdrawal (of first) without decision on merits, was not barred, but practice of filing successive bail application, without disclosing any fresh ground or the circumstances which might have taken place after withdrawal of the first bail application, creating necessity for institution of second one, had to be deprecated---Second bail petition would be dismissed where the petitioner was not able to canvass any fresh ground or necessity for filing the same after withdrawal of the first one---Bail petition was dismissed accordingly.

Ali Hassan v. The State 2001 SCMR 1047 and Muhammad Riaz v. The State 2002 SCMR 184 ref.
Mahram Ali Bali for Petitioner.
Muhammad Ishaq, Deputy Prosecutor General.
Rana Sajjad Ahmad for the Complainant.
Noor Ali, S.I. with record.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Amir Masih, petitioner by filing the petition in hand, seeks his release on post-arrest bail in case F.I.R. No.78 dated 26-2-2012 registered at Police Station Sundar, Lahore under sections 302 and 34, P.P.C.

2. At very out-set, the learned counsel for the complainant has raised an objection that earlier bail application filed by the petitioner was dismissed as withdrawn on 5-12-2012, therefore, in view of decision of the apex Court recorded on 3-1-2013 in Criminal Petition No.896-L of 2012 titled "Muhammad Siddique v. The State and another", second bail application is not entertainable unless and until any fresh ground is urged. The learned counsel further submitted that in the petition in hand, the petitioner has not canvassed any fresh ground for filing the second bail petition in respect of the same petitioner. He has also referred to the judgment of this court delivered in the case of "Noraz Akbar v. The State and another" (2011 PCr.LJ 852). It is the further submission of learned counsel for the complainant that it has become common practice that when the court is going to announce the order of dismissal of the petition, the petitioner usually withdraws the same for availing the second chance of the bail.

3. Meeting with the objections raised by learned counsel for the complainant, learned counsel for the petitioner has submitted that the judgment delivered by the apex Court supra has been recorded in case wherein High Court had allowed suspension of sentence by

deciding petition filed under section 426, Cr.P.C. but the apex Court had recalled the concession of bail granted by this court, which principle is not applicable to the bail application filed under section 497, Cr.P.C. In this connection, the learned counsel has attempted to draw the distinction between the judgment and an order by referring to section 369, Cr.P.C. In order to strengthen his arguments on his point of applicability of section 369 Cr.P.C., the learned counsel has referred two cases i.e. "Gulzar Hassan Shah v. Ghulam Murtaza and 4 others" (PLD 1970 Supreme Court 335) and case of "Saleem Akhtar v. The State" (PLD 1980 Lahore 127). The learned counsel has further argued that there is no bar for filing successive bail applications, if the earlier application is not decided on merits and the court's view had not taken any form in black and white on the file of the case. In this connection, he has referred to the cases of "The State through Advocate-General, N. W.F.P. v. Zubair and 4 others" (PLD 1986 Supreme Court 173), "Ali Hassan v. The State" (2001 SCMR 1047) "Muhammad Riaz v. The State" (2002 SCMR 184) and "Muhammad Nasir and others v. The State and another" (2013 P Cr.L J 95).

4. While dilating upon the submissions made by learned counsel for the parties, the case-law cited at the bar has been examined minutely. There is no cavil to the proposition that the orders passed in the bail petitions are not judgments and also the same are not reviewable by the same court as is apparent from the wording contained in section 369, Cr.P.C. For convenience the provisions of said section is reproduced hereunder:--

> "Save as otherwise provided by this Code or by any other law for the time being in force or, in case of a High Court by the Letters Patent of such High Court no Court when it has signed its judgment, shall alter or review the same, except to correct a clerical error."

This provision of law clearly restrains the Court from reviewing its own judgment and orders except if some clerical or typographical error is found therein. The judgment of the apex Court recorded in the case of Gulzar Hassan Shah supra has created an exception to this provision by observing that in rare and exceptional cases, the High Court has the inherent power to revoke, review or alter its own earlier decisions in cases which are not governed by sections 369, 424 and 430 Cr.P.C. with a view to give effect to any order under the Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. Perhaps, it is lurking in the mind of the learned counsel for the petitioner that withdrawal of the earlier bail application and filing the subsequent one may amount to the review of the order earlier passed by the court but it is not so. The case of Saleem Akhtar, supra, is in line with the ratio of Gulzar's case. From the facts and circumstances of this case, it is a clear proposition that the orderspassed by courts in the bail applications filed under section 498 or 497, Cr.P.C. are not equal to the judgments which are the result of conducting full-fledged trial of a criminal case, by a court of law under the Code of Criminal Procedure, 1898. Nevertheless, this conclusion does not amount that orders passed while deciding bail petitions, could be altered or review, except in cases where clerical error is to be corrected.

5. Next proposition cropped up for consideration is whether underlying principles for exercising discretion under section 426, Cr.P.C. and 497, Cr.P.C. are same and whether a

petition under section 426, Cr.P.C. can be decided on the principles linked with decision of a petition under section 497, Cr.P.C. This argument was made by learned counsel for the petitioner with reference to the latest view of the apex Court recorded in case of Muhammad Siddique, supra in which bail was granted to a convict under section 426, Cr.P.C. by this court but was recalled by the Hon'ble Supreme Court. The answer to this proposition is simple and is contained in the judgment of the Apex Court recorded in case of "Mazhar Ahmed v. The State and another" (2012 SCMR 997). It was observed in the said judgment that the provisions of sections 497 and 426, Cr.P.C. are analogous provisions and in the absence of any guideline, the principles which govern section 497, Cr.P.C. may guide the exercise of discretion under section 426, Cr.P.C. In this connection, the case of "Shamshad Hussain v. Gulraiz Akhtar" (PLD 2007 Supreme Court 564) has been relied upon. So now the position has become clear that the principles guiding exercise of discretion under section 426, Cr.P.C. are analogous and the principles can be borrowed from the provisions of section 497, Cr.P.C. while deciding petition under section 426, Cr.P.C.

5(sic) Coming to the next submission of learned counsel for the petitioner that after withdrawal of first bail application when it is not decided on merits, filing of second bail application is not barred. The apex Court in the case of Ali Hassan and Muhammad Riaz, supra, has held so; that filing of successive bail applications after withdrawal without decision on merits, is not barred but now things as well as circumstances around have been changed to great extent and counsel for complainant has rightly pointed out that when the court is going to announce an order of dismissal of the bail applications, petitioner abruptly makes a request for withdrawal of the bail application and then after sometime, he files the same through same counsel or through some other counsel. Sometimes he conceals fact of filing earlier petition and due to this lapse, petition is placed before Bench other than the Bench wherefrom earlier application was withdrawn. This view as noted in judgments supra has been revisited by the Apex Court, in case of Muhammad Siddique, supra and had deprecated the practice of filing successive bail applications, without disclosing any fresh ground or the circumstances which may have taken place after withdrawal of the first bail application, creating necessity for institution of the second one. This view of creating bar for filing successive bail application was also taken by this court in case of Noraz Akbar supra. This practice adopted by the litigants of withdrawing one petition and then filing the successive petitions has increased the workload upon the courts as each time, a new application which had already been dealt with by the court, is placed before it for decision. It has become the need of the day to curb this practice in order to save precious public time which may be consumed by the courts in deciding othermatters. Respectfully, following the dictum of the apex Court laid down in the case of Muhammad Siddique supra, I do not find any reason for entertaining this second bail petition filed by Amir Masih consequently the same is dismissed holding that the petitioner is not able to canvass any fresh ground or necessity for filing the second petition after withdrawal of first one.

6. In view of the above, the petition in hand is dismissed for the above said reasons.

MWA/A-27/L Bail refused.

2013 Y L R 260

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi, J

SHAHID NAZIR---Petitioner

Versus

THE STATE and another---Respondents

Criminal Miscellaneous No.1 of 2011 in Criminal Appeal No.563 of 2009, decided on 16th August, 2011.

Criminal Procedure Code (V of 1898)---

----S. 426---Penal Code (XLV of 1860), S.302(b)--- Qatl-e-amd--- Suspension of sentence---Accused had given a single "Danda" blow on the head of his father which proved to be fatal---Accused having not repeated the blow could not be treated as a hard hearted or callous person---Mother of accused (co-accused) and two other co-accused had been acquitted by Trial Court---Accused was not a previous convict and he could not be termed as a desperate, hardened or a dangerous criminal and his case was not hit by the proviso of S. 426(1-A), Cr. P. C.---Delay in the disposal of appeal could not be attributed toaccused---Brother, co-accused had been declared a proclaimed offender---Accused was 20 years old and appeared to be the sole bread earner of his family---Accused was behind the bars for the last 2 years and there was no likelihood of hearing of appeal in the near future---Sentence of imprisonment for life of accused was suspended in circumstances and he was released on bail accordingly.

Altaf Hussain Shah v. State 1994 SCMR 480; Muhammad Yaqoob and others v. The State 1991 SCMR 1459 and Liaqat and another v. The State 1995 SCMR 1819 rel.
Liaqat Ali v. The State 1999 PCr.LJ 1942; Shaukat Ali v. The State 2006 YLR 1174 and Muhammad Mustafa v. The State 2001 MLD 1335 ref.
Tariq Mehmood Sipra for Petitioner.
Muhammad Ishaq, D.P.G. for the State.
Ali Baqir Najfi for the Complainant.

ORDER

Criminal Miscellaneous No.1 of 2011

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---By this order Criminal Miscellaneous No.1 of 2011 relating to suspension of sentence of imprisonment is proposed to be disposed of.

2. This petition pertains to suspension of sentence of imprisonment for life awarded in private complaint of one Noor Muhammad to the petitioner Shahid Nazir on 30-3-2009 by Mr. Rehan Bashir, learned Addl. Sessions Judge, Wazirabad, District Gujranwala.

3. Learned counsel for the petitioner made his submissions touching the merits of the main appeal as well as on the basis of amendment made on 18-4-2011 in section 426, Cr.P.C, alleging that the petitioner is behind the bars for the last two years and there is no likelihood of hearing of his appeal (Criminal Appeal No.563 of 2009) in the near future. He prayed for the suspension of the sentence order dated 30-3-2009 and the sentence awarded thereunder. In this connection, learned counsel has relied upon the cases of Altaf Hussain Shah v. State (1994 SCMR 480), Muhammad Yaqoob and others v. The State (1991 SCMR 1459) and Liaqat and another v. The State (1995 SCMR 1819).

4. On the other hand, learned D.P.-G. assisted by counsel for the complainant submitted that the suspension of the sentence as prayed for cannot be granted as the petitioner had murdered his real father with his `Danda' below, which injury was found to be fatal. The cases of Liaqat Ali v. The State (1999 PCr.LJ 1942), Shaukat Ali v. The State (2006 YLR 1174) and Muhammad Mustafa v. The State (2001 MLD 1335) have been cited by learned counsel to support the contention.

5. The parties have been heard and record perused.

6. The cases of Liaqat Ali and Shaukat Ali (supra) referred to by the learned counsel for the complainant are not on the point that sentence under section 426, Cr.P.C. cannot be suspended. In those cases the Murder Reference were disposed of by this Court after appreciating the whole evidence on the record as such these cases have no bearing upon application for suspension of sentence. The judgment in the case of Muhammad Mustafa (supra) could be relevant to some extent in this respect in which case the suspension of sentence was refused to the convict on the ground that he had committed the murder in a heinous manner, which reflected that he was callous and hard hearted person. In the instant case there is nothing on the file to show the callousness of the petitioner in murdering his father. The petitioner was not alone responsible for the offence, as per contents of the F.I.R., in murdering his father, rather his real brother, mother and two others persons had also participated in murder. One 'Danda' blow is attributed to the petitioner at the head of the deceased. He did not repeat the infliction of the injuries thus cannot be treated as hard hearted or callous. Mere fact that he had murdered his real father is not sufficient in the circumstances to refuse the relief for which the petitioner is entitled. His mother Mst. Farzana Bibi and two other co-accused had been acquitted by the learned trial Court.

7. In cases, seeking suspension of sentence, the only thing to be examined by the Court, is whether the case of the petitioner falls within the proviso to section 426(1)(a) Cr.P.C, which provides that sentence imposed cannot be suspended if the convict is desperate, hardened criminal, previous convict and dangerous criminal. Present petitioner does not fall within any of the categories enunciated in the proviso. On merits the record shows that the appeal filed by the petitioner against his conviction was entertained in this Court on 10-6-2009 and uptil now the same has not been fixed for regular hearing. In this manner it cannot be said that the delay in disposal of appeal is on the part of the petitioner. Further, in such like situation the Court has also to keep in mind the other factors, like one that the brother of the petitioner has been declared as proclaimed offender in this case while the mother of the petitioner has also faced the trial of the case. The petitioner is of the age of about 20 years

and as per evidence he is a student and still to undergo nineteen years in imprisonment. He also appears to be sole bread earner for his family.

8. Thus while relying upon the cases of Altaf Hussain Shah, Muhammad Yaqoob and Liaqat (supra) this Court is inclined to grant this application as the same is warranted in the circumstances narrated above.

9. For the foregoing reasons, the petitioner's case is made out, therefore, the sentence imposed upon the petitioner in the order dated 30-3-2009 by the learned Addl. Sessions Judge Wazirabad is suspended on the basis of statutory ground and he is ordered to be released from jail subject to his furnishing of bail bonds in the sum of Rs.200,000 with two sureties in the like amount to the satisfaction of Deputy Registrar (Judi.) of this Court. The petitioner is further directed to appear in this Court as and when the main appeal is fixed for hearing.

NHQ/S-148/L Sentence suspended.

2013 Y L R 210
[Lahore]
Before Syed Muhammad Kazim Raza Shamsi, J
MUHAMMAD RIAZ---Appellant
Versus
MUHAMMAD JAVED---Respondent

S.A.O. No.84 of 2007, heard on 31st May, 2011.

West Pakistan Urban Rent Rest-riction Ordinance (VI of 1959)---

----S.13---Ejectment of tenant on ground of default in payment of rent---Denial of relationship of landlord and tenant---Rent Controller accepted the ejectment petition which was affirmed by the first Appellate Court---Validity---Documents proved that appellant was a tenant of the respondent and he had admitted such fact in a suit filed by him against the respondent---Appellant, therefore, was estopped to deny title of landlord in view of his own admission---Courts below had duly appreciated evidence led by both the parties and concluded that appellant was tenant under respondent and had defaulted in payment of rent---No exception could be taken against such finding of the courts below which did not suffer from misreading or non-reading of evidence---High Court dismissed second appeal, in circumstances.

Sh. Naveed Shahryar for Appellant.
Mian Manzoor Hussain and Zafar Iqbal Chohan for Respondent.
Date of hearing: 31st May, 2011.
JUDGMENT

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---This second rent appeal is directed against the judgment dated 28-6-2007 passed by Mr. Muhammad Ahmad Farooqi, learned Additional District Judge, Khushab whereby he maintained the order dated 29-5-2007 passed by Ch. Mehboob Ahmad Khan, learned Rent Controller, Khushab whereby the ejectment petition was accepted.

2. Facts of the case briefly stated are that Muhammad Javed claimed to be a auction purchaser of the property in dispute from the Tehsil Municipal Administration, Jauharabad filed ejectment petition against Muhammad Riaz on the ground that later paid the monthly rent up till January, 2003 whereafter he defaulted in the payment of rent. The petition was contested by the respondent denying the relationship of landlord and tenant on the ground that he was in possession of the disputed premises in his own rights. The learned Rent Controller framed issue of existence of relationship of landlord and tenant, proceeded to record evidence of the parties whereafter he concluded that relationship between the parties of landlord and tenant exist, consequently, accepted the ejectment petition. In an appeal filed against the said order, the learned first appellate court also concurred with the findings of the learned Rent Controller and dismissed the rent appeal. Feeling aggrieved by the ejectment order, recorded by both the courts below, instant appeal has been filed.

3. I have considered the submissions made by learned counsel for the parties and examined the whole evidence available on the record.

4. The documents Exh.A.1 to Exh.A.13 prove that the appellant is the tenant of the respondent which fact he also admitted in the suit filed by the appellant against the respondent. He is now estopped to deny the title of the landlord in view of his own admission. Learned counsel for the appellant contended that the appellant has filed a suit for declaration against the Tehsil Municipal Administration, Jauharabad. The learned counsel for the respondent rebutted this submission by stating that the suit was dismissed by the learned civil court vide order dated 16-9-2009 against which an appeal was preferred which also met with the same fate vide judgment dated 12-1-2010. Both the courts after duly appreciating the evidence led by both the parties had concluded that the appellant is the tenant under the respondent who defaulted in the payment of rent, therefore, no exception can be taken against this finding of the courts below which do not in any manner suffer from misreading and non-reading of evidence. The findings recorded by the courts below are liable to be maintained as such.

5. For the foregoing reasons, the appeal having no merit is dismissed with costs.

KMZ/M-902/L Appeal dismissed.

2013 Y L R 402
[Lahore]
Before Syed Muhammad Kazim Raza Shamsi, J
MUHAMMAD BILAL---Petitioner
Versus
MUHAMMAD ABBAS and others---Respondents

Criminal Miscellaneous No.17342-B of 2011, decided on 23rd January, 2012.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), Ss.324/109/ 34---Attempt to commit qatl-e-amd, abetment---Bail, grant of---Non-recovery of firearm---Plea of alibi---Accused was alleged to have raised 'Lalkara' while his co-accused fired a shot at the complainant's son---Accused had not performed any overt act towards the occurrence and was shown to be armed with firearm and guarded his co-accused but non recovery of firearm from accused negated the allegation levelled in the F.I.R.---Police had collected only one empty from the place of occurrence, which was fired by co-accused at the deceased and recovery of such single empty further strengthened the case of accused that he did not fire at the time of occurrence---Accused had raised plea of alibi mentioning that at the time of occurrence he was offering prayers in a mosque, which fact was supported by the statements of witnesses and the police had verified the version of the accused and cleared him from the present case---Absconsion of accused was no ground for refusing bail when he had otherwise made out a case of bail from the facts of the case---Accused was admitted to bail accordingly.

Sabir Ali Padyar for Petitioner.
Muhammad Ishaque, D.P.G. with M. Rafique, A.S.-I. for Respondent.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---The petitioner Muhammad Bilal through the instant criminal miscellaneous petition seeks his release on bail in case arising out of F.I.R. No.84 of 2011, dated 26-2-2011 registered under sections 302, 109 and 34, P.P.C. with Police Station Changa Manga, District Kasur having the allegation that the petitioner while armed with pistol .30 bore raised lalkara that if any one came near would not be spared while his co-accused Muhammad Arif fired a shot on Abdul Wahid son of the complainant with his pistol .30 bore.

2. It is contended that the petitioner during the investigation has been found innocent and his plea of alibi was accepted by the Police, which is based upon sound evidence; that the pistol .30 bore as alleged in the F.I.R. was not recovered from the petitioner and that the co-accused Mst. Bashiran Bibi has been admitted to bail by this Court.

3. The petition has been opposed by the learned D.P.-G. by arguing that the petitioner is duly nominated in the F.I.R. with specific role, which version of the prosecution is duly supported by the statements of the P.Ws., who fully implicated the petitioner for the offence

alleged in the F.I.R. and that the petitioner remained fugitive from law as such is not entitled for the concession of bail.

4. Arguments heard and record perused.

5. As per prosecution case the petitioner did not perform any overt act towards the occurrence. He was shown to be armed with pistol .30 bore and guarded his co-accused while he made firing at the deceased of the case but non-recovery of pistol .30 bore at the instance of the petitioner negates the allegation levelled in the F.I.R. The Police had collected only one empty from the place of occurrence, which was fired by co-accused Muhammad Arif from his pistol .30 bore at deceased Abdul Wahid. The recovery of single empty of crime weapon further strengthened the case of the petitioner that he did not fire at the time of occurrence. The petitioner has raised the plea of alibi mentioning that at the time of occurrence he was offering prayer in the mosque, which fact was supported by the statements of the witnesses and the Police had verified the version of the petitioner and cleared him from the instant case. Mere absconsion of the petitioner is no ground for refusing bail, which in the given circumstances is made out from the facts of the case.

6. In view of the above, the petition is accepted and the petitioner Muhammad Bilal is admitted to bail on furnishing of bail bond in the sum of Rs.100,000 with one surety in the like amount to the satisfaction of the learned trial Court.

MWA/M-26/L Bail granted.

2013 Y L R 979
[Lahore]
Before Syed Muhammad Kazim Raza Shamsi, J
SAQIB ALI---Petitioner
Versus
The STATE and others---Respondents

Criminal Miscellaneous No.12823-B of 2012, decided on 7th December, 2012.

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

----S. 497(2)---Penal Code (XLV of 1860), Ss. 302, 148, 149 & 109---Qatl-e-amd, rioting armed with deadly weapons, unlawful assembly---Bail, grant of---Further inquiry---Two versions provided qua role of accused---Complainant changing his initial version---Effect---Accused was alleged to have fired at the deceased---Complainant corrected his initial version and nominated accused with the role of general beating with a stick and attributed the fatal shot to the co-accused---Such second version given by complainant was never negated by him and he owned the same---Fact that scribe of application written on behalf of complainant had wrongly attributed role of firing to accused, whereas it was co-accused who had fired at the deceased, was found mentioned in zimini No.1, which was also

recorded simultaneously with the F.I.R.---Prosecution witnesses made their statements under section 161, Cr.P.C. and mentioned that co-accused had fired at deceased and that accused was armed with a stick at the relevant time---During investigation weapon was recovered at instance of co-accused---Involvement of accused in the beating of deceased required further probe as body of deceased had only two injuries with a bluntweapon---Accused was admitted to bail in circumstances.

Muhammad Abbasi v. The State and another 2011 SCMR 1606 rel.

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

----S. 497---Bail---Case of two versions---Effect---Court should not exercise discretion in favour of accused merely on the ground that case contained two versions, rather the court should rely upon other material brought on record by the prosecution including F.I.R., statement of complainant under section 161, Cr.P.C as well as incriminating and circumstantial evidence for tentative assessment whether the accused was involved in the commission of the offence or not.

Muhammad Abbasi v. The State and another 2011 SCMR 1606 rel.
Muhammad Ahsan Bhoon for Petitioner.
Muhammad Ishaque, D.P.G. with Ghazanfar Ali, S.I. for Respondents.
Muhammad Iqbal Mohal for the Complainant.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Saqib Ali petitioner seeks his release on bail in case F.I.R. No.233, dated 11-6-2012, registered under sections 302, 148 and 149, P.P.C. with Police Station Sadar Pasrur, District Sialkot.

2. As per contents of the F.I.R. the petitioner while armed with pistol fired at Arif Hussain deceased, the brother of the complainant, hitting on his left side of the neck under the ear.

3. Learned counsel for the petitioner argued that although in the F.I.R. a specific injury has been attributed to the petitioner but the complainant in the second breath in Zimini No.1 got corrected his omission of attributing the role of firing to the petitioner instead of his co-accused Armaghan. He maintained that in the supplementary statement lodged promptly by the complainant, the petitioner has been shown armed with 'Sota'. at the relevant time. Learned counsel added that a general role of beating alongwith other co-accused has been allocated to the petitioner, which fact is not supported by the postmortem examination as the dead body was having two injuries with blunt weapon when the autopsy was conducted. He further submitted that the case of the petitioner calls further probe into the allegation, thus he is entitled for the concession of bail.

4. While opposing the petition, learned Deputy Prosecutor-General, assisted by the learned counsel for the complainant, argued that the bail cannot be granted merely on the ground that the case in hand is of two versions. In this connection, learned counsel for the

complainant has referred to the judgment of the Apex Court recorded in the case of Muhammad Abbasi v. The State and another (2011 SCMR 1606). He further argued that the petitioner has failed to make out a case of any ill-will against the complainant, due to which he was falsely implicated in the case. He added that the petitioner along with his co-accused gave merciless beating to the innocent person and has also caused death by inflicting injury on the vital part of his body, therefore, the petitioner is not entitled for the concession of bail.

5. Parties heard and record perused.

6. The judgment cited by the learned counsel for the complainant has been examined in which it is observed by the Apex Court that the Court should not exercise discretion in favour of an accused merely on the ground that the case contains two versions, rather the Court should rely upon other material brought on the record by the prosecution including the F.I.R., statement of the complainant under sec-tion 161, Cr.P.C. as well as incriminating and circumstantial evidence for tentative assessment whether the accused was involved in the commission of the offence or not. Keeping in view the guidelines provided in the afore-noted judgment of the Apex Court, the record has been thoroughly examined. The record reveals that the second version given by the complainant Khadim Hussain has never been negated by him during the investigations and has owned the same. This fact that the scribe of the application written on behalf of Khadim Hussain complainant had wrongly attributed the role of firing to Saqib Ali whereas it was Armghan, who had fired at the deceased is found mentioned in Zimin No.1, which was also recorded on 11-6-2012 i.e. simultaneously with the registration of the F.I.R. against the assailants. Further this fact was authenticated by P.Ws. Tunvir Hussain and Intizar Hussain by making their statements under section 161, Cr.P.C. mentioning that Armghan accused had fired at the deceased Arif Hussain, which hit on the left side of his neck under the ear and that Saqib petitioner was armed with 'Sota' at the relevant time. During the investigations the pistol was not recovered at the instance of the petitioner Saqib, rather it was recovered at the instance of Armghan accused. These facts thus sufficiently lead to the conclusion that the complainant had simultaneously with the registration of the F.I.R. corrected the same by nominating the petitioner with the role of general beating with 'Sota' and attributed the fatal shot to co-accused Armghan. This fact, as stated above, is duly supported by the statements of P.Ws. recorded under section 161, Cr.P.C. and the recovery of the pistol at the instance of Armghan. In this manner the involvement of the petitioner in the beating of deceased Arif Hussain requires further probe as the body of the deceased was having two injuries with blunt weapon, which injuries have allegedly been caused by the petitioner and his co-accused except Armghan. In this manner it is a case calling for further probe into allegations and fit for grant of bail to the petitioner.

7. For what has been discussed above, the petition is allowed and Saqib Ali petitioner is admitted to bail on furnishing of bail bonds in the sum of Rs.100,000 (Rupees One Lac only) with one surety in the like amount to the satisfaction of the learned trial Court.

SAK/S-131/L Bail granted.

2013 Y L R 1281
[Lahore]
Before Syed Muhammad Kazim Raza Shamsi, J
SHAHID HUSSAIN and another---Petitioners
Versus
The STATE and others---Respondents

Criminal Miscellaneous No.12513-B of 2012, decided on 26th September, 2012.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), Ss.302, 324, 148 & 149---Qatl-e-amd, attempt to commit qatl-e-amd, rioting, rioting armed with deadly weapons---Bail, refusal of---Accused was alleged to have fired at complainant's brother (deceased) which resulted in the latter's death---Co-accused was alleged to have fired at the complainant's son, which resulted in serious injuries---Motive for the occurrence was that accused party had suspicion that deceased had abused them in their house due to a land dispute---Accused and co-accused both had been attributed fire-shot injuries---Investigating officer had not taken the view that accused and co-accused were present empty-handed at the spot---Overwhelming evidence was available on record against accused and co-accused in the form of medical and ocular account coupled with the motive attributed to them, which fully connected them with the commission of the offence---Mere fact that police during investigation introduced different version of the case could not nullify the evidence available on record, which was collected in a very promptly lodged F.I.R. ruling out the possibility of false implication and substitution---Accused and co-accused were refused bail in circumstances.

Ghulam Mujtaba Qadri v. The State and others 2012 SCMR 662; Ehsan Ullah v. The State 2012 SCMR 1137; Subeh Sadiq alias Saabo alias Kalu v. The State and others 2011 SCMR 1543; Haji Muhammad Nazir and others v. The State 2008 SCMR 807; Amir Ali and others v. The State 1984 SCMR 521 and Malik Waheed alias Abdul Hameed v. The State and another 2011 SCMR 1945 distinguished.
Mudassar Altaf and another v. The State 2010 SCMR 1861 rel.
Ehsan Akbar v. The State and 2 others 2007 SCMR 482 ref.
Muhammad Zubair Khalid Chaudhry for Petitioners.
Muhammad Ishaque, D.P.G. with Dilawar Bajwa, S.I. for the State.
Muhammad Aurangzeb for the Complainant.
ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---The petitioners Shahid Hussain and Shahzad Hussain through the instant criminal miscellaneous petition seek their release on bail in case F.I.R. No.70, dated 12-2-2012, registered under sections 302, 324, 148 and 149, P.P.C. with Police Station Satrah, District Sialkot.

2. As per crime report made on 12-2-2012 by Muhammad Javed on the same day at about 5-30 p.m. he along with his brother Muhammad Iqbal and his son Muhammad Afzal were present at the sweetshop when Shahid Hussain, Zahid Hussain, Shahzad, Arshad, Imran, Amir and Sajjad Khan while armed with pistols emerged there. Shahid Hussain raised lalkara that a lesson be taught to the complainant party for insulting them and fired at Iqbal, which hit on the right side of his chest whereafter Sajjad also fired at Iqbal which hit on his right hand. Iqbal fell on the ground, whereafter Shahzad fired at Afzal injured P.W., which hit on his right lumber-region, Imran's fire landed at the upper right side of the hip of Afzal and Sajjad's fire also caused injury at the same place. Afzal also fell on the ground and the accused decamped from the spot raising 'Lalkaras'. The motive for the occurrence was that Shahid etc. were having suspicion that deceased Iqbal had abused them in their house due to the dispute of the land. Muhammad Iqbal succumbed to the injuries at the spot whereas Afzal injured P.W. was taken to the hospital in precarious condition.

3. Learned counsel for the petitioners while touching the conduct of the complainant party has referred to various F.I.Rs. registered at different Police Stations in respect of their misdeeds and attempted to show that the complainant party is not neat and clean and is involved in many criminal cases. It was pointed out by the learned counsel that after arrest of the petitioners the complainant party attacked their houses and took away all household articles in respect of which an F.I.R. was registered at the Police Station. He further submitted that according to the Police investigations fires were made by Imran and Sajjad co-accused and the petitioners were present at the place of occurrence empty handed. Further argued that co-accused Zahid, Arshad and Amir were admitted to bail by this Court vide order dated 9-8-2012 passed in Criminal Miscellaneous No.9217-B of 2012, therefore, prayed for grant of bail to the petitioners on same premises, Learned counsel to support his submissions has placed reliance upon the cases of Ghulam Mujtaba Qadri v. The State and others (2012 SCMR 662), Ehsan Ullah v. The State (2012 SCMR 1137), Subeh Sadiq alias Saabo alias Kalu v. The State and others (2011 SCMR 1543), Haji Muhammad Nazir and others v. The State (2008 SCMR 807), Amir Ali and others v. The State (1984 SCMR 521) and Malik Waheed alias Abdul Hameed v. The State and another (2011 SCMR 1945).

4. The petition has been opposed by the learned D.P.G., assisted by the learned counsel for the complainant, with the submission that the finding of the Police is not based upon sufficient material, therefore, the same is not binding upon the Court and that the petitioners were nominated in a promptly lodged F.I.R. with specific role of murder of Muhammad Iqbal and causing serious injuries to Afzal P.W., therefore, they are not entitled for the concession of bail. He further contended that the eye-witnesses of the case fully implicate the petitioners and their statements are in line with the medical evidence. It is further argued that the case of Zahid Hussain, Arshad and Amir co-accused is not at par with the case of the present petitioners, therefore, the same treatment cannot be afforded to the present petitioners. Learned counsel for the complainant has relied upon the cases of Mudassar Altaf and another v. The State (2010 SCMR 1861) and Ehsan Akbar v. The State and 2 others (2007 SCMR 482).

5. I have considered the submissions made by the learned counsel for the parties and examined the case-law cited at the bar. Learned counsel for the petitioners has relied upon

the cases, which have been examined and it is found that the same do not cover the facts of the instant case as such are of no help to him. It was observed by the Apex Court in the case of Haji Muhammad Nazir (Supra) that each criminal case has its own features and is required to be decided on its own merits independently. In view of this dictum of the Apex Court the facts of the case are being examined independently.

6. Similarly, the case of Ghulam Mujtaba Qadri (supra) pertains to offence of abetment in which the accused had not been attributed any role in causing the murder nor he is connected with the motive part as per prosecution story whereas in the instant case according to the record Shahid Hussain petitioner had given a fatal shot at the chest of the deceased Muhammad Iqbal and co-accused Shahzad inflicted firearm injury at the lumber-region of the injured.

7. In the case of Subeh Sadiq (supra) it was not alleged by the prosecution that the accused was armed with any weapon or caused any injury to the opponent thus the facts of this case are also not applicable to the case in hand.

8. In the case of Amir Ali and others (supra) the Apex Court observed that the findings of the Police regarding the absence of the accused of the case was based upon sufficient material but in the instant case there appears no material available on the record to subscribe the view of the Investigating Officer to the effect that the petitioners were present at the spot empty handed.

9. Similarly, the case of Malik Waheed (supra) had totally different facts as in that case no specific injury was attributed to the accused whereas in the instant case both the accused have been attributed injuries, one to the deceased and the other to the injured P.W.

10. The crux of the above discussion is that the case-law relied upon by the learned counsel for the petitioners are not applicable to the facts of the instant case and are distinguishable. On merits when the case has been examined it is found that there is overwhelming evidence available on the record in the form medical and of ocular account coupled with the fact that the motive is also attributed to the petitioners, fully connecting them with the murder of Muhammad Iqbal and causing injury to Muhammad Afzal P.W. Mere fact that the Police during investigation introduced different version of the case cannot nullify the evidence available on the record, which was collected in a very promptly lodged F.I.R. ruling out the possibility of false implication and substitution. Even otherwise the observations of Investigating Officer are not based upon sufficient material cannot be believed and allowed to change complexion of case as held in the case of Mudassar Altaf (supra). In my view, it is not a case in which any concession of bail can be extended to the petitioners.

11. For the foregoing reasons, the petition having no merits is dismissed.

MWA/S-110/L Bail refused.

2013 Y L R 1587
[Lahore]
Before Syed Muhammad Kazim Raza Shamsi, J
YASER NAVEED---Petitioner
Versus
The STATE and another---Respondents

Criminal Miscellaneous Nos.13981-B, 14662-B and 15028-B of 2012, decided on 24th October, 2012.

Criminal Procedure Code (V of 1898)---

----Ss. 161, 497(2) & 498---Penal Code (XLV of 1860), Ss. 302/148/149/364---Qatl-e-amd, rioting armed with deadly weapons, unlawful assembly, kidnapping or abducting in order to murder---Bail, grant of---Implication of accused on basis of supplementary statement---Scope---Accused and co-accused persons allegedly kidnapped the deceased and killed him---F.I.R. attributed role of lalkara upon accused and co-accused persons whereas in the supplementary statement of complainant, they were assigned a specific role of causing fatal injuries to the deceased---Accused and co-accused persons were mentioned in the F.I.R. as unknown persons with no description provided therein--- Complainant subsequently implicated accused and co-accused persons through his statement before the police by stating that he and prosecution witnesses had verified that it was the accused and co-accused persons, who had murdered the deceased---Statement introduced subsequently by the complainant did not disclose the place where the complainant and prosecution witnesses confronted the accused and co-accused persons and as to how they were able to identify them---Subsequent statement of complainant was merely a statement made under S. 161, Cr.P.C., which had no value in eyes of law and could not be equated with the first version made in the crime report---Supplementary statement was made by complainant after six days of the occurrence, therefore, there was every likelihood that nomination of accused and co-accused persons could have been a result of due deliberation and consultation---Case was of two versions, one given in the F.I.R. and the other made in the supplementary statement, therefore implication of accused and co-accused persons required further inquiry---Interim pre-arrest bail granted to accused was confirmed in circumstances, while co-accused persons were ordered to be released on bail.

2003 SCMR 1419 and 2008 SCMR 1556 rel.
Azam Nazeer Tarar and Mian Jameel Akhtar for Petitioner.
Sikandar Javed for the Complainant.
Nisar Ahmad Gondal, Addl. P.G. with Ahmad Munir, S.I.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Criminal Miscel-laneous No.13981-B of 2012, Criminal Miscellaneous 14662-B of 2012 and Criminal Miscellaneous No.15028-B of 2012 are being disposed of by this single order as these petitions have arisen from single F.I.R.

2. Yasir Naveed petitioner seeks anticipatory bail whereas Umar Farooq and Mst. Aisha alias Ashi pray for their post arrest bail in case F.I.R. No.351 dated 23-5-2012 registered under sections 364, 302, 148/149, P.P.C. with Police Station Sillanwali, District Sargodha. It would be advantageous to mention at this stage that Yasir Fareed petitioner was admitted to post-arrest bail by learned Addl. Sessions Judge, Sargodha vide order dated 8-9-2012 but subsequently the bail granting order was withdrawn by exercising the jurisdiction under section 497(5), Cr.P.C. by learned Addl. Sessions Judge, Sargodha vide order dated 24-9-2012. In this situation, Yasir Farid has prayed for his anticipatory bail.

3. As per allegations contained in the F.I.R. one Mustafa Dogar on 22-5-2012 at about 8-00 a.m. visited the complainant Rana Muhammad Bashir with the complaint that his son Rana Irshad makes obnoxious calls to Mst. Mary and asked the complainant to restrain his son from doing the wrong to his daughter. The complainant in presence of Mustafa Doga etc. admonished his son and the accused party went back satisfied. He further reported that on 22-5-2012 at 'Maghrib vela' Mst. Ashi, Mustafa Dogar, Mirza Shayan along with three unknown persons while riding on a car armed with weapons again came at his house and called Rana Irshad out of his house. They kidnapped Irshad and subsequently the accused persons killed him by firing upon his abdomen, chest and mouth. The unknown persons at that time remained raising lalkara not to come near otherwise, he would also be done to death. Further reported that the assailants took away his son in injured condition at some unknown place. Khawar-Hussain, Rana Muhammad Afzaal and Rana Muhammad Anwar had seen the assailants firing and injuring Irshad deceased, whose dead body was found lying within the area of Chak No.128 North. The motive for the occurrence narrated in the F.I.R. is that Mst. Ashi had illicit liaison with the Shayan, who had suspicion that the deceased Irshad used to tease Mst. Mary the sister of Ashi due to which grudge they killed Rana Irshad. Subsequently on 29-5-2012, the complainant of the case introduced Yasir Fareed and Umar Farooq as an accused in the case with the role that they had caused injuries at the belly of the deceased and murdered him. This nomination was made by the complainant in respect of petitioners Yasir and Umar Farooq on the basis that he himself along with his eye-witnesses attempted to trace the assailants and two accused several times confronted with them at different places, who were duly identified by him and his P.Ws. He further stated in his supplementary statement that he has completely verified that Umar Farooq and Yasir Fareed were the persons who while armed with pistols had fired at the deceased.

4. Arguments of both the parties have been heard and record perused.

5. Initially, the F.I.R. registered at the police station does not provide any description of unknown persons, nor any role of firing except lalkara has been attributed to them. The complainant subsequently changed his version by making a statement before the police that those unknown persons were identified by him and his P.Ws. and that he verified the fact that they were the culprits who murdered his son with their pistols. This statement introduced subsequently by the complainant does not disclose the place where the complainant and his P.Ws. confronted with the petitioners and how they were able to identify them. Even this part of the statement does not explain the participation of the

petitioners in the incident particularly, identification of the petitioners, when it was not mentioned that the petitioners were known to the complainant. Moreso, F.I.R. also lacks antecedents and description of the unknown persons. This statement has been treated by the superior courts as merely a statement made under section 161 Cr.P.C., which has no value in the eyes of law. It is further provided in the precedent cases that this part of the statement of the complainant cannot be equated with his first version made in the crime report and further that there is every likelihood that nominations of the persons in the supplementary statement is with due deliberation and consultation for the reason, the complainant has ample time for doing so. In the instant case, this statement was made by the complainant after six days of the occurrence. Thus it can validly be observed that nomination of the present petitioners could be result of due deliberation and consultation. Reliance in this respect is placed upon (2003 SCMR 1419) and (2008 SCMR 1556).

6. So far as the implication of the petitioners in the case is concerned, it needs further probe as presently there are two versions on the record, one given in the F.I.R. and the other made in the supplementary statement. In F.I.R. only role of lalkara has been attributed to the petitioners whereas in the supplementary statement a specific role of causing fatal injuries to the deceased has been placed on the record. Which version of the complainant is correct one, would be determined by the trial Court at trial stage. At present the case in hand clearly falls within the ambit of section 497(2), Cr.P.C. entitling the petitioners for bail. It would not be out of place to mention here that Mst. Ashi has not been ascribed with any role and her mere presence at the spot has been mentioned in both of the statements of the complainant thus she also cannot be detained in the jail till the proof of her participation in the occurrence.

7. For the foregoing reasons all the three petitions are allowed. Interim pre-arrest bail granted to Yasir Naveed is confirmed on furnishing of fresh bail bonds in the sum of Rs.one lac with one surety in the like amount to the satisfaction of learned trial Court, while petitioner Umar Farooq and Mst. Ashi are ordered to be released on bail on furnishing of bail bonds in the sum of Rs.one lac each with one surety each in the like amount to the satisfaction of learned trial Court.

MWA/Y-2/L Bail granted.

PLJ 2013 Cr.C. (Lahore) 98

Present: Syed Muhammad Kazim Raza Shamsi, J.

MUHAMMAD ASGHAR alias SADAM--Petitioner

versus

STATE and another—Respondents

Crl. Misc. No. 8460-B of 2012, decided on 1.8.2012.

Criminal Procedure Code, 1898 (V of 1898)—

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 149, 342, 147, 337-A(iii), 337-A(i)--Bail, grant of--Injury allegedly caused by petitioner did not result into fracture of the skull, therefore, the question whether the petitioner had inflicted injury with the intention to murder him is yet to be established during the trial--Submission of the counsel for the complainant that the petitioner remained proclaimed offender and was a history-sheeter, cannot stand in the way of grant of relief of bail to him, particularly when there was nothing on the file to suggest that the petitioner was convicted in any of the case shown at his credit--Petitioner was facing incarceration for the last four months whose trial has not yet been concluded and that criminal intent was yet to be determined in the trial--Bail allowed. [P. 99] A

Malik Ghulam Abbas Nissoana, Advocate for Petitioner.
Mr. Muhammad Ishaq, DPG for State.
Mr. Faisal Shahzad Gondal, Advocate for Complainant.
Date of hearing: 1.8.2012.

Order

Muhammad Asghar alias Saddam petitioner seeks his release on bail in case FIR No. 582 dated 9.12.2011 registered against him under Sections 149, 342, 147, 337-A(iii), 337-A(i), PPC with Police Station Dinga, District Gujrathaving an allegation that the petitioner while armed with sota hit at the forehead of the complainant and caused injury covered by Section 337-A(iii), PPC.

2. After having heard the learned counsel for the parties and perusing the record it is found that the injury allegedly caused by the petitioner did not result into fracture of the skull, therefore, the question whether the petitioner had inflicted injury with the intention to murder him is yet to be established during the trial. The submission of the learned counsel for the complainant that the petitioner remained proclaimed offender and is a history-sheeter, cannot stand in the way of grant of relief of bail to him, particularly when there is nothing on the file to suggest that the petitioner was convicted in any of the case shown at his credit. The petitioner is facing incarceration for the last four months whose trial has not yet been concluded and that criminal intent is yet to be determined in the trial.

3. In view of above, this petition is allowed and Muhammad Asghar alias Sadam petitioner is admitted to bail subject to his furnishing bail bonds in the sum of Rs. 1,00,000/- with one surety in the like amount to the satisfaction of the learned trial Court.

(A.S.) Bail allowed.

PLJ 2103 Cr.C. (Lahore) 145 (DB)
[Multan Bench Multan]
Present: Mazhar Iqbal Sidhu and Syed Muhammad Kazim Raza Shamsi, JJ.
INTIZAR ALI IMRAN--Petitioner
versus
STATE, etc.—Respondents

Crl. Misc. Nos. 2-Q and 87-M of 2013, heard on 29.1.2013.

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

----Ss. 265(K) & 561-A--Acquittal of petitioner--Jurisdiction--Allegation of murderous assault--Allegation made by complainant in his crime report that the petitioner along with his co-accused launched murderous assault upon resulting into the death of accused and a bullet of petitioner hit at the neck of latter--Complainant of the case did not enter into the witness box to support the allegations maintained by him in his first information report rather he was given up by prosecution itself--If trial of the petitioner was conducted, was a sham submission for the reason that his statement if recorded now, that may have adverse effects upon earlier trial conducted in respect of "S" etc.--When the star witness of the prosecution was given up by prosecution itself, then now that witness cannot be allowed to enter in the witness box to say that the petitioner was the person who had fired at injured PW--injured PW as per report submitted by ASI, was no more in this world to substantiate the injuries received by him allegedly at the hands of the petitioner--During the investigation, a clean chit was given to the petitioner by the police as a consequence of which, no incriminating evidence connecting the petitioner with the commission of crime was available on the file--Solitary statement of PW in absence of statements of the complainant and injured may not be sufficient to implicate the petitioner with the commission of crime alleged in the FIR--If the prosecution of the petitioner was undertaken now in the light of afore-noted facts that would be abuse of process of law and would be an exercise in futility as there appears to be no probability of recording any conviction against the petitioner--It would also amount to beat dead horse--Trial Court did not concentrate upon these facts borne out of the record thus impugned order was not sustainable--There was no probability of conviction of the petitioner of any offence and if petitioner was sent to face trial that may be abuse of process of Court--Trial Court, had failed to exercise jurisdiction vested in it under law while refusing application of the petitioner--Petitioner allowed--Application was accepted. [Pp. 149 & 150] A

M/s. Muhammad Ramzan Khalid Joiya and Muhammad Yousaf Javed Phaphra, Advocates for Petitioner.

Mr. Munir Ahmad Sayal, DPG for State.

Date of hearing: 29.1.2013.

JUDGMENT

Crl. Misc.No. 87-M/20.13

Seeks grant of interim injunction. Since main case has been listed today through supplementary cause list therefore, this petition has rendered infructuous and disposed of as such.

SYED MUHAMMAD KAZIM RAZA SHAMSHI, J.--Intizar Ali Imran, a member of legal fraternity, by filing a petition under Section 561-A, Cr.P.C. prays for setting aside of an order dated 17.12.2012 passed by learned Judge, Anti Terrorism Court No. I, Multan whereby an application filed by the petitioner under Section 265-K, Cr.P.C. seeking his acquittal from the case FIR No. 486 dated 2.12.1994 registered with Police Station City Burewala, District Vehari under Sections 302, 324, 34, 109, PPC was dismissed with further direction to the SHO of the Police Station to submit challan against the petitioner.

2. Brief facts of the case are that on 2.12.1994, Muhammad Ramzan son of Haji Mushtaq Ahmad made statement to Muhammad Attique SI of the Police Station mentioning that at

about 2.30 p.m. on that day, he along with Abdul Hannan, Nasrullah, Mushtaq Ahmad and Munawar Ahmad were going to board on wagon his father for Multan and when they reached at Street No. 1, Multan Road, from the rear side, Intizar Shah, Intizar Ali Imran and. Ali Ibrar emerged on a motorcycle driven by Intizar Shah while the two other assailants were armed with rifle who while reaching at the spot started firing upon Mushtaq Ahmad who fell on the ground. Munawar Ahmad attempted to pick up Mushtaq Ahmad when petitioner Intizar Ali Imran fired with his rifle hitting at the neck of Munawar Ahmad who also fell down. The assailants shouted lalkara that they had taken the revenge of murder of Mazhar-ul-Haq (father of the petitioner). After the occurrence, the suspects decamped towards the canal side. The injured were taken to the hospital where Mushtaq Ahmad succumbed to the injuries.

The motive for the occurrence statedly was that 1« years ago Mazhar-ul Haq father of Intizar Ali Imran was murdered and Mushtaq Ahmad was the nominated accused of the case. According to the complainant the occurrence had taken place at the instigation and conspiracy hatched by Jalil Saqlain Naqvi, Zakir Hussain Shah and Riaz Rizvi Advocate, Burewala. On this report, formal FIR was lodged against the accused persons.

3. The police investigated the matter and found that the petitioner Intizar Ali Imran along with other co-accused did not participate in the occurrence, thus, sent the challan against Saeed-ur-Rehman and Zakir Hussain to the Court mentioning the name of the petitioner in column No. 2 of the report. The petitioner in view of the declaration of innocence given to him by the police went abroad and returned later in the year, 1999. In the meanwhile, the learned Court conducted the trial of the challan of accused persons and acquitted both Saeed-ur-Rehman, Zakir Hussain and issued perpetual warrants of arrest against Ghulam Raza, Intizar Ali Imran, Ali Ibrar and Jalil Saqlain Rizvi as they were declared proclaimed offenders. This judgment was handed down by the learned Judge, Special Court on 24.5.2002. Subsequently, the Court tried Ghulam Raza alias Abbas Raza in second round and by accepting his application filed under Section 265-K, Cr.P.C. he was also acquitted from the charge of murder of Mushtaq Ahmad vide judgment dated 14.10.2004. The main reason prevailed upon the mind of the Court was that PW-9 Muhammad Attique S.I. vide his statement dated 2.9.2004 declared six persons innocent and the predecessor Court had acquitted the main accused Mujahid Hussain therefore, there was no reason to farther, continue with the trial of the case.

4. The petitioner when gained the knowledge that he had been declared proclaimed offender, appeared before the learned trial Court and furnished his surety bonds on the ground that he had no knowledge of the proceedings initiated against him under Sections 87 & 88, Cr.P.C. and that he had shifted his residence to Lahore, the address of which was available in the police file but no summon/warrants were sent at that address for his service. The Court accepted surety bonds furnished by the petitioner. The petitioner then filed an application under Section 265-K, Cr.P.C. seeking his acquittal from the case on the following grounds:--

(a) The instant case was got registered by the complainant Muhammad Ramzan with afterthoughts as the deceased and the complainant were facing the charge of the murder of Mazher-ul Haq, the father of the petitioner subject-matter of case FIR No. 125 dated 28.5.1993.

(b) During investigations of the case in hand the petitioner along with other six persons was declared innocent by the police and their names were mentioned in Column No. 2 of report submitted to the Court under Section 173, Cr.P.C.

(c) In the trial conducted against Zakir Hussain and Saeed-ur Rehman the Court had recorded whole of the prosecution evidence and after analyzing the same, both of the main culprits were acquitted. Added that if same evidence is now produced and considered by the Court against the petitioner, the result would not be different than the result of Saeed-ur-Rehman etc. Added that the allegation as per FIR against the petitioner is that he fired at Munawar Ahmad injured PW but said Munawar Ahmad did not appear as prosecution witness before the Court when the trial of Saeed-ur-Rehman etc. was conducted rather Munawar Ahmad PW was given up by the prosecution because of his non-availability. According to the learned counsel reportedly Munawar Ahmad PW has passed away thus, now cannot be examined by the prosecution if the trial is conducted by the Court

(d) The learned Special Court while dismissing the application of the petitioner had directed the SHO of the Police Station concerned to submit challan in the Court which was not needed as challan against the petitioner has already been sent to the Court mentioning his name in Column No. 2 thus, according to the learned counsel the Court has committed illegality in passing such an order.

(e) The complainant Muhammad Ramzan even did not enter in the witness box to support his crime report in earlier trial.

(f) Solitary statement of PW-4 Nasrullah is not enough to believe the participation of the petitioner in the occurrence.

(g) That sending petitioner in view of available material on record would be misuse of process of law.

Learned counsel in view of submission prays for his acquittal from the charge.

5. The request made by the learned counsel for the petitioner has been contested by the learned Deputy Prosecutor General submitting that the petitioner had fully participated in the occurrence which had taken place in broad day light and with his fire Munawar Ahmad received injury at his neck therefore, he cannot be exonerated from his liability. According to the learned counsel PW-4 still stands against the petitioner whose testimony is sufficient to record the conviction of the petitioner.

6. We have given our anxious thoughts to the submissions made by the learned counsel for the parties and ourselves examined the record.

7. We have examined the narration of allegations made by Muhammad Ramzan in his crime report that the petitioner along with his co-accused launched murderous assault upon Mushtaq Ahmad and Munawar Ahmad resulting into the death of Mushtaq Ahmad and a bullet of petitioner hit at the neck of latter. In the trial conducted against Saeed-ur-Rehman etc. Muhammad Ramzan who is the complainant of the case did not enter into the witness box to support the allegations maintained by him in his first information report rather he was given up by prosecution itself. The arguments of learned Law Officer that Muhammad

Ramzan PW may now be examined if trial of the petitioner is conducted, is a sham submission for the reason that his statement if recorded now, that may have adverse effects upon earlier trial conducted in respect of Saeed-ur Rehman etc. When the star witness of the prosecution was given up by prosecution itself, then now that witness cannot be allowed to enter in the witness box to say that the petitioner is the person who had fired at Munawar Ahmad injured PW. Munawar Ahmad injured PW as per report Mark-A submitted by Zafar Iqbal ASI, is no more in this world to substantiate the injuries received by him allegedly at the hands of the petitioner. The report is dated 15.9.2004 and upon the basis of this report, the Court had passed an order on 16.9.2004. Furthermore, during the investigation, a clean chit was given to the petitioner by the police as a consequence of which, no incriminating evidence connecting the petitioner with the commission of crime is available on the file. Solitary statement of PW-4 in absence of statements of the complainant and injured Mushtaq, in our opinion may not be sufficient to implicate the petitioner with the commission of crime alleged in the FIR. In our view, if the prosecution of the petitioner is undertaken now in the light of afore-noted facts that would be abuse of process of law and would be an exercise in futility as there appears to be no probability of recording any conviction against the petitioner. It would also amount to beat dead horse. The learned trial Court did not concentrate upon these facts borne out of the record thus impugned order is not sustainable. In this backdrop, we may observe that there is no probability of conviction of the petitioner of any offence and if petitioner is sent to face trial that may be abuse of process of Court. Learned trial Court, in the circumstances, has failed to exercise jurisdiction vested in it under law while refusing application of the petitioner.

8. For the foregoing reasons, the petition in hand is allowed and order impugned is set aside, Resultantly, application filed by the petitioner under Section 265-K, Cr.P.C. before the trial Court is accepted and petitioner is acquitted from the charge. Bail bonds submitted before the trial Court are cancelled and sureties are relieved of their liability.
(A.S.) Petition allowed.

PLJ 2013 Cr.C. (Lahore) 159 (DB)
[Multan Bench Multan]
Present: Sh. Najam-ul-Hssan and Syed Muhammad Kazim Raza Shamsi, JJ.
RASHID NASEEM RIZVI--Appellant
versus
STATE—Respondent

Crl. Appeal No. 30 of 2006, heard on 23.5.2012.

Anti Terrorism Act, 1997 (XXVII of 1997)--
----Ss. 25 & 7(c)--Pakistan Penal Code, (XLV of 1860), Ss. 365 & 34--Conviction and sentence--Challenge to--Case of abduction--Important question involved in the case was demand of ransom from the victim which if established on the record would bring the case of the prosecution within the jurisdiction of Anti Terrorism Court--No iota of evidence in this respect on the record establishing that accused had ever demanded any ransom for releasing of PW--When no such evidence is available on the file then it would be justified to say that offence u/S. 365-A, P.P.C. was not made out thus, could not be tried by Anti-

Terrorism Court--Case of simple abduction/kidnapping was made out from the evidence led on the record which was triable by the Courts of plenary jurisdiction--Trial Court did not appreciate that act of non-demanding of ransom while charging the appellants trying and convicting them--When the offence u/S. 365-A, P.P.C. had come out from the jurisdiction of Anti Terrorism Court then the application of S. 7(e) of Anti Terrorism Act, 1997 is also not made out--Prosecution has miserably failed to prove that abductee was abducted by the appellants for extorting ransom from him, however, a case of abduction/kidnapping falling u/S. 365 P.P.C. stood against the appellants--Appellants have already been acquitted under offence u/Ss. 353 and 427 P.P.C. by trial Court--Appeals were partly allowed, offence u/S. 365-A P.P.C. was converted into an offence u/S. 365 P.P.C. and the appellants were convicted accordingly. [P. 163] A, B & C

Maulvi Muhammad Sultan Alam, Advocate for Appellant (in Crl. A. No. 30 of 2006).

M/s. Mian Khalid Hussain Mitro, Malik Ansar Naseer Bhutta and Malik Imtiaz Haider Advocates for Appellant (in Crl. Appeal No. 26 of 2006).

Mr. Mudassar Altaf Qureshi Advocate for Appellant (in Crl. Appeal No. 09 of 2008).

Mr. Abdul Majeed Rana, Addl. Prosecutor General, Punjab for State.

Date of hearing: 23.5.2012.

JUDGMENT

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.--Talib Hussain, Najma Bibi, Muhammad Ashraf and Rashid Naseem Rizvi faced trial in case FIR. No. 08 dated 22.11.2005 registered under Sections 365-A, 353, 427, 434 P.P.C. with Police Station Rakhi Gaj, District D.G. Khan which was conducted by the learned Judge, Anti-Terrorism Court, D.G. Khan and vide judgment dated 13.5.2006, Mst. Najma Bibi was acquitted from the charge while appellants were convicted under Section 7(e) of Anti-Terrorism Act, 1997 read with Sections 365-A and 34, P.P.C. and were sentenced to imprisonment for life each. They were acquitted under Sections 353, 427, P.P.C. Talib Hussain and Muhammad Ashraf convicts assailed their conviction through Jail Appeals bearing Crl. Appeal No. 26/2006 and Crl. Appeal No. 9/2008 whereas Rashid Naseem Rizvi filed Crl. Appeal No. 30/2006. The matter of acquittal of Mst. Najma Bibi was not assailed by the State by filing an appeal. Rashid Naseem Rizvi the appellant was admitted to bail by this Court vide order dated 3.6.2008 recorded in Crl. Misc. No. 01/2007. Since all the afore-noted appeals have arisen out of single judgment of the learned trial Court as such, are being decided jointly.

2. The criminal machinery was set into motion on the complaint of Muhammad Jamil Sarwar of MBP Rakhi Gaj, Dera Ghazi Khan who lodged the F.I.R. Ex.PA on 22.11.2005 mentioning that at about 3.30 p.m., he along with Muhammad Mussa and M. Nawaz was on traffic duty at the check post, when they noticed a car which was enrouted to Balochistan. The car when stopped did not halt was chased and hauld up where from six persons along with a suckling baby were taken into custody. Talib Hussain and Mst. Najma Bibi having a baby were found sitting on the front seat and three persons were at the, rear seat, one of those sitting in between two persons was clad in a black chaddar. On interrogation, the hard pressed person disclosed his name Malik Muhammad Hanif resident of Sandilianwali, Tehsil Kamalia, District Toba Tek Singh and further informed that his accomplices were TalibHussain, Najma Bibi, Muhammad Ashraf and Rashid Naseem Rizvi and had abducted him forcibly and he was taken to some unknown place.

3. Investigation in the case were carried out whereafter the challan against all the four persons was sent to the Court for trial. All the four persons were charge sheeted, tried and convicted in the above terms by the learned trial Court.

4. It is contended by the learned counsel for the appellants that the alleged abductee did not make any statement disclosing that he was abducted by the appellants for having ransom from him. He further contended that the appellants have been interrogated by the police about the purpose of abduction Malik Muhammad Hanif, they told to the police that he (Malik Muhammad Hanif) was abducted for ransom. According to the learned counsel for the appellants this single word in the whole prosecution evidence is not sufficient to constitute an offence under Section 365-A, P.P.C. He further submitted that the appellants were known to the victim of the case rather TalibHussain remained in the employment for six months and owed money towards the alleged abductee and the abductee in order to avoid that liability concocted the story of his abduction. It is further contended that Rashid Naseem Rizvi runs a rent a car business and in that connection he was accompanying the appellants when he along with other co-appellants were apprehended by the police. Added further that sole statement of PW-1 without any independent corroboration is not sufficient to infer that Malik Muhammad Hanif was abducted for ransom purpose; that if at all any case is made out against the appellants that could be under Section 365, P.P.C. for which the punishment provided by the law is seven years. Adding further in this respect the learned counsel submitted that except Rashid Naseem Rizvi other appellants are in incarceration for more than seven years, thus, in this manner they have served out the sentence.

5. The learned Additional Prosecutor General had supported the judgment of learned trial Court and argued that the braneula fixed at the hand of the abductee through which he was tranquillized is the proof that MalikMuhammad Hanif was being taken away only for the purpose of ransom and for not other reason thus, in this scenario the solitary statement of PW-1 is sufficient to make out a case against the appellants under Section 365-A, P.P.C. He further submitted that the appellants failed to dent the prosecution evidence in this respect as such, they were rightly convicted and sentenced by the learned trial Court.

6. We have considered the submissions advanced by the learned counsel for the parties and examined the record.

7. Mere fact that the alleged abductee was having a branulla on his hand is not sin qua non of the fact that he was being taken away for extorting ransom from him. The abductee when recovered from the car although was in semi conscious condition, did not disclose this fact to Muhammad Jamil Sarwar the complainant which was introduced for the first time when he deposed as PW-1 in the Court on 12.4.2006. The investigating officer did not investigate this fact of abduction of Malik Muhammad Hanif for ransom purpose thus, the prosecution evidence lacks an important ingredient constituting an offence under Section 365-A P.P.C. In the evidence, it was admitted by PW-1 that Talib Hussain was his employee. A suggestion was made to PW-1 that said Talib Hussain was cultivating his land for the last four years which goes to prove the defence version of Talib Hussain in the sense that denial of the defence was evasive and ambiguous. Thus, presumption of law is that same stood admitted. In the statement recorded under Section 342 Cr.P.C. Talib Hussain stated that his family was brought by the victim' from Sandilianwala for cultivation purposes and he was

cultivating jointly with Malik Muhammad Hanif. He further stated in his defence that Malik Muhammad Hanif had himself accompanied him for giving him the out standingamount which he (victim) was to receive from Dera Ghazi Khan area but instead of fulfilling his promise, he managed a case against him and others in connivance BMP Rakhi Gaj. When this defence plea is kept in juxtaposition with the prosecution case, it appears that the same had substance, it was put to PW-1 the star witness of the prosecution who although denied these facts but without any cogent reason.

8. The important question involved in the case is the demand of ransom from the victim which if established on the record would bring the case of the prosecution within the jurisdiction of Anti-Terrorism Court. As already observed above, there is no iota of evidence in this respect on the record establishing that the appellants had ever demanded any ransom for the release of PW-1. When no such evidence is available on the file then it would be justified to say that offence under Section 365-A, P.P.C. is not made out thus, could not be tried by the learned Judge of Anti-Terrorism Court, D.G. Khan. A case of simple abduction/kidnapping is made out from the evidence led on the record which was triable by the Courts of plenary jurisdiction. The learned trial Court did not appreciate this fact of non-demanding of ransom while charging the appellants trying and convicting them. When the offence under Section 365-A, P.P.C. has come out from the jurisdiction of Anti-Terrorism Court then the application of Section 7(e) of Anti-Terrorism Act, 1997 is also not made out.

9. The upshot of the above discussion is that the prosecution has miserably failed to prove that Malik Muhammad Hanif was abducted by the appellants for extorting ransom from him, however, a case of simple abduction/kidnapping falling under Section 365, P.P.C. stood against the appellants. The appellants have already been acquitted under offence under Sections 353 and 427, P.P.C. by learned trial Court.

10. For the forgoing reasons, afore-noted appeals are partly allowed, offence under Section 365-A, P.P.C. is converted into an offence under Section 365 P.P.C. and the appellants are convicted accordingly. The appellants TalibHussain and Muhammad Ashraf are sentenced to imprisonment for seven years with fine of Rs.50,000/- in default whereof they shall serve three months simple imprisonment. Benefit of Section 382-B, Cr.P.C. is also extended to them. Rashid Naseem Rizvi is sentenced to one already undergone by him as he has no knowledge of the abduction of Malik Muhammad Hanif rather his car was hired by Talib Hussain for traveling to D. G. Khan. He is also burdened to pay fine of Rs.25,000/- in default whereof he shall serve three months simple imprisonment.

11. Rashid Naseem Rizvi is present in the Court on bail who has undertaken to pay the fine of Rs.25,000/- within a week in the Treasury. On the payment of fine within the prescribed time, his bail bonds shall be cancelled and sureties would be relieved of their liability. In case of default in the payment of the above said amount, he shall be taken into custody to serve simple imprisonment of three months.
(A.S.) Appeals partly allowed.

PLJ 2013 Cr.C. (Lahore) 174
Present: Syed Muhammad Kazim Raza Shamsi, J.
SADAM--Petitioner
versus
STATE and another—Respondents

Crl. Misc. No. 17767-B of 2012, decided on 15.1.2013.

Criminal Procedure Code, 1898 (V of 1898)—

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 302 & 34--Bail, dismissal of--Specific role of murdering--Allegation contained in FIR petitioner while armed with Repeater 12 bore fired at deceased hitting at his neck, which fire proved fatal as per postmortem report available on the record--Petitioner remained unable to establish on the record his substitution or false implication in the case rather the allegation levelled against him were duly supported by the statements of the PWs recorded u/S. 161, Cr.P.C.--Those witnesses appeared before Investigating Agency and fully corroborated the fact that deceased lost his life with the fire of petitioner--Medical evidence on file also supported the version of prosecution--Since the specific role of murdering deceased had been levelled against the petitioner with "sufficient incriminating evidence available on the record--Petitioner was not entitled for the concession of bail. [P. 175] A

Rai Muhammad Tufail Khan Kharal, Advocate for Petitioner.
Mr. Muhammad Ishaque, DPG for State.
Mr. Shahid Ali Shakir, Advocate for Complainant.
Date of hearing: 15.1.2013.

Order

By filing instant criminal miscellaneous petition Sadam petitioner seeks his release on bail in case FIR No. 03, dated 01.01.2012, registered under Sections 302 & 34, PPC with Police Station Satiana, Tehsil Jaranwala, DistrictFaisalabad.

2. On 01.01.2012 Nazar Muhammad reported that Sadam while arm with Repeater .12 bore fired at his son Javed from the roof of his house which hit at the neck of Javed. Co-accused Waryam also fired at Javed which hit on his left lumber-region and third fire of Suba landed at the abdomen of Javed, who succumbed to the injuries at the spot.

3. Learned counsel for the petitioner contended that regarding the same occurrence a cross-version has been lodged against the complainant party for launching criminal assault on Suba etc. in which he received injuries at his arm and the Police has challaned three persons from the complainant side, therefore, the case in hand is of two versions, the benefit of which is to be given to the petitioner. He further submitted that the motive narrated in the FIR is not supported from the document as the sister of Suba was abducted 4/5 years prior to the occurrence during which time no action was taken against the delinquents, therefore, this allegation of abduction has no substance.

4. The petition has been opposed by the learned Deputy Prosecutor General, assisted by learned counsel for the complainant, submitting that the petitioner is specifically nominated in the FIR with specific role of murdering son of the complainant. Added further that the crime weapon was also recovered at the instance of the petitioner and crime empties were collected from the spot, thus there is sufficient incriminating material on record, therefore, petitioner is not entitled for bail.

5. Parties heard and record perused.

6. As per allegation contained in the FIR Sadam petitioner while armed with Repeater .12 bore fired at Javed hitting at his neck, which fire proved fatal as per post-mortem report available on the record. The petitioner remained unable to establish on the record his substitution or false implication in the case rather the allegation levelled against him are duly supported by the statements of the PWs recorded under Section 161, Cr.P.C. Those witnesses appeared before the Investigating Agency and fully corroborated the fact that Javed lost his life with the fire of the petitioner. Medical evidence on file also supports the version of prosecution. Since the specific role of murdering Javed has been levelled against the petitioner with sufficient incriminating evidence available on the record, therefore, the petitioner is not entitled for the concession of bail.

7. For the foregoing reasons, the petition having no merits is dismissed.
(A.S.) Bail dismissed.

PLJ 2013 Cr.C. (Lahore) 188
Present: Syed Muhammad Kazim Raza Shamsi, J.
MUHAMMAD HUSSAIN--Petitioner
versus
STATE and another—Respondents

Crl. Misc. No. 18499-B of 2012, decided on 17.1.2013.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 302, 337-F(v), 337-L(ii), 337-A(i), 337-F(i), 147, 149--Bail, grant of--Further inquiry--Allegation of--Murderous assault--Two versions--Petitioner party had also lodged cross version against the complainant party in which the assailants have been challaned--Cross-version depicts that the petitioner and his wife also received injuries at the hands of the complainant party which injury has been suppressed in the FIR by complainant--Registration of cross-version and challaning of the assailants, prima facie makes the present case as of two versions--The question may be adjudicated upon by trial Court--As per allegations in the FIR, the petitioner has caused injuries to one who was an injured PW of the case and was supporting prosecution version but the injuries received by him were not on the vital part which clearly manifest the intention of the petitioner for not causing his death--Contention of counsel for the complainant that the cross version was planted one as the injured of that version had received simple injuries, if admitted as correct, even then the fact remains that the question of sharing the common intention by the petitioner with his co-accused was to be determined

during trial by the Court--It was a clear case of further inquiry entitling the petitioner for grant of bail. [P. 189] A

Mr. Shahid Ali Shakir, Advocate for Petitioner.
Mr. Muhammad Ishaq, Deputy Prosecutor General for State.
Rana Ghulam Dastagir, Advocate for Complainant.
Date of hearing: 17.1.2013.

Order

Muhammad Hussain, petitioner seeks his release on bail in case FIR No. 341 dated 28.06.2012 registered under Sections 302, 337F(v), 337L(ii), 337A(i), 337F(i), 147, 149, PPC with Police Station Saddar Jaranwala District Faisalabad.

2. As per allegation contained in the FIR, the petitioner in the company of five other co-accused while armed with `sotas' launched a murderous assault upon Manzoor Ahmad. The petitioner Muhammad Hussain, inflicted injuries with his `sota' at the person of Muhammad Yasin, the injured PW/which hit on his hand on different parts of his legs. In this fight one Salah-ud-Din lost his life.

3. Parties heard. Record perused.

4. As per record the petitioner party had also lodged cross version against the complainant party in which the assailants have been challaned. The cross-version depicts that the petitioner and his wife also received injuries at the hands of the complainant party which injury has been suppressed in the FIR by complainant. The registration of cross-version and challaning of the assailants, prima facie makes the present case as of two versions. The question may be adjudicated upon by the learned trial Court. As per allegations in the FIR, the petitioner has caused injuries to one Muhammad Yasin who is an injured PW of the case and is supporting prosecution version but the injuries received by him are not on the vital part which clearly manifest the intention of the petitioner for not causing his death. The contention of learned counsel for the complainant that the cross version is planted one as the injured of that version had received simple injuries, if admitted as correct, even then the fact remains that the question of sharing the common intention by the petitioner with his co-accused is to be determined during trial by the Court. In this view of the matter, it is a clear case of further inquiry entitling the petitioner for grant of bail.

5. In view of the above, the petition is allowed and Muhammad Hussain, petitioner is admitted 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.
(A.S.) Bail granted.

PLJ 2013 Cr.C. (Lahore) 266
Present: Syed Muhammad Kazim Raza Shami, J.
NADEEM ABBAS--Petitioner
versus
STATE and another—Respondents

Crl. Misc. No. 16913-B of 2012, decided on 29.11.2012.

Criminal Procedure Code, 1898 (V of 1898)—

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 395 & 412--Bail, grant of--Allegation of--He alongwith his co-accused had snatched cash, mobile phones, motorcycle and gold ornaments etc.--Petitioner was facing incarceration for the last more than two years whose trial could not be concluded as yet--Early trial of a person is his statutory right--Further, the petitioner was not a nominated accused of the FIR who was introduced in the case through a supplementary statement which did not disclose source of identification of petitioner--Motorcycle, although had been recovered but it was a joint recovery rendering it inadmissible in evidence--The submission of counsel for the complainant that the petitioner was having record of 11-cases was untenable for the reason that the prosecution could not place on record anything suggesting that he was ever convicted in any of those cases--Even otherwise, mere registration of FIRs was no ground for refusing relief of bail which was otherwise made out from the facts of the case--Bail admitted. [Pp. 266 & 267] A
Haji Khalid Rehman, Advocate for Petitioner.
Mr. Muhammad Ishaq, Deputy Prosecutor General for State.
Date of hearing: 29.11.2012.

Order

Nadeem Abbas, petitioner seeks his release on bail in case FIR No. 470 dated 23.04.2010 registered under Sections 395 and 412, PPC with Police Station Peoples Colony District Faisalabad containing an allegation that he alongwith his co-accused had snatched cash, mobile phones, motorcycle and gold ornaments etc.

2. After having heard learned counsel for the parties and perusing the record, it is noticed that the petitioner is facing incarceration for the last more than two years whose trial could not be concluded as yet. Needless to say that early trial of a person is his statutory right. Further, the petitioner is not a nominated accused of the FIR who was introduced in the case through a supplementary statement which does not disclose source of identification of petitioner. Motorcycle, although has been recovered but it is a joint recovery rendering it inadmissible in evidence. The submission of learned counsel for the complainant that the petitioner is having record of 11-cases is untenable for the reason that the prosecution could not place on record anything suggesting that he was ever convicted in any of those cases. Even otherwise, mere registration of FIRs is no ground for refusing relief of bail which is otherwise made out from the facts of the case.

3. In view of the above, this petition is allowed and Nadeem Abbas, petitioner is admitted 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 learned trial Court.
(A.S.) Bail admitted

PLJ 2013 Cr.C. (Lahore) 325
Present: Syed Muhammad Kazim Raza Shamsi, J.
LIAQAT ALI--Petitioner
versus
STATE and another—Respondents

Crl. Misc. No. 15238-B of 2012, decided on 23.11.2012.

Criminal Procedure Code, 1898 (V of 1898)—

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 302, 337-F(v), 337L(ii), 337A(i), 337F(i) 147 & 149--Bail, grant of--Further inquiry--Case of two versions--Question of--Petitioner did not cause any injury with his sota to the deceased of the case and the injury attributed to him had been declared as shajjah-i-khafifah falling u/S. 337A(i), PPC which is a simple injury--Submissions of counsel for the complainant that the petitioner alongwith his co-accused had formed unlawful assembly and launched attack with common intention, were the questions which were to be determined by trial Court--Liability of the petitioner in the given circumstances of the case called for further inquiry entitled the petitioner for grant of bail--Bail allowed. [P. 326] A
Mian Shahid Ali Shakir, Advocate for Petitioner.
Mr. Muhammad Ishaq, Deputy Prosecutor General for State.
Rana Ghulam Dastagir Khan, Advocate for Complainant.
Date of hearing: 23.11.2012.

Order

Liaqat Ali, petitioner seeks his release on bail in case arising out of FIR No. 341 dated 28.06.2012 registered at Police Station Saddar Jaranwala District Faisalabad under Sections 302, 337F(v), 337L(ii), 337A(i), 337F(i), 147 and 149, PPC having an allegation that he while armed with sota had inflicted injuries at the hands and head of Naseer-ud-Din.
2. After having heard learned counsel for the parties and examining the record, it is noticed that at the instance of the petitioner party, a cross version was recorded against complainant of the FIR, thus in view of this fact the case in hand is of two versions and which version is correct one would be determined by the learned trial Court after recording evidence of the parties. Admittedly, the petitioner did not cause any injury with his sota to the deceased of the case and the injury attributed to him has been declared as Shajjah-i-khafifah falling under Section 337A(i), PPC which is a simple injury. The submissions of learned counsel for the complainant that the petitioner alongwith his co-accused had formed unlawful assembly and launched attack with common intention, are the questions which are to be

determined by the learned trial Court. The liability of the petitioner in the given circumstances of the case calls for further inquiry entitling the petitioner for grant of bail.
3. The petition is accordingly allowed and Liaqat Ali, petitioner is admitted 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 learned trial Court.
(A.S.) Bail allowed.

PLJ 2013 Cr.C. (Lahore) 592 (DB)
Present: Mazhar Iqbal Sidhu and Syed Muhammad Kazim Raza Shamsi, JJ.
STATE & others--Petitioners
versus
MUHAMMAD PERVAIZ & others—Respondents

M.R. No. 146 of 2007, Crl. Appeal No. 73 of 2007 and Crl. Revision No. 144 of 2007, heard on 23.5.2013.

Pakistan Penal Code, 1860 (XLV of 1860)—
----Ss. 302(b), 337-A(ii) & 337-L(ii)--Conviction and sentence--Challenge to--Benefit of doubt--Lack of proof of the motive as alleged by PW in his report as well as in the complaint--Bare statement of the witness to the effect that a day earlier, the assailants were shooting the quail (Batair) in the field situated nearby the house of the complainant side and when they were restrained a scuffle had taken place between the parties is not believeable, for the reason that this fact could not sufficiently be proved in the statements of both eye-witnesses nor in investigation, this incident was ever established--Further all the accused including the appellants were found not involved in the incident and in this connection, no crime weapon could be recovered at their instance--CW in his statement deposed that he was not able to collect any crime empty from the spot thus, the case of the prosecution against the appellants remained uncorroborated regarding firing made by appellants with their weapons--Trial Court thus convicting three appellants has misread the material available on the record, so the finding of conviction against the three appellants is not sustainable--Case in hand has not been proved by the prosecution against the appellants to its hilt--The evidence so relied upon by the prosecution is neither sufficient nor is cogent and convincing to believe that the occurrence mentioned in the FIR or in the complaint had taken place in such a manner and same was seen by the eye-witnesses--Appeal allowed. [P. 600] A & B
Kh. Haris Ahmad, Advocate for Petitioners.
Ch. Muhammad Mustafa, DPG for State.
Syed Imdad Hussain Hamdani, Advocate for Complainant.
Date of hearing: 23.5.2013.

JUDGMENT

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.--Muhammad Pervaiz, Muhammad Aslam, Mansab Khan, Habib-ur-Rehman, Muhammad Latif, Mazhar Iqbal and Abdul Aziz had faced charge of the murder of Muhammad Aslam and injuring Ansar Iqbal and

Muhammad Latif framed in a private complaint filed under Sections 302, 324, 337-A(ii), 337-L(2), 148 & 149, PPC and at the conclusion of trial, vide judgment dated 26.1.2007 passed by the learned Sessions Judge, Khushab, Muhammad Pervaiz, Mansab Khan and Muhammad Latif were convicted and sentenced in the following terms:--

Muhammad Pervaiz appellant: convicted under Section 302(b), PPC and sentenced to death, further burdening him with compensation of Rs. 1,00,000/- to be paid to the legal heirs of the deceased Muhammad Aslam or in default of the payment thereof to suffer six months simple imprisonment.

Mansab Khan appellant: convicted under Section 337-A(ii), PPC for causing injury to Ansar Iqbal complainant and sentenced to Arsh equal to 5 % of the Diyat and to suffer five years rigorous imprisonment.

Muhammad Latif appellant: convicted under Section 337-L(ii), PPC for causing hurt to Mansoor PW and sentenced to two years rigorous imprisonment with payment of Daman of Rs. 15000/-to be paid to the injured.

Mansab Khan and Muhammad Latif were also extended benefit of Section 382-B, Cr.P.C.

Remaining co-accused Muhammad Aslam, Mazhar Iqbal, Habib-ur Rehman and Abdul Aziz were given benefit of doubt and acquitted accordingly. The acquittal so recorded by the learned trial Court remained unchallenged in any appeal.

2. A Murder Reference Bearing No. 146/2007 has been forwarded by the learned trial Court with the request for the confirmation of death sentence awarded to Muhammad Pervaiz appellant whereas Muhammad Pervaiz, Mansab Khan and Muhammad Latif appellants have assailed their convictions and sentences by filing Criminal Appeal No. 73/2007.

3. On the other hand Ansar Iqbal complainant by filing separate Criminal Revision No. 144 of 2007 has prayed for enhancement of the sentences awarded to Mansab Khan and Muhammad Latif appellants-convicts. Since all the afore-noted matters relate to one occurrence and common convicting judgment has been assailed by the parties, as such all the afore-noted matters have been taken up for decision through this single judgment.

4. During the pendency of the appeal, Muhammad Latif and Mansab Khan were admitted to bail through suspension of their sentences by this Court vide order dated 9.4.2007 and 2.10.2007 respectively.

5. Criminal machinery was set into motion by Ansar Iqbal complainant (PW-3) by making an application to Mehr Ahmad Khan SI (PW-11), on 27.9.2004 at 10.00 a.m. and it was alleged therein that at about 8.30 a.m. he along with his father Muhammad Aslam, brother Amjad Naseem (not examined) and Mamoon Mansoor Ahmad (PW-4) were coming to Quaidabad and when they reached near the Saim Nala, they saw Mansab Khan armed with gun .12 bore, Muhammad Pervaiz with rifle, Muhammad Aslam, Habib-ur-Rehman with pistol, Muhammad Latif armed with gun .12 bore along with two unknown persons standing across the Saim Nala. On seeing the afore-noted persons, Mansoor Ahmad went to the accused persons for making request but when he reached near them, Habib along with

two unknown persons started beating him. On seeing the beating given to Mansoor Ahmad, Muhammad Aslam and Amjad Naseem ran towards the accused persons whereupon Muhammad Pervaiz fired with his rifle on Muhammad Aslam which hit on the left front side of his chest while Mansab Khan fired at the complainant Ansar Iqbal with his gun hitting on the front side of his chin. The assailants thereafter fled away from the spot while brandishing their weapons.

6. The motive behind the occurrence reportedly was that on 26.9.2004, the assailants were shooting the Quails (Batair) in the paddy crop, which was cultivated near the house of the complainant and when they were forbidden by them (complainant party), a scuffle had taken place between the two parties. However, the complainant party admonished the accused persons upon which they felt insult and in consultation with each other, they murdered Muhammad Aslam and injured the complainant and his Mamoon. On this report, formal FIR Ex.PB was recorded at the police station.

Subsequently, Ansar Iqbal the complainant (PW-3) by adding Mazhar Iqbal and Abdul Aziz who were initially shown to be unknown assailants, lodged private criminal complaint against seven persons. Mazhar Iqbal and Abdul Aziz were shown to be armed with gun and rifle respectively and role of beating to Mansoor Ahmad was ascribed to them. Rest of the allegation against the remaining assailants were remained same. Further in order to justify institution of complaint, the allegation against the police regarding dishonest investigation was also made.

7. Mehr Ahmad Khan SI (PW-11) after recording the FIR (Ex.PB) started the investigations and completed the same. On 24.10.2004 he arrested Muhammad Pervaiz, Muhammad Aslam, Mansab Khan, Habib-ur Rehman and Muhammad Latif on direction of PW-12 Ijaz Hussain Khan DSP who subsequently conducted the investigation of the case on the orders of District Police Officer.

8. On 28.10.2004, Mehr Ahmad Khan SI on the pointation of Muhammad Latif recovered a gun .12 bore from a residential room along with its license and on the same day, he arrested Mazhar Iqbal and Abdul Aziz co-accused. On 6.11.2004, again Muhammad Latif led to the recovery of pistol .30 bore as per recovery memo. Ex.PD .

9. After completion of the formalities, CW-2 Mehr Ahmad Khan SI did not recommend for the prosecution of Muhammad Pervaiz, Mansab Khan, Mazhar Iqbal, Habib-ur-Rhman, Muhammad Aslam and Abdul Aziz and placed their names in Column No. 2 of the challan. In the meanwhile, private criminal complaint had been instituted by Ansar Iqbal in which all the nominated persons were summoned to face trial.

10. The learned trial Court after framing the charge against seven persons proceeded to record the statement of 12 PWs and two CWs as the respondents/accused nominated in the private complaint did not plead guilty and claimed for a trial. After the closure of prosecution evidence, the same was confronted to the accused by recording their statements under Section 342, Cr.P.C., who controverted all the allegations and professed their innocence. However, Muhammad Pervaiz, Mansab Khan and Muhammad Latif appellants in reply to a question "Why this case against you and why the PWs have deposed against you?" took up almost the similar stand which is reproduced hereunder:--

"In fact on the day of occurrence at about 4.00 p.m. Muhammad Aslam deceased while armed with gun and some other persons who were not the witnesses of this case and one of them was carrying the licensed pistol of Mansoor Ahmad attacked some minors of the Kallu tribe namely Ahmad Sher son of Noor Muhammad, Muhammad Nawaz son of Alamsher, Ghulam Muhammad son of Fateh Muhammad, Hussain Ahmad son of Muhammad Khan, Habib son of Hayat, Abdul Rehman son of Sher Muhammad, Muhammad Aslam son of Muhammad Ramzan, Sher Muhammad son of Atta Muhammad and there was exchange of firing and Muhammad Aslam received injuries during this cross firing. But since the complainant party did not know the names of the afore-said minors, therefore, they picked up the adult persons of Kallu clan and made a false case against them. During Investigation, I along with my co-accused was found innocent. Police also collected evidence in this respect and our names were placed in Column No. 2 of the challan being innocent."

11. All the three convicts-appellants along with their acquitted co-accused did not produce any defence evidence nor appeared in the witness box as their own witness for disproving the prosecution evidence as required u/S. 340(2), Cr.P.C.

12. Dr. Ehsan Ullah Danish (PW-8) on 27.9.2004 firstly examined Ansar Iqbal injured and found single injury i.e.:
"0.5 x 0.5 cm lacerated wound bone deep on the front of chin justlateral to the mid line. (on the right side. Patient claimed of a gun shoot injury."
According to the Medical Officer, no burnt margin was seen. The injury was caused by fire-arm within the duration of about 12 hours. The injury was declared as Jurh Mudihah.

13. At about 4.30 p.m. the said Medical Officer examined Mansoor Ahmad and found the following injury on his person:--

"Slant marks (multiple) were seen on the mid posterior back and left mid region. Few presents on the upper posterior chest as well."
According to the doctor the said injury was caused with blunt weapon within the duration of 12 hours. The injury was declared falling under Section 337-L(2), PPC.

14. Dr. Ehsan Ullah Danish on the same day at about 5.30 p.m. also conducted post-mortem examination on the dead body of Muhammad Aslam deceased and found the following injury on his person:--

"1 x 0.9 cm entrance wound almost in mid clavicular line with inverted, partially burnt margin in the third intercoseteral space. It was roughly circular shaped. On opening the chest the left lung was collapsed and the right lung was hipher inflated. The bullet appears the left lung near its route and got through its postural aspect. It then damaged the area of the great vessels in the area of right atrium. (Superior venaciva, azyges vane etc.) About 3 liters of free blood was recovered from the left thorax cavity. Heart escaped gun shot but its pericardium was injured on the right side. Bullet was discovered from postural intercostals space between 9th and 10th ribs postural. Heart was found empty as were the great vessels. Suggesting sever hemorrhage. Corresponding hole of gun shot was noticed on the pocket of kameez. Rigger mortis was well developed."

It was explained by the doctor in his statement that he had described the injury partially burnt margins but they were not classically burnt margins usually seen in the gun shot injuries. They may be because of a bullet fired nearer to the accused causing the doubtful burning of the margin or it may be because of a bullet fired from some distance and taking some stain along with it before passaging the body of the victim or this discoloration may have been acquired by the dead body during its wake towards post-mortem. He further left this determination subject to the police investigation.

15. According to the opinion of the doctor, the deceased had received injury to the nearer area of the apex of the left lung and the injury was sufficient to cause death in the ordinary course of nature. He described the probable time elapsed between injury and death was about 5 to 10 minutes and between death and post-mortem was 12 to 20 hours.

16. Learned counsel for the appellants while opening the arguments submitted that there are glaring contradictions in the statements made by Ansar Iqbal complainant (PW-3) and Mansoor Ahmad (PW-4) vis-a-viz with the statement of PW-8, the Medical Officer who had shown partially burnt margin around the injury received by Muhammad Aslam which injury according to the PW-3 and PW-4 was not caused from the close-range, thus, the benefit of this contradiction is to be extended in favour of the appellant Muhammad Pervaiz. He has also discussed the time of occurrence while pointing out towards the statements of PW-3 and 4 and submitted that the occurrence as alleged by PW-3 had not taken place at the time prescribed by him. He further added that the prosecution has miserably failed to establish the motive part of the case and as observed by Mehr Ahmad Khan SI (PW-11) the same could not be established by PW-3 and PW-4 in their statements and during investigations the same was found fake. Learned counsel for the appellants further maintained that Mazhar Iqbal and Abdul Aziz as admitted by PW-3 and PW-4 were previously known by the complainant party but they did not name them initially when they mentioned two unknown persons in the FIR but subsequently when the private criminal complaint was filed, they were roped in the case that too, without providing any evidence regarding their involvement. They both along with Habib-ur Rehman had allegedly beaten Mansoor Ahmad but that beating is not supported with visible injuries. It is further elaborated by learned counsel for the appellants that according to the investigations, the appellant and other acquitted accused were not recommended for the prosecution by Investigating Officer as the case against them was not proved by the complainant side, so, their conviction even in the absence of the evidence against them is very surprising. It is also stated by the learned counsel that the version made by PW-3 and PW-4 is not corroborated by any other independent piece of evidence like the recovery of weapon at the instance of the appellants, thus, the case is highly doubtful and the benefit of which is to be extended in favour of the appellants. Learned counsel in this connection has placed reliance upon the case of Muhammad Ishaque Vs. The State (2007 SCMR 108) as well as upon the case reported as 2013 SCMR 383.

17. Conversely, while controverting the arguments of learned counsel for the appellants, it is the argument from the complainant side that the appellants have been nominated in the private complaint with specific role of firing and beating given to the injured PW-4 and the deceased which fact was duly established by the complainant by producing confidence inspiring evidence, thus, the learned trial Court has rightly convicted Muhammad Pervaiz

for the murder of Muhammad Aslam deceased. In respect of revision petition seeking enhancing sentences of Muhammad Latif and Mansab Khan, it is the argument of the learned counsel for the complainant that they in furtherance of their common object had participated in the occurrence, therefore, they should also be convicted under Section 302, PPC for actively participating in the occurrence but the learned trial Court has erroneously convicted both of the appellants only under Sections 337-A(ii) and 337-L(2), PPC. In this scenario, learned counsel for the complainant has prayed for the dismissal of the appeal filed by the appellants and prayed for enhancement of sentences in respect of Muhammad Latif and Mansab Khan, convicts.

18. We have given due consideration to the submissions made by the learned counsel for the parties and have also examined the record with their able assistance.

19. The case of the prosecution as set up initially in Ex.PB was that with the fire of Muhammad Pervaiz appellant, Muhammad Aslam lost his life while Habib-ur Rehman and two unknown persons gave beating to Mansoor Ahmad PW-4 and that fire of Mansab Khan also hit on his chin. In order to prove these allegations, the statements of PW-3 and PW-4 are on record, which indicate that both the PWs along with Muhammad Aslam were present on the one side of the Seam Nala while the accused party allegedly was present on the other side of drain. The distance of the presence of the parties shown in the site-plan (Ex:PL), is not so close to the deceased Muhammad Aslam that if later is fired at that could contain burning around the edges of the injuries. The presence of the appellant Muhammad Pervaiz has been shown at distance about 20 feet from the deceased, thus, if the evidence of PW-3 and PW-4 is admitted as correct that he had fired from other end of the drain even then the possibility of appearing of burning around the injury is not possible. Usually the burning on the wound occurred when the muzzle is at a distance of 5 to 6 feet from the victim but from such a long distance, as mentioned in the site-plan, appearance of the burning on the injury of the deceased was not possible. This fact goes to establish that in fact both the PWs i.e. Ansar Iqbal and Mansoor Ahmad were not present at the time of occurrence. Similarly, Amjad Naseem another brother of the complainant was also present at the spot as stated by PW-3 in his statement who did not receive any injury at his person nor he was produced as a witness in the witness box. He was also a material prosecution witness who could narrate incident but he was withheld by prosecution for the reasons best known to it. Another factor denying the presence of PW-3 at the place of occurrence is that the wound received by him at his chin, according to the Doctor, injury on the person of PW-3 was not with fire-arm. The witness further was not able to describe the nature of weapon, so, it can easily be gathered that there is material contradiction in the medical evidence vis-a-viz the ocular account as according to the statement of eye-witnesses the fire was made from a long distance while the medical evidence discloses that it was a close range fire. At this stage, the case of Muhammad Ishaque (supra) comes to rescue of the appellants, in which it was observed by the apex Court that in such like case, ocular account cannot be believed.

20. Another factor, which is noteable from the evidence i.e. lack of proof of the motive as alleged by PW-3 in his report as well as in the complaint. Bare statement of the witness to the effect that a day earlier, the assailants were shooting the quail (Batair) in the field situated nearby the house of the complainant side and when they were restrained a scuffle had taken place between the parties is not believeable, for the reason that this fact could not

sufficiently be proved in the statements of both eye-witnesses nor in investigation, this incident was ever established. Further all the accused including the appellants were found not involved in the incident and in this connection, no crime weapon could be recovered at their instance. CW-2 in his statement deposed that he was not able to collect any crime empty from the spot thus, the case of the prosecution against the appellants remained uncorroborated regarding firing made by appellants with their weapons. The learned trial Court thus convicting three appellants has misread the material available on the record, so the finding of conviction against the three appellants is not sustainable.

21. Parting with this judgment, we feel no hesitation in observing that the case in hand has not been proved by the prosecution against the appellants to its hilt. The evidence so relied upon by the prosecution is neither sufficient nor is cogent and convincing to believe that the occurrence mentioned in the FIR or in the complaint had taken place in such a manner and same was seen by the eye-witnesses.

22. In view of above, we allow Crl. Appeal No. 73 of 2007 and set aide the impugned convictions and sentences recorded against the three appellants, namely, Muhammad Pervaiz, Muhammad Latif and Mansab Khan, who are acquitted from the charges by extending them the benefit of doubt Crl. Revision No. 144 of 2007 filed by Ansar Iqbal complainant having no merit is also dismissed. Mansab Khan and Muhammad Latif appellants are already on bail whose bail bonds are discharged and the sureties are relieved from the liability. Muhammad Pervaiz appellant is in jail, who shall be released forthwith if not required in any other case.

23. Murder Reference No. 146/2007 is answered in Negative and death sentence of Muhammad Pervaiz appellant is not confirmed.

(A.S.) Appeal allowed.

PLJ 2013 Cr.C. (Lahore) 986

Present: Syed Muhammad Kazim Raza Shamsi, J.

SHAUKAT ALI--Petitioner

versus

STATE and another—Respondents

Crl. Misc. No. 7016-B of 2013, decided on 12.7.2013.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), 1860, Ss. 302, 109, 148 & 149--Bail, grant of--Further inquiry--Allegation of--Involvement in murder of deceased--Petitioner was holding the deceased by his arm--Animosity inter-se--Brother of the petitioner was murdered and in this respect an FIR was lodged against the present complainant side--The involvement of the petitioner with the allegation of holding the deceased by his arm, appears to involve whole of the family members of the petitioner as one arm was allegedly hold by the petitioner while the other one by co-accused when Haji brother of petitioner fired at the deceased--Similarly, the determination of the vicarious liability at this stage is

not possible--Admittedly, the parties are having animosity inter-se therefore, in these circumstances, determination of the role played by the petitioner in the incident requires further inquiry--In view of this, the petitioner is found entitled for the concession of bail. [P. 988] A

Malik Muhammad Siddique Awan, Advocate for Petitioner.
Mr. Muhammad Ishaque, DPG for State.
Mr. Muhammad Ahsan Bhoon, Advocate for Complainant.
Date of hearing: 12.7.2013.

Order

Shaukat Ali petitioner seeks his release on bail in case FIR No. 372 dated 30.10.2012 registered under Sections 302, 109, 148 & 149, PPC at Police Station Garh, District Faisalabad.

2. As per crime report, on the day of occurrence at about 7.00 a.m. the nephew of the complainant Ashiq Ali, Nasir and Nosher were going to Katchery Tandlianwala for attending the case when they were intercepted by Haji,Shaukat and Mursaleen who were ambushing in the cotton crop. Shaukat and Mursaleen caught hold of Ashiq Ali from his arm while Haji son of Ameer made a direct fire with his repeater gun .12 bore hitting on the right side of the chest. The injured succumbed to the injuries at the spot. The motive for the occurrence was that the brother of Shaukat and Mursaleen namely Munir was murdered and the complainant party was the accused in that FIR No. 70/2012, due to which grudge, Ashiq Ali has been killed.

3. Learned counsel for the petitioner argued that the role of holding the deceased with his arm has been attributed to the petitioner, which role has not been substantiated on the record and the petitioner has been booked in the instant case due to the enmity as admitted by the complainant in the FIR. It is further contended that the mala fide of the complainant for falsely implicating the petitioner is established from the fact that all the family members of the petitioner have been booked in this case while allocating different roles for restraining them for the prosecution of the criminal case lodged against the complainant of the case. Learned counsel prayed for the grant of bail in these circumstances.

4. The arguments made by learned counsel for the complainant has been controverted by learned Deputy Prosecutor General, assisted by learned counsel for the complainant, with the submission that the fire made by Ameerwas from a very close range as is evident from the post-mortem report which could only be possible if a person receiving the injury is holding by some other person and this allegation of holding levelled against the petitioner is substantiated from the post-mortem report. He further contended that the petitioner has specifically been nominated in the FIR with categorical role, whose false implication is beyond any shadow of doubt. Learned counsel prayed for dismissal of the bail petition.

5. Parties heard. Record perused.

6. It is evident from the file that the brother of the petitioner was murdered and in this respect an FIR was lodged against the present complainant side. The involvement of the petitioner with the allegation of holding the deceased by his arm, appears to involve whole of the family members of the petitioner as one arm was allegedly hold by the petitioner while the other one by Mursaleen when Haji brother of Shaukat fired at the deceased. Similarly, the determination of the vicarious liability at this stage is not possible. Admittedly, the parties are having animosity inter-se therefore, in these circumstances, determination of the role played by the petitioner in the incident requires further inquiry. In view of this, the petitioner is found entitled for the concession of bail.

7. In view of above, this petition is allowed and Shaukat Ali petitioner is admitted to bail subject to his furnishing bail bonds in the sum of Rs. 1,00,000/- with one surety in the like amount to the satisfaction of the learned trial Court.

(A.S.) Bail allowed.

2014 M L D 117
[Lahore]
Before Syed Muhammad Kazim Raza Shamsi, J
ZULFIQAR ALI and others---Petitioner
Versus
The STATE and others---Respondents

Writ Petition No.4410 of 2012, decided on 5th June, 2013.

Constitution of Pakistan---

---Art.199---Penal Code (XLV of 1860), Ss. 392 & 406---Robbery and criminal breach of trust---Constitutional petition---Quashing of F.I.R.---Allegations against the accused were that they refused to pay sale price of apartments purchased from the complainant and snatched the cheque from his pocket at the pistol point---Contention of the accused was that offence under S. 406, P.P.C. was not made out and the matter related to civil jurisdiction---Validity---Accused wanted to short circuit the procedure to avail the opportunity to get their acquittal from the charge which could not be granted to them in view of availability of alternate remedy before the Trial Court---Constitutional petition was dismissed.

Miraj Khan v. Gul Ahmed and 3 others 2000 SCMR 122 distinguished.

Ahmed Saeed v. The State and another 1996 SCMR 186; Col. Shah Sadiq v. Muhammad Ashiq and others 2006 SCMR 276; Dr. Ghulam Mustafa v. The State and others 2008 SCMR 76 and Director-General, Anti-Corruption Establishment, Lahore and others v. Muhammad Akram Khan and others PLD 2013 SC 401 rel.

Syed Zameer Hussain, Abdul Sattar Junaid and Syed Salman Haider Jafri for Petitioners.
Syed Ali Abid Tahir, Assistant Advocate-General for the State.
Ch. Muhammad Rashid-III for the Complainant.
Muhammad Saleem, S.I. for the State.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---By filing petition in hand under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, the petitioners Zulfiqar Ali and Syed Yousaf Shah, have prayed for quashing of F.I.R. No.734 dated 23-8-2011, initially registered under sections 392 and 406 P.P.C. at Police Station Ghalib Market, Lahore. Subsequently, during the investigations, charge under section 392 P.P.C. was deleted.

2. Briefly stated facts of the case are that one Abrar Ahmad Yasin, reported the matter to the police asserting that the petitioners had agreed to purchase his two apartments for a consideration of Rs.90-Lakhs and in this connection, he had received two payments of

Rs.16-Lakhs and Rs.4-Lakhs through cheques as earnest money whereafter the complainant on the guarantee of one Shakil Ahmad had executed a sale deed in favour of the petitioners. Subsequently, when the complainant demanded, his money of Rs.70-Lakhs from the petitioners, they refused to adhere to his request and had also snatched the cheque from his pocket at the pistol point which cheque in the amount of Rs.70-Lakhs was to be returned by the complainant to the petitioners on the pretext of having issued another cheque on the account of petitioners maintained with the bank at Lahore. On the basis of these allegations, an F.I.R. has been registered at the police station against the petitioners.

3. Learned counsel for the petitioners has forcefully argued that the offence under section 406 P.P.C. is not made out against the petitioners; that the matter relates to civil jurisdiction and no criminal action can be initiated against the petitioners on the basis of non-payment of sale price of the apartments and that this court has jurisdiction to quash the F.I.R. even if the challan has been submitted to the court. In this connection, the learned counsel has placed reliance upon various judgments of this court as well as of the apex Court.

4. While controverting these contentions, the learned counsel for respondent No.2 argued that this court initially enjoys little jurisdiction to interfere into the matters of quashing of F.I.R. and added that after submission of challan, it is within the domain of the learned trial court to decide whether any offence from the given circumstances is made out against the petitioner or not. He has also disputed the issuance of cheques which the petitioner has narrated in Para-4 of this petition whereby the complainant after execution of sale deed had borrowed cash amount from the petitioners and had issued various cheques in liquidation of that liability which cheques were subsequently dishonoured by the bank and the petitioner side had lodged the F.I.R. against the complainant. The learned counsel has also placed reliance upon various judgments of the apex court including the latest view taken by the Hon'ble Supreme Court in case "Director-General, Anti-Corruption Establishment, Lahore and others v. Muhammad Akram Khanand others" (PLD 2013 Supreme Court 401).

5. The arguments made by learned counsel for the parties have duly been appreciated and the case-law cited at the bar has also been examined minutely.

6. It is the case of the petitioners that from the bare perusal of the F.I.R., the offence as charged against the petitioners is not made out rather the contents of the F.I.R. indicate that the parties have a dispute inter se which is of civil in nature and on this fact, criminal liability did not accrue nor any F.I.R. can be lodged. In this connection, the learned counsel has taken the court through various documents to establish his point and also to Para-4 of this petition wherein it is mentioned that the complainant of the case had borrowed cash from the petitioners after execution of sale deed which was executed on 3-6-2011 in favour of the petitioners and in liquidation of that liability, he has issued cheques upon bouncing of which cheques, he had lodged F.I.Rs. against the complainant of the case. This fact has been disputed by learned counsel for the respondent by submitting that the submission so made by learned counsel for the petitioners is not the true picture and has attempted to unfold the reality but this court after considering these submissions of the learned counsel reached at a conclusion that this dispute between the parties involves factual controversy and this is not the proper forum to hold an enquiry into disputed questions. This submission made by

learned counsel for the respondent that after submission of challan in the court, quashing of F.I.R. is ousted from the jurisdiction of this court and falls within the domain of learned trial court has the substance for the reason that when a court takes cognizance of the matter, which is a proper forum created by law, then constitutional jurisdiction cannot be exercised in favour of quashing of F.I.R. The reliance placed by learned counsel for the petitioners in contrast to submission made on behalf of respondent, while relying upon the case titled as "Miraj Khan v. Gul Ahmed and 3 others" 2000 SCMR 122 is not much helpful to the petitioners for the reason that the Hon'ble Supreme Court in the cases reported as "Ahmed Saeed v. The State and another" (1996 SCMR 186), has candidly observed that this court has no jurisdiction to quash the F.I.R. even under section 561-A Cr.P.C. This view was further followed in the case of "Col. Shah Sadiq v. Muhammad Ashiq and others" (2006, SCMR 276) wherein the Hon'ble Supreme Court had pointed out the remedies available to a litigant before the learned trial court and had maintained the order of this court refusing to quash the F.I.R. Similarly, in another judgment reported as "Dr. Ghulam Mustafa v. The State and others" (2008 SCMR 76), this view was followed by the apex Court. The latest view provided by the Hon'ble Supreme Court is in the case of "Director-General, Anti-Corruption Establishment, Lahore and others v., Muhammad Akram Khan and others" (PLD 2013 Supreme Court 401) wherein it has been observed as under:--

"The law is quite settled by now that after taking of cognizance of a case by a trial court the F.I.R. registered in that case cannot be quashed and the fate of the case and of the accused persons challaned therein is to be determined by the trial court itself. It goes without saying that if after taking of cognizance of a case by the trial court an accused person deems himself to be innocent and falsely implicated and he wishes to avoid the rigours of a trial then the law has provided him a remedy under sections 249-A/265-K, Cr.P.C. to seek his premature acquittal if the charge against him is groundless or there is no probability of his conviction."

When this view taken by the apex Court has been examined vis-a-vis contents of the case in hand, it is found that by seeking relief of quashing of F.I.R. in the constitutional jurisdiction, the petitioners want to short circuit the procedure and want to avail the opportunity to get his acquittal from the charge in presence of other remedies as stated above. This practice cannot be appreciated in view of this latest view of the Hon'ble Supreme Court which has also provided remedy for an aggrieved person to be availed before the learned trial court, seized of the matter.

7. Keeping in view the ratio of cases stated above, it is quite clear that the relief prayed for by the petitioners through the instant petition cannot be granted to him in view of availability of alternate remedies before the learned trial court. On the merits of the case, I have intentionally refrained myself from giving any comment lest it may not prejudice the mind of the learned trial Court.

In view of the above, the petition in hand is dismissed in the light of afore-noted observations. However, the petitioners shall be at liberty to avail their legal remedies before the learned trial Court as enunciated in the cited cases supra.

AG/Z-13/L Petition dismissed.

2014 M L D 489
[Lahore]
Before Syed Muhammad Kazim Raza Shamsi, J
TARIQ AMJAD---Appellant
Versus
The STATE and another---Respondents

Criminal Appeal No.1240 of 2010, heard on 9th May, 2013.

(a) Criminal trial---

----Evidence---Contradictions---Scope---Mere fact that on some points, witness has given a different statement than the one taken by other witnesses is not sufficient to discard his testimony, which is otherwise supported by evidence on record.

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

----S.302(b)---Qatl-e-amd---Appreciation of evidence---Substitution of real culprit, phenomena of---Applicability---Scope---Accused was convicted and sentenced to imprisonment for life by Trial Court for committing murder---Plea raised by accused was that it was blind murder---Real brother of deceased could not let off real assailant and substitute some other person for murder of his brother---Trial Court rightly observed that it was accused who had knowledge of place where he kept crime weapon and he led to that place and got recovered the same---Such finding of Trial Court could not be set aside on the ground that independent person of locality or some respectable did not join at the time by investigating officer---Prosecution successfully proved case against accused who was the sole person inflicting single fatal injury to deceased in daylight for no legal justification---Findings of Trial Court were borne out of the record and supported by convincing and cogent prosecution evidence and the same were maintained---Appeal was dismissed in circumstances.

Mian Ahmad Mahmood for Appellant.
Muhammad Ishaq, Deputy Prosecutor-General for the State.
Muhammad Ali Khatana for the Complainant.
Date of hearing: 9th May, 2013.

JUDGMENT

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---This appeal filed under section 410, Cr.P.C. is directed against judgment dated 28-4-2010, passed by the learned Sessions Judge, Chiniot who whiletrying the appellant Tariq Amjad in case F.I.R. No. 608 dated 2-9-2009 registered under section 302, P.P.C. at Police Station Langrana District Chiniot had convicted him under section 302(b), P.P.C. and sentenced him to life imprisonment. The appellant was further directed to pay compensation of Rs.100,000 to the legal heirs of the

deceased and in default of the payment of the said amount, to undergo simple imprisonment for six months.

2. Briefly stated facts of the case are that the complainant Ghulam Mustafa, brother of Shamsher Ali (deceased), aged 14/15 years had gone to his school (deceased) situated at Chak No.237-JB at the close hours to pick him and when both the brothers reached near Veterinary Hospital, the accused Tariq Amjad caught hold of Shamsher Ali and gave a knife blow in the presence of Abid Hussain and Muhammad Iqbal, P.Ws. at the chest of the deceased who fell on the ground while the assailant managed to escape. The injured was taken to the hospital where he succumbed to the injury.

3. The motive behind the occurrence was that a day earlier on 1-9-2009, both the deceased and the accused had exchanged some abuses and the deceased had given a slap to the culprit who in return threatened him for taking revenge.

4. P.W.8, Muhammad Amin, S.I/I.O. completed investigations in the case who arrested the appellant on 14-9-2009 and on his pointation had recovered blood stained knife (P.3) whereafter he forwarded the report under section 173, Cr.P.C. to the court for trial.

5. Before the learned trial court, the appellant pleaded not guilty and claimed trial and the prosecution in order to prove the same had examined eight witnesses in all. The prosecution evidence was further strengthened by the reports of the Chemical Examiner and Serologist issued in respect of the weapon of offence which they found stained with blood and the blood was of human being.

6. The evidence produced by the prosecution was confronted to the accused who while negating the allegations of his presence at the spot and inflicting fatal blow to the deceased, in an answer to the question "why" the case against you and why the P.Ws. deposed against you" stated that "P.Ws. are relatives inter se and the complainant of the case and the P.Ws. lodged F.I.R. against him to blackmail him, his father and his grandfather falsely in this case. It was a blind murder. I am innocent." He did not opt to depose on oath in respect of the allegations levelled against him and in his defence, he had produced School Leaving Certificate Exh.DC and Birth Certificate Exh.DD.

7. P.W.2, Dr. Muhammad Rehmatullah vide the postmortem report Exh.PB reported a solitary injury on the chest of the deceased in the following words:--

"A stab wound (incised wound) of 2.5 cm X 1 cm on left upper chest."

According to him, the injury had damaged and injured the left lung pericardium and heart which resulted into death. According to further observation of the Medical Officer, the probable time elapsed between the injury and death within half an hour and between death and postmortem as 2-12 hours.

8. The learned trial court has duly appreciated the evidence and discussed the points of motive, ocular account, medical evidence and the recovery of the weapon of offence at the

instance of the appellant by discussing the volume of evidence led by the prosecution and also met with the objections raised by the defence. The discrepancies pointed out in the statements of P.W.6 and P.W.7, the eye-witnesses were brushed aside by the court on the ground that mere relationship of the witnesses and the deceased is not enough to set aside their testimonies and the discrepancies pointed out did not absolve the appellant from his inculpability. The medical evidence has also been believed to be in line with the ocular account. The objections raised by the appellant before the learned trial court, have again be reiterated in the instant appeal.

9. The main stress of learned counsel for the appellant in the instant appeal is that the appellant as per document Exh.DC and Exh.DD is having the age of 13/14 years. The other points on which learned counsel has argued this appeal, relates to the discrepancies in the statements of P.W.6 and P.W.7, lapse in conducting the investigations left by P.W.8 and non-professional attitude adopted by P.W.3, Kashif Hameed, Draftsman in drafting the scaled-site-plan. While pointing out improvements in the statements of eye-witnesses, it is the argument of learned counsel that when the school was over, the teachers of the school were found leaving but none of them had met with the complainant of the case and that after the occurrence, it is not on the record as to who had taken the books and bag of the deceased from the place of occurrence. He has tried to point out contradictions in the statements of P.W.8 and the eye-witnesses. In this connection, the learned counsel has also placed reliance upon various judgments of the apex Court as well as of this court stating that only one circumstance is sufficient to cast doubt upon the story of the prosecution, the benefit of which is to be extended to the appellant. He has also referred to the judgments in respect of conducting postmortem examination with delay and it is argued that delayed postmortem indicates that eye-witnesses were planted.

10. On the other hand, the arguments have been controverted by the learned counsel for the complainant submitting that it is a daylight occurrence in which a single accused is involved who had inflicted a single injury to the deceased which proved fatal and that the identity of the assailant is not shrouded in mystery as he is known to the complainant party who in the presence of the complainant and witnesses had killed the younger brother of the complainant. He has also commented upon the factum of recovery of the weapon of offence at the instance of the appellant with the assertion that the same was recovered on the pointation of the appellant who had the knowledge of the place where the weapon had been concealed, thus the recovery is neither planted and nor is doubtful. It is added by learned counsel that the appellant failed to establish his defence by producing his grandfather in the witness box to establish the involvement of his father and grandfather in the transaction of Rs.30,000. Lastly, he prayed for dismissal of the appeal on the ground that the prosecution has established the guilt of the appellant beyond any shadow of doubt.

11. Parties have been heard at length and the record as well as the case-law cited at the bar has also been examined minutely.

12. The first ground taken by the defence about minority of the appellant is found untenable for the reason that in respect of the age of the appellant, the ossification test has already been conducted by the Board of the Doctors on the orders of the court and according to

report submitted by the said Board, the age of the appellant was about 17-years at the time of occurrence. In this regard, documents Exh.DC and Exh.DD cannot be relied upon after report of medical board. So far as the contradictions pointed out by learned counsel for the appellant in the statements of P.W.6 and P.W.7 are concerned, it is found that those discrepancies do not negate the factum of murder in the daylight near the veterinary hospital rather it goes to establish that it is only the appellant who while armed with a sharp edged weapon had inflicted single blow on the vital part of the body of the deceased which resulted into his death. In this respect, the learned trial court has examined the evidence available on the record and while repelling the objections of the appellant, had held that the testimonies of P.W.6 and P.W.7 are confidence inspiring and do not create any circumstance leading to the belief that some other person had killed Shamsher Ali, than the appellant. Similarly, with respect to the objection in respect of the investigations conducted by P.W.8, it is found that the witness has squarely supported the prosecution version who during the course of investigation, had proceeded to arrest the appellant and also recovered the weapon of offence on his pointation. Mere fact that on some points, he has given a different view than the one taken by P.W.6 and P.W.7 is not sufficient to discard his testimony which is otherwise supported by the evidence on the record. The findings recorded by the learned trial court to this effect do not suffer from misreading and non-reading of the evidence. Similarly, the medical evidence is also corroborative to the narrations of the eye-witnesses regarding seat of injury and the kind of weapon used in the occurrence. There is no evidence produced by the defence to the effect that the postmortem examination was conducted with the delay due to the reason that the real assailant was not traceable and the appellant was substituted. It is very strange that a real brother of the deceased would proceed to let off the real assailant and substitute some other person for the murder of his brother. In this go, it is observed by the learned trial court that it is the appellant who had the knowledge of the place where he had kept the crime weapon, who, led to the said place and got recovered the same. This finding of the court cannot be brushed aside on the simple ground that the independent person of the locality or some respectable did not join at that time by the investigating officer.

13. The survey of the whole record as well as the case-law cited at the bar leads to the conclusion that the prosecution has successfully proved the case against the appellant who solely is the person inflicting the single fatal injury to the deceased in the daylight for no legal justification and in this respect, the learned trial court has rightly believed the prosecution evidence which findings have borne out of the record and supported by convincing and cogent prosecution evidence, thus are liable to be maintained.

14. For the foregoing reasons, the appeal in hand having no merits, is dismissed.

MH/T-9/L Appeal dismissed.

2014 M L D 594
[Lahore]
Before Syed Muhammad Kazim Raza Shamsi, J
MUHAMMAD SALEEM---Petitioner
Versus
The STATE and others---Respondents

Criminal Miscellaneous No.7510-B of 2013, decided on 26th June, 2013.

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

----S. 497---Penal Code (XLV of 1860), Ss. 337-A(i), 337-A(iii), 337-F(v), 337-L(2), 452, 109 & 34---Shajjah-i-khafifah, shajjah-i-hashimah, ghayr-jaifah-hashimah, other hurt, house-trespass after preparation for hurt, assault or wrongful restraint, abetment, common intention----Bail, grant of---Non-conclusion of trial within the statutory period---Case diary did not indicate that accused was solely responsible for the delay in conclusion of trial---On various dates prosecution witnesses did not turn up and the court had to take coercive measures for procuring their attendance, while on other dates, the Bar remained on strike, therefore, the accused was not at fault for delay in conclusion of trial---Person could not be detained in jail for an indefinite period as his life and liberty were involved---Although prosecution contended that injury was caused on vital part of the body of injured victim, which fact was supported by medical evidence, statements of prosecution witnesses and opinion of police, but the accused could not be convicted on basis of such evidence---Evidence collected by police was not legal evidence nor it enjoyed such status for the reason that prosecution witnesses had merely made statements, which could not be equated with legal evidence---Legal statements were those upon which the opposite party had made cross-examination to sift the truth---Since trial of accused had not been concluded within the statutory period of time and there was nothing on record to declare him a desperate and hardened criminal, as such he was entitled for concession of bail---Accused was granted bail accordingly.

(b) Evidence---

----Legal evidence/statements upon which conviction could be based---Scope---Legal statements were those upon which the opposite party had made cross-examination to sift the truth---Unless such statements were subjected to cross-examination they could not enjoy the status of legal evidence.

Rai Salah ud Din Kharal for Petitioner.
Muhammad Ishaque, D.P.G. with Tariq Mehmood, A.S.-I. for the State.
Muhammad Saleem for the Complainant.

ORDER
SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Muhammad Saleem petitioner seeks his release on bail in case F.I.R. No.38, dated 17-2-2012, registered under sections 337-F(v), 337-A(iii), 337-L(ii), 337-A(i), 452, 109, and 34 P.P.C. with Police Station

Balochni, District Faisalabad, having an allegation that the petitioner had caused injury at the nose of Mst. Robina Yasmin, which injury was declared falling under section 337-F(v), P.P.C.

2. Parties heard and record perused.

3. The petitioner has moved this petition on the ground that he is facing incarceration for the last more than one year, whose trial has not been concluded thus prayed for invoking the concession of bail in his favour. In order to appreciate the ground taken by the petitioner the case diary has been examined, which does not indicate that the petitioner is solely responsible for the delay in the conclusion of the trial. On various dates the P.Ws. did not turn up and the Court has to take coercive measures for procuring their attendance while on other dates the Bar remained on consistent strike, therefore, the petitioner is not at fault for the delay in the conclusion of the trial. It is a cardinal principle of law that a person cannot be detained in the jail for an indefinite period as his life and liberty is involved.

4. Learned D.P.-G. submitted that the petitioner had caused injury at the vital part of the injured, which fact has further been supported by the medical evidence as well as statements of P.Ws. and the Police had also held the petitioner guilty of the offence, therefore, he is not entitled for the concession of the bail. When the learned D.P.-G. has been asked whether on the basis of this material the petitioner can be convicted, he has answered in negative without affording any reason. The reason for not passing any conviction at this stage against the petitioner is that the evidence collected by the Police is not legalevidence nor it enjoys the status of the same for the reason that the P.Ws. had merely made the statements, which cannot equated with legal statements. Legal statements are those upon which the opposite party had made cross-examination to sift the truth. Unless those statements are subjected to cross-examination they cannot enjoy the status of legal evidence that is why the conviction at this stage when all the circumstances are against the petitioner can be recorded. Since the trial of the petitioner has not been concluded within the statutory period of time and there is nothing on the record to declare him desperate and hardened criminal, as such the petitioner is found entitled for the concession of bail.

5. In view of the above, the petition is allowed and Muhammad Saleem petitioner is admitted to bail on furnishing of bail bonds in the sum of Rs. 50,000 (Rupees Fifty Thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.
MWA/M-209/L Bail granted.

2014 P Cr. L J 218
[Lahore]
Before Syed Muhammad Kazim Raza Shamsi, J
M. SAJJAD ANWAR---Petitioner
Versus
C.C.P.O. and others---Respondents

Writ Petition No.7683 of 2010, decided on 29th November, 2013.

Penal Code (XLV of 1860)---

----S. 489-F---Criminal Procedure Code (V of 1898), S.22-A---Constitution of Pakistan, Art. 199---Constitutional petition---Decree of Civil Court---Criminal proceedings, setting aside of---Issuance of cheque under coercion---Proof---Respondent sought order from Ex-Officio Justice of Peace for registration of case under S.489-F, P.P.C. against petitioner---Petitioner filed civil suit which was contested and subsequently Civil Court had decreed the suit in favour of petitioner on the ground that cheque in dispute was obtained from petitioner under coercion and did not incur any liability in favour of defendant of suit (respondent)---Validity---After decree of suit and declaration of cheques in dispute being obtained by exerting undue influence there was no need to lodge criminal case under S.489-F, P.P.C. against petitioner---High Court in exercise of Constitutional jurisdiction set aside order passed by Ex-officio Justice of Peace resulting into dismissal of application under S.22-A, Cr.P.C. filed by respondent---Petition was allowed in circumstance.

Qazi Misbah-ul-Hassan for Petitioner.
Wali Muhammad Khan, A.A.-G. with Usman Haider, A.S.-I. for Respondents.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Allegedly the cheque issued by the petitioner in favour of respondent No.5 was dishonoured and for the purpose of having remedy respondent No.5 filed an application before the learned Ex-Officio Justice of Peace seeking a direction for registration of the case against the petitioner, which was allowed and the direction sought for was granted by the court vide order dated 18-3-2010. This order is the subject-matter of the instant constitutional petition.

2. After having heard the learned counsel for the parties and perusing the record, I am inclined to allow this petition on the ground that regarding the disputed cheques the petitioner had filed a civil suit for permanent injunction against respondent No.5 Abid Bilal, Which was contested and subsequently the Court had decreed the suit in favour of the present petitioner on the ground that the cheques in dispute were obtained from the petitioner under coercion, which did not incur any liability in favour of the defendant of the suit. After decretal of the suit and the declaration of the cheques in dispute being obtained by exerting undue influence there is hardly any need to lodge criminal case under section 489-F, P.P.C. against the present petitioner. In view of position of the record, the petition in

hand is allowed and the order impugned through the instant petition is set aside resulting into dismissal of the application under section 22-A, Cr.P.C. filed by respondent No.5.

MH/S-300/L Petition allowed.

2014 P Cr. L J 520
[Lahore]
Before Mazhar Iqbal Sidhu and Syed Muhammad Kazim Raza Shamsi, JJ
ZAFAR IQBAL alias PAPPI---Appellant
Versus
The STATE---Respondent

Criminal Appeal No.281 of 2008 and Murder Reference No.37 of 2009, heard on 11th September, 2013.

Penal Code (XLV of 1860)---

----S. 302(b)--- Qatl-e-amd--- Appreciation of evidence---Sentence, reduction in---Accused was specifically nominated in promptly lodged F.I.R., and the names of the witnesses had also been provided---Crime weapon was recovered at the instance of accused; which was sent to the Forensic Science Laboratory for matching the same with the crime empties---Laboratory report revealed that bullets were fired from the same weapon recovered at the instance of accused---Both eye-witnesses though were closely related to the deceased, but mere relationship of witnesses was not sufficient to disbelieve the testimony of such witnesses, unless it was shown that their evidence was not confidence-inspiring---Accused had failed to point out any ulterior motive on the part of said witnesses for falsely implicating him in the case---Confidence-inspiring account provided by said witnesses, could not be shattered by defence in the cross-examination---Statements of said witnesses were properly relied upon by the Trial Court, in circumstances---Prosecution failed to prove the motive to its hilt---Contradiction with regard to locale of injury on the person of the deceased, in the evidence of prosecution witnesses, was not fatal to the main statements---Accused could not prove his plea of alibi---Simple statement of accused that it was an unseen occurrence, without any corroboration, was not believable---Prosecution through convincing and cogent evidence, had established that occurrence had taken place in presence of the witnesses---Prosecution by producing convincing and confidence-inspiring ocular account, which was in line with the medical evidence and factum of recovery of crime weapon at the instance of accused, had established the charge of murder of the deceased beyond the shadow of doubt---Motive for the occurrence having not been established, treating the same as mitigating circumstance, death sentence awarded to accused, was commuted into the one of imprisonment for life while the remaining sentences would remain intact---Benefit of S.382-B, Cr.P.C., was extended to the accused, in circumstances.

Talib Hussain v. The State 2009 SCMR 825 rel.

Muhammad Aslam Khan Dhukkar for Appellant.
Malik Muhammad Jaffar, D.P.-G. for the State.
Muhammad Nadeem Kanjoo for the Complainant.
Date of hearing: 11th September, 2013.

JUDGMENT

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Zafar Iqbal was tried in a case F.I.R. No.7 dated 7-1-2008 registered under sections 302/34, P.P.C. at Police Station Thingi, District Vehari for committing murder of one Muhammad Asif Rizwan. The learned trial Court after conclusion of the trial of the case vide judgment dated 26-8-2008 convicted Zafar Iqbal appellant. The following sentences had been awarded to Zafar Iqbal son of Khadim Hussain:--

Zafar Iqbal son of Khadim Hussain

Death Sentence under section 302(b), P.P.C. as "Tazir" with a compensation of Rs.1,00,000 to be paid to the legal heirs of Muhammad Asif Rizwan deceased as required by section 544-A, Cr.P.C. and in default of the payment of the amount, he was directed to further undergo six months' simple imprisonment.

2. Murder Reference No.37 of 2009 has been sent by the learned trial Court as required under section 374, Cr.P.C. seeking confirmation of death sentence awarded to Zafar Iqbal while Zafar Iqbal appellant also assailed his conviction and sentence by filing Criminal Appeal No.281 of 2008. Both the matters are being disposed of by this single judgment.

3. Briefly the facts as alleged by Qamar-uz Zaman (P.W.9) the complainant in his statement in the F.I.R. Exh-PJ/2 are that the occurrence in this case for the murder of Muhammad Asif Rizwan had taken place at 12.00 (midnight) on 7-1-2008. According to him, he (complainant) along with his brother Muhammad Asif Rizwan (deceased), Safdar Hussain (P.W. 10) and Mukhtiar Hussain (given up P.W.) along with other people of the vicinity were present in connection with marriage ceremony of Sarfraz son of Muhammad Hanif due to close relative. That Zafar Iqbal alias Pappi son of Khadim Hussain resident of 44/WB (accused) armed with Carbine .12 bore came, raised lalkara to Muhammad Asif Rizwan brother of the complainant to be ready to die and immediately caused a straight fire shot to Muhammad Asif Rizwan which landed at his chest on left side, who after receiving injury fell down. The complainant along with P.Ws. Safdar Hussain and Mukhtiar Hussain tried to apprehend accused Zafar Iqbal who fled away by brandishing firearm weapon. The complainant and P.Ws. shifted Muhammad Asif Rizwan to District Headquarter Vehari in injured condition who was admitted there by the doctor. The doctor after examination of the injured shifted him in Surgical Ward where injured died on the next day at 9-00 a.m. and then offence under section 302, P.P.C. was added.

The motive for the occurrence was that accused Zafar alias Pappi had personal grudge against Muhammad Asif Rizwan regarding possession of an Ihata and on the basis of this grudge, accused Zafar Iqbal committed Qatl-e-amd of Muhammad Asif Rizwan.

4. The police completed usual investigations and submitted the challan against Zafar Iqbal alias Pappi accused in which he was charge-sheeted on 16-4-2008 under sections 302/34, P.P.C. The accused professed innocence and claimed trial. The prosecution examined eleven witnesses to prove the charge. The learned trial Court at conclusion of trial, convicted Zafar Iqbal appellant in the manner noted in preceding para.

5. Qamar-uz Zaman (P.W.9) and Safdar Hussain (P.W.10) deposed about murder of Muhammad Asif Rizwan, Akbar Dawod, C-420 (P.W.2), Ghulam Mustafa, 389/C (P.W.3) deposed about sending parcels to the Forensic Science Laboratory. Muhammad Ashiq (P.W.6) identified the dead body of Muhammad Asif Rizwan before the Doctor. Sajjad Hussain (P.W.7) deposed about the recovery of crime weapon used in the occurrence. Dr. Ghulam Abbas (P.W.1) and Dr. Muhammad Ahmad Shahzad (P.W.4) provided the medical evidence while Muhammad Iqbal SI (P.W.11) deposed about his investigations conducted in the case.

6. Dr. Ghulam Abbas, Medical Officer, DHQ Hospital, Vehari on 7-1-2008 at 1-15 a.m. in night examined Muhammad Asif Rizwan (injured) brought by Qamar-uz Zaman (brother) and found the following injury on his body:--

Injuries:--

(1) Wound of Entry: A fire circular wound 6 cm x 6 cm x DNP, margins inverted on the front of left side of chest with omentum coming out 10 cm below the left nipple.

In the opinion of Doctor, probable duration of injury was fresh. Fresh bleeding was coming from the wound. Kind of weapon used was the firearm. The patient was referred to Surgical Ward after providing first aid.

7. Dr. Muhammad Ahmad Shahzad, Medical Officer, RHC, Vehari (P.W.4) on 7-1-2008 at 1-00 p.m. conducted autopsy over dead body of Muhammad Asif Rizwan deceased and found the following injuries on his body:--

INJURIES:-

(1) A stitched wound 10 cm, extending from left side of upper abdomen to midline (wound of entry of fire arm) as per MLC No.09/08 DHQ Vehari, 10 cm below left nipple.

(2) A stitched wound 25 cm extending from epigastrium to lower abdomen.

(3) A circular hole (of colostomy) 3 cm x 3 cm on right side of abdomen, 8 cm from midline and 9 cm above anterior superior iliac spine.

(4) A circular wound (of drain) 1 cm x 1 cm on left iliac fossa.

(5) A circular hole 1 cm x 1 cm (of drain) on right side of abdomen 4 cm above injury No.3.

In the opinion of Medical Officer, death was caused due to injury No.1. The said injury was grievous and fatal to life. All the injuries were ante-mortem, which were inflicted with firearm weapon. The cause of death was due to haemorrhage and shock which was sufficient to cause death in ordinary course of nature. Probable time elapsed between injuries and death was within 8 to 10 hours and between death and postmortem was about 3 to 4 hours.

8. The prosecution closed its evidence by giving up Mukhtiar Ahmad (P.W.) being unnecessary. Report of Chemical Examiner Exh.PP, Serologist Exh.PQ and report of Forensic Science Laboratory regarding pistol Ex.PR were also placed on record.

9. The prosecution evidence so recorded during the trial was confronted to the accused Zafar Iqbal alias Pappi while recording his statement under section 342, Cr.P.C. who set up his defence in the following words, in an answer to the question No.8:--

"Why this case against you and why the P.Ws. deposed against you?"

"The P.Ws. are highly interested. They are closely related with the deceased and inter se and also inimical towards me. In fact it is unseen occurrence. I have been falsely roped in this case due to enmity/grudges. The police being collusive with the complainant party arrested me on the very first day of occurrence from my home and I was kept under illegal detention for 22 days by the police concerned. I was subjected to persecution during my illegal detention to fetch confession and when my condition became precarious the Investigating Officer concocted the story of my production before him by some person. The date of arrest is totally fictitious and concocted one. I am innocent. When the police failed to detect the real culprit of this blind murder, I have been falsely challaned in this case just to fill in the gap."

The appellant did not opt to produce any evidence in his defence nor wanted to make statement under section 340(2), Cr.P.C. to disprove the allegation levelled against him in the prosecution evidence.

10. It is contended by learned counsel for the appellant that the learned trial Court has erred in law in awarding death penalty to the appellant. He has contended that the prosecution has failed to prove the case against the appellant through independent witnesses. According to the learned counsel eye-witnesses whose evidence was believed by learned trial Court, were closely related and were interested witnesses, so their evidence ought to have been discarded and disbelieved, that there were material contradictions in deposition of the prosecution witnesses in respect of locale of injury as noted by the Medical Officer (P.W.4) in his statement which has not been noticed by the learned trial Court while recording the conviction and sentence of death against the appellant. He next contended that the prosecution has failed to prove the motive which has been attributed to the appellant for the murder of Muhammad Asif Rizwan but had erred in awarding capital punishment when the courts itself had disbelieved the motive part ofthe prosecution case.

11. The submissions have been controverted by the learned Deputy Prosecutor-General with the assistance of learned counsel for the complainant and argued that the learned trial court has not disbelieved the motive in clear terms which otherwise was proved by the prosecution witnesses in clear and candid manner; that the appellant was having dispute over the possession of the 'ihata' against the deceased in the garb of which he (appellant) had committed the murder in a marriage ceremony in presence of the P.Ws. and others. So far as the contention with regard to the contradiction in the statement of P.Ws. regarding locale of injury is concerned, learned counsel submitted that the injury was available on the chest of the deceased and it was humanly not possible to provide a graphic picture of the injury by mentioning the exact place where it was sustained. According to the submission of the learned counsel, young brother of the complainant was killed within his view, therefore, lapse in providing exact seat of injury is quite natural. Learned counsel further submitted that the occurrence had taken place in the ceremony of marriage and within 1.45 hours the matter was reported to the police leaving no room for doubt of false implication of the appellant in the instant case. He further stated that the prosecution evidence based upon ocular account, medical evidence and recovery of crime weapon has duly been proved by the prosecution witnesses, therefore, the learned trial Court has rightly recorded the conviction of the appellant and awarded him capital punishment.

12. We have heard the learned counsel for the parties and perused the record.

13. The incident had taken place at 12.00 night on 7-1-2008 which was witnessed by Qamar-uz Zaman, Safdar Hussain and Mukhtiar Ahmad, P.Ws. regarding which occurrence the F.I.R. was registered at the police station within about two hours. The perusal of the record indicates that the appellant is specifically nominated in the F.I.R. where the names of the witnesses have also been provided while the crime weapon was also recovered at the instance of the appellant which was sent to the Forensic Science Laboratory for matching the same with the crime empties and according to the report of Forensic Science Laboratory Exh.PR, the bullets were fired from the same weapon recovered at the instance of the appellant.

14. The contention of learned counsel for the appellant that both the eye-witnesses were closely related to the deceased, is no ground to discard the testimony in view of the case of Talib Hussain v. The State (2009 SCMR 825) in which it was observed that mere close relationship of witnesses is not sufficient to disbelieve the testimony of such witnesses unless it is shown that his evidence is not confidence-inspiring. Besides this judgment of the Apex Court, there are chain of authorities in this respect. The appellant has miserably failed to pinpoint any ulterior motive on the part of P.W.9 and P.W.10 for falsely implicating him in the case in hand, thus, the 'statements of these P.Ws. were properly relied upon by the learned trial court. Even otherwise, the eye- witnesses had provided confidence-inspiring account which could not be shattered by the defence in the cross-examination conducted upon them, thus, the contention of the learned counsel having no force is repelled.

15. The further contention of learned counsel for the complainant that the learned trial court had not disbelieved the motive part of the case is unfounded as the learned trial Court in

para 49 of its judgment has clearly mentioned that the motive is something hidden in the mind of the assailant which he materializes whenever he finds chance and now it was not necessary for prosecution to prove the same. This part of the judgment of the trial Court does not indicate that the court has provided any candid opinion on the fact thus, in absence of any categorical finding, it can be assumed that the court had not believed the motive part of the case. Moreover, P.W.9 in his statement although has mentioned that there was a dispute of possession of 'Ihata' in between the deceased and the appellant but he has not provided the nature of that dispute and that the said dispute was being resolved by court or any complaint in this respect was lodged with the competent authority. It is also not mentioned in the statement that any legal remedy was availed by the deceased against the possession of the Ihata. In our opinion, the prosecution remained failed to prove the fact of motive to its hilt.

16. The next contention of learned counsel for the appellant that the testimony of P.W.9 and P.W.10 are not in line with the crime report Exh.PJ/2 as P.W.9 in his statement has provided the locale of injury on the right side of the chest of the deceased whereas in the F.I.R. he had mentioned that the deceased had received injury on the left side of his chest. This contention of the learned counsel is ill-founded for the reason firstly that the defence did not confront this contradiction to the P.W. in cross-examination and secondly that the injury was available on the left side of the chest of the deceased according to the report of the Medical Officer (P.W.4) which is quite in line with the F.I.R. and it does not matter that the P.W. in his statement has provided different place where the injury was present as his statement in the court was recorded on 22-7-2008 after lapse of more than six months of the occurrence. There is a possibility that due to lapse of time, the witnesses may have provided different seat of injury than he had mentioned in F.I.R. This contradiction is not fatal to the main statement made by the P.W. as he remained consistent on the fact of arrival of the appellant at the spot, raising lalkara and then firing upon the deceased. This contention of the learned counsel is also repelled.

17. After discussing the prosecution evidence we now tend to have a glance on defence taken by the appellant in his own statement recorded under section 342, Cr.P.C. in which statement he had mentioned that the occurrence was unseen and due to enmity/grudge, he was enroped falsely in the case. He has also levelled allegation against the police which according to the appellant had arrested him on the day of occurrence from his house and kept him under illegal detention for 22 days for having his confession when his condition became precarious, through a concocted story, his arrest was shown in instant case. When we have examined this defence of the appellant, it is found that the allegation of arrest of the appellant on the day of occurrence and his detention in the police lock-up is not established from the record as the appellant had not produced any evidence to show that he was in illegal detention of the police. Apparently he had not filed any petition in the court for his release from illegal detention. Similarly, simple statement that it was an unseen occurrence without any corroboration is not believable. The prosecution through convincing and cogent evidence has established the fact that in presence of witnesses, the occurrence had taken place. We do not find any reason to believe the plea raised by the appellant in his statement.

18. The analysis of the case of the parties as made by us in the preceding paras indicate that the prosecution by producing convincing and confidence-inspiring ocular account which is in line with the medical evidence, factum of recovery of crime weapon at the instance of the appellant, established the charge of murder of Muhammad Asif Rizwan beyond any shadow of doubt. As already has been observed above, that the case of the prosecution on the factum, motive for the occurrence has not been established on the record, therefore, treating the same as mitigating circumstance, we are inclined to commute the death sentence awarded to the appellant into one imprisonment for life.

19. For the foregoing reasons, the appeal in hand is dismissed with the modification of commuting the sentence of death into one imprisonment for life while the remaining sentences shall remain intact. Benefit of section 382-B, Cr.P.C. is also extended in favour of the appellant.

20. Death sentence of the appellant/convict Zafar Iqbal alias Pappi son of Khadim Hussain is NOT CONFIRMED and Murder Reference No.37 of 2009 is answered in the NEGATIVE.

HBT/Z-25/L Order accordingly.

2014 P Cr. L J 1293

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi, J

MUHAMMAD SIDDIQUE---Appellant

Versus

MUNIR AHMAD and 8 others---Respondents

Criminal Appeal No.785 of 2012, decided on 13th May, 2014.

Penal Code (XLV of 1860)---

----Ss. 380, 440 & 447---Qanun-e-Shahadat (10 of 1984), Art. 129(g)---Criminal Procedure Code (V of 1898), S. 417(2A)---Appeal against acquittal---Appreciation of evidence---Investigating officer not appearing before court during trial to record his statement---Complainant making no effort before Trial Court for summoning the investigating officer---Presumption---Prosecution was duty bound to adduce all relevant evidence in the court but the same was not done and the witness (i.e. investigating officer) was withheld---Presumption in such circumstances would be that had the witness (i.e. investigating officer) appeared in the court, he might not have supported the prosecution case---Appeal against acquittal of accused persons was dismissed accordingly.

Mian Tariq Hussain for Appellant.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Respondents Nos.1 to 8 were booked by the appellant in case F.I.R. No.168 dated 1-5-2005 registered under sections 440, 447 and 380, P.P.C. with Police Station Pir Mahal, District Toba Tek Singh who were tried by learned Judicial Magistrate Ist Class, Kamalia, Camp at Pir Mahal, and were acquitted from the charges vide judgment dated 4-4-2012.

2. The charges against the respondents were that on 2-4-2005 at about 10-00 a.m. in the morning, they while armed with weapons came and broke the door of the 'Ihata' of the complainant and also tried to demolish the wall. They took away gurders, bricks, doors, windows and also took over the possession of the 'Ihata' which was allotted to the complainant of the case.

3. The learned trial Court after recording the evidence reached at the conclusion that the prosecution had failed to make out any case against the respondents so they all were acquitted therefrom.

4. The judgment handed down by the learned trial Court has been examined and it is found that the same is based upon the proper appreciation of evidence led by the parties as such, it is not suffered from any misreading and non-reading of evidence. The Investigating Officer did not appear in the court and this fact has been pointed out by the learned counsel for the appellant forcefully that the case is liable to be remanded for recording the statement of the Investigating Officer. This submission of learned counsel is untenable for the reason that the appellant had not made any effort before the learned trial Court for making request for summoning the investigating officer. It was the duty of the prosecution to adduce all the relevant evidence in the court but the same was not done and the witness was withheld so the presumption is that had the witness appeared in the court he may not support the prosecution. The judgment delivered by the learned trial Court in these circumstances is found in accordance with law and is thus liable to be maintained.

5. For the foregoing reasons, the appeal in hand having no merits is dismissed in limine.

MWA/M-187/L Appeal dismissed.

2014 P Cr. L J 872

[Lahore]

Before Mazhar Iqbal Sidhu and Syed Muhammad Kazim Raza Shamsi, JJ

GHULAM MUSTAFA and others---Appellants

Versus

The STATE and another---Respondents

Criminal Appeals Nos. 296, 306-J, 307-J, 308-J, 309-J, 310-J, 321 of 2008 and Murder Reference No. 4 of 2009, heard on 23rd September, 2013.

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

----Ss. 302, 396, 397, 324, 337-F(v), 337-F(iii) & 34---Qatl-e-amd, dacoity with murder, robbery or dacoity, causing Hashimah, Mutalahima, common intention---Appreciation of evidence---Benefit of doubt---F.I.R. was promptly lodged, but the names of the assailants were not mentioned---Complainant had named accused persons subsequently on having information provided by prosecution witness which was fatal to the prosecution case---Complainant and the prosecution witness, after due deliberation had introduced the names of accused persons---No explanation had been provided for making supplementary statement with delay---Identity of accused participating in the occurrence was not established from the evidence led by the prosecution---Statement of witness of 'Waj Takker', had no independent corroboration---Said witness on his own statement was residing at the distance of one acre from the place of occurrence; and in the dark night his identification qua accused was not beyond any shadow of doubt---Said witness made statement that he had identified accused persons while fleeing away with considerable delay---Reasonable doubts existed with regard to involvement of accused persons in the occurrence, benefit of doubt was to be extended in their favour---When identity of accused persons had not been established by the prosecution, other pieces of evidence, which were of corroboratory nature, could not be relied upon solely to hold that it was the accused persons who were armed with weapons; and had fired at the deceased and injured the prosecution witnesses---Prosecution having failed to bring home guilt of accused persons, there was no need to ponder upon the defence plea---Case of prosecution being not free from doubt, benefit of same was to be extended to accused persons---Impugned judgment was set aside---Accused persons were set at liberty.

Falak Sher alias Sheru v. The State 1995 SCMR 1350 ref.
Khalid Javed and another v. The State 2003 SCMR 1419 rel.

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

----S. 154---Information in cognizable cases---Subsequent statement---Effect---Report with subsequent statement made by complainant, could be treated as an improvement for falsely implicating the person, with due deliberation and consultation.

Mushtaq Hussain's case 2011 SCMR 45 rel.
Muhammad Nadeem Kanjoo for Appellants.
Syed Shahbaz Ali Rizvi for the Complainant.
Abdul Quddous, Deputy Prosecutor-General for the State.
Date of hearing: 23rd September, 2013.

JUDGMENT

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---After having faced trial in case F.I.R. No.2 dated 3-1-2007 registered under sections 302, 396, 397, 324, 337F(v), 337F(iii), 34, P.P.C. at Police Station Chowk Azam District Layyah, the appellants Ghulam

Mustafa son of Muhammad Sadiq, Muhammad Iqbal son of Sultan Ahmad, Muhammad Asif Riaz alias Tanveer son of Muhammad Riaz, Muhammad Tafseer alias Ashiq Hussain son of Muhammad Iqbal and Muhammad Anwar alias Mushtaq son of Noor Muhammad, were convicted and sentenced to death by the learned Sessions Judge, Layyah for committing "Qatl-e-amd" of Saeed Ahmad alias Muhammad Nawaz and injuring Muhammad Sharif, in the following manner:--

Under section 302 read with section 396, P.P.C.	Sentence to death with fine of Rs.50,000 each, in default of payment of fine to further suffer simple imprisonment for six months.
Under section 397, P.P.C.	Rigorous Imprisonment for seven years with fine of Rs.10,000 each and in default of payment of fine, to further undergo simple imprisonment for six months.
Under section 324, P.P.C.	Rigorous imprisonment for ten years with fine of Rs.10,000 each, in default of which to further undergo six months' S.I.
Under section 337F(v), P.P.C.	Five years rigorous imprisonment with fine of Rs.5,000 each, in default whereof to further suffer six months' S.I.
Under section 337F(iii), P.P.C.	Three years' R.I. as Ta'zir with Daman of Rs.3,000 each and in default of payment of Daman to further suffer simple imprisonment for six months.

All the sentences were directed to run concurrently with the observation that benefit of section 382-B, Cr.P.C. is withheld as the appellants committed the murder of a person and injured another during the dacoity.

2. The learned trial Court has sent Murder Reference No.4 of 2009 under section 374, Cr.P.C. seeking confirmation of death sentences awarded to all the aforementioned appellants who have also challenged their convictions and sentences by filing separate appeals. As all the matters are interconnected as such, the same are being decided by this single judgment.

3. Succinctly, the story as narrated in the F.I.R. Exh.PM/1 is that the complainant Tahir Naveed Ahmad (P.W.11) made a statement/complaint (Exh.PM) alleging that on the night of 2nd/3rd January, 2007, he along with Saeed Ahmad alias Muhammad Nawaz, his brother, Muhammad Sharif and Haji Bashir Ahmad were salting the leathers purchased by them on Eid in their godown and then Bashir Ahmad slept in the room while Muhammad Sharif and the complainant Tahir Naveed Ahmad slept in the Verandah and Saeed Ahmad alias Muhammad Nawaz slept under the Kikar tree on a cot lying there, when at about 3-00 a.m., Saeed Ahmad alias Muhammad Nawaz called them to wake up upon which call the complainant and Muhammad Sharif awoke while Bashir Ahmad also came out of the room after hearing the noise when they saw that four persons out of whom two were wearing white Qameez Shalwar and were of wheat (Gandami) colour, two were of longer height and two were of middle height, out of them two were armed with rifles and other two were armed with pistols who were seen in the light of bulb; that all the four persons claimed the amount from them and flared up on their refusal while one of them made two successive

fires which hit Saeed Ahmad alias Muhammad Nawaz on his right shoulder and left ankle while the other person also fired hitting on the upper part of left leg of Muhammad Sharif which passed through the same; that the other two persons while making fires threatened them not to come forward; that many persons gathered there and the accused persons fled away by making continuous firing and went towards west towards the metalled road and that both the injured were taken to hospital.

4. On 3-1-2007, Syed Rameez Bokhari, Inspector/I.O. (P.W.13) reached at RHC, Hospital, Chowk Azam where he recorded the statement of the complainant Tahir Naveed Ahmad (Exh.PM) and sent the same to police station for registration of formal F.I.R. He prepared injuries statements of Saeed Ahmad and Muhammad Sharif, injured Exh.PB and Exh.PE. He prepared the injury statement of Saeed Ahmad, deceased (Exh.PG), inquest reports Exh.PJ. He also collected two empties of the pistol .30-bore (P-10/1-2) and three crime empties of the rifle (P-11/1-3) vide I recovery memo Exh.PS. On 31-1-2007, he arrested the accused Ghulam Mustafa and on 4-2-2007, he (I.O.) got recovered .30-bore pistol (P-13) along with two live bullets (P-14/1-2) vide recovery memo Exh.PT. He also prepared the site plan of the recovery place Exh.PT/1. He arrested Muhammad Iqbal, accused on 6-2-2007 and got recovered from him the motorcar (P-4) and took into possession same on 7-2-2007. He got prepared the scale-wise site plan in duplicate from Patwari. He arrested accused persons, namely, Muhammad Asif Riaz, Muhammad Tafseer and Muhammad Anwar after seeking the permission of the court. Muhammad Asif Riaz, accused led to the recovery of rifle .44-bore (P-15) along with three bullets (P-16/1-3) which were taken into possession vide recovery memo Exh.PU. While in the police custody, on 8-3-2007, the accused Muhammad Tafseer led to the recovery of rifle (P-17) along with two live bullets (P18/1-2) which were taken into possession vide recovery memo (Exh.PV). The I.O. stated that on the same day Muhammad Anwar, accused led to the recovery of pistol (P-19) with three live bullets (P-20/1-3) which were taken into possession vide recovery memo Exh.P.W. He recorded statements of P.Ws. under section 161, Cr.P.C. and after concluding investigations, forwarded challan to the court for further proceedings.

5. After receipt of challan, the accused were charge-sheeted under sections 302/396/397/324/337F(iii)/337F(v)/34, P.P.C. for Qatl-e-amd of Saeed Ahmad alias Muhammad Nawaz deceased and injuring Muhammad Sharif, to which they denied and claimed trial, as such, the case was fixed for prosecution evidence. The prosecution in order to prove the charge, examined 13-witnesses and gave up evidence of Sarfraz Ali, Haji Bashir Ahmad, Ashiq Hussain, Constable and Riaz Ahmad, whereafter it closed evidence by tendering report of Chemical Examiner (Exh.PY), report of Serologist (Exh.PZ) and reports of Forensic Science Laboratory Exh.PAA and Exh.PBB.

6. Dr. Muhammad Yousaf, (P.W.2) on 3-1-2007 examined Saeed Ahmad alias Muhammad Nawaz, injured and observed following injuries on his body:--

"(1) A firearm wound of entrance measuring .75 cm x 1/2 cm at lateral aspect of right buttock, 12 cm lateral to the right anterior, superior iliac spine. No blackening or burning was present. The edges were inverted. There was another lacerated wound measuring 2 cm x 1.5 cm with averted margin at lateral aspect of left buttock, 17 cm away from the left

anterior superior iliac spine. It was wound of exit. Holes corresponding to wounds were present in clothes which were bloodstained.

(2) A fire-arm wound of entrance measuring 1/2 cm x 1/2 cm at the medial aspect of left ankle (at medial maleolus) no blackening or burning was present. There was another lacerated wound measuring 3 cm x 1 cm at the outer border of left foot, 3 cm prornimal to the metaraso-phalange joint of the little toe. The injury was kept under observation."

7. On the same day i.e. 3-1-2007, he also examined Muhammad Sharif, injured and observed the following injuries on his body:--

"A firearm wound of entrance measuring 1 cm x 1/2 cm at the anterolateral aspect of left buttock, 6 cm below the left anterior superior iliac spine. The edges of the wound were inverted. No blackening or burning was present. There was another lacerated wound measuring 0.75 cm x 1/2 cm with averted margin at back of left buttock, 5 cm lateral to the natal cleft. Corresponding hoes to the wounds were present in the clothes which were blood-stained. The injury was kept under observation. It was caused by fire-arm and probable duration of the injury was one hour."

8. The doctor stated that on 3-1-2007, Saeed Ahmad alias Muhammad Nawaz, succumbed to the injuries and he conducted the postmortem on his dead body and observed the following injuries:--

"(1) A fire-arm wound of entrance measuring 0.75 cm x 0.5 cm at the lateral aspect of right buttock 12 cm away and lateral to right anterior, superior iliac spine. No blackening was present. The edges were inverted and lacerated. There was another lacerated wound measuring 2 cm x 1.5 cm with averted margins at lateral aspect of left buttock. Both the lacerated wounds communicated with each other.

(2) A firearm wound of entrance measuring 1/2 cm x 1/2 at the inner aspect of left ankle. No blackening or burning was present. The edges were lacerated. It communicated with another lacerated wound measuring 3 cm x 1 cm at the distal 1/3 of outer border of left foot. It was wound of exit".

In the opinion of Medical Officer, the injuries were ante-mortem and caused by firearm. Injury No.1 was dangerous to life and injury No.2 was Jurrah Ghair Jaifa Hashimah and that the cause of death was due to excessive haemorrhage due to injuries to left iliac blood vessels as a result of injury No.1 which led to hypovolemic shock followed by death. The probable time that elapsed between injuries and death was two hours and between death and postmortem five hours.

9. The evidence so recorded during the trial of the case was confronted to the appellants by recording their statements under section 342, Cr.P.C. and in an answer to question "why this case against you and why the P.Ws. deposed against them?" the convicts/appellants set up their defence in the following words:--

"Saeed Ahmad son of Fazal Lodhi is owner of ten acres of land in Chak No.153/TDA, Tehsil Layyah. His daughter is married to Ibrar Hussain, the maternal uncle of Asif accused. In the year 2005 Saeed Ahmad, deceased, Muhammad Sharif injured P.W. and one Muhammad Hussain Jat along with others got illegal possession of land of said Saeed Ahmad Lodhi who informed the incident to his son-in-law namely Ibrar Hussain upon which Asif accused along with his maternal uncle Ibrar Hussain came in Chak No.153/TDA and obtained possession of land of said Saeed Ahmad Lodhi from Saeed Ahmad, deceased etc. After getting back the possession of land Asif accused remained there with Saeed Lodhi and Tafseer accused being the friend of Asif accused had been visiting Asif accused in Chak No.153/TDA due to which the complainant party also became inimical towards Tafseer accused. Saeed Ahmad deceased and Muhammad Sharif, injured P.W., Muhammad Hussain, Jat obtained illegal possession of land of other persons in the locality more over Saeed Ahmad deceased had illicit relations with many women of the locality. Complainant party also had their so many enemies out of Layyah. About 5/6 years ago Muhammad Sharif, PHUPHA of the deceased Saeed Ahmad was murdered in Chak No.427 Tehsil Gojra District Toba Tek Singh by unknown persons. In fact some unknown enemies of the complainant party murdered Saeed Ahmad and injured Muhammad Sharif, therefore, the complainant Tahir Naveed got recorded the F.I.R. without nomination of any culprit. But later on due to enmity, the complainant party with the connivance of police involved me and other accused and the police to get rid of this blind murder case, challaned the accused persons malafidely. Private P.Ws. are close relatives inter se and inimical towards me. Recoveries from the accused persons are false and fabricated only to strengthen the case."

10. The appellants did not opt to make statement under section 340(2), Cr.P.C. to disprove the allegations levelled against them in the prosecution evidence and produced documentary evidence.

11. The learned counsel for the appellants, while assailing the verdict of learned trial Court, convicting and sentencing the appellants, has submitted that the learned court through the impugned judgment by convicting the appellants has misread the material pieces of evidence which lead to the conclusion that the appellants were not the real culprits who had murdered Saeed Ahmad alias Muhammad Nawaz. In this respect, the learned counsel has pointed out that the occurrence had taken place in the cold winter night in the month of January at about 3-00 a.m. and this incident was reported by Tahir Naveed Ahmad (P.W.11) to the police station against four unknown persons stating that they had trespassed into their premises asking for the money and on refusal one of them fired at Saeed Ahmad alias Muhammad Nawaz hitting at his right hip and left ankle while fire of another person injured Muhammad Sharif, P.W.12. Saeed Ahmad alias Muhammad Nawaz, succumbed to the injuries at the spot. The complainant had also described the unknown persons but subsequently made another statement in the late hours of the day to enrobe the present appellants on the statement of injured P.W.12 and witness of Waj Takkar, P.W.9 Munir Ahmad. According to the learned counsel, the assailants were already known to the complainant himself but he had concealed this fact in his crime report and made subsequent statement on the information provided by P.W.12. He maintained that the legal value of the subsequent statement made by a complainant has been determined by the apex Court in the

case of "Falak Sher alias Sheru v. The State" (1995 SCMR 1350) by holding that same statement cannot be equated with the first information report nor can be read as part of the same. It is further argued that when the identification of the culprits has not been established on the record then the corroborative pieces of evidence cannot be relied upon to pass a conviction judgment. It is argued that P.W.9 had not provided any explanation about his presence at the place of occurrence nor has given candid time of making the statement before the Investigating Officer. He treated the statements of P.W.9 and P.W.12 as belated one having element of consultation and deliberation, whereafter the complainant made his supplementary statement. In the backdrop of these arguments, the learned counsel for the appellants has claimed their clean acquittal by acceptance of their appeals.

12. The submissions so made by the learned counsel for the appellants have been controverted by the learned Deputy Prosecutor-General assisted by learned counsel for the complainant by submitting that the prosecution through the trustworthy and reliable evidence has established beyond any reasonable shadow of doubt that in fact the appellants were the persons who had trespassed into the premises and asked for the money but on the resistance they had fired at the deceased Saeed Ahmad alias Muhammad Nawaz and Muhammad Sharif killing one and injured the other and this fact was further corroborated by the medical evidence as well as recovery of the crime weapons at the instance of the appellants. He argued that the learned trial Court by appreciating the oral as well as documentary evidence available on the record had reached at just conclusion through the impugned judgment accordingly he prayed for dismissal of the appeals.

13. We have given our conscious thoughts to the submissions made by learned counsel for the parties and examined the evidence available on the file.

14. The stance of P.W.11, the complainant of the case is that on the fateful day at about 3-00 a.m., four unknown persons had trespassed into the godown and asked for money and on the refusal they fired killing one and injuring the other. He had lodged the F.I.R. at 4-40 a.m. within two hours which can be treated as promptly lodged F.I.R. The complainant by making the statement had not mentioned the names of the assailants. According to the record, he on the same day made another statement nominating the appellants with specific role of asking money and making fire at the complainant party. According to his own statement, he named the appellants on the information provided by P.W.12 Muhammad Sharif regarding the identity of the assailants. This fact itself shows that the appellants had no acquaintance with the assailants but this fact is stood negated through the statements of P.W.12 as well as P.W.9 who in their cross-examination admitted that the assailants were known to the complainant also and that the parties were having business dealings inter se. It is also in the evidence that prior to the occurrence, the appellants allegedly had visited the godown of the complainant side and asked the rate of leather meaning thereby that the complainant at that time had seen the appellants. The learned counsel for the complainant had attempted to justify that at that time, the complainant was busy in some other work but this explanation is not oozed out of the statement of P.W.12. Similarly, P.W.12, Muhammad Sharif, according to his own version had made statement before the police in the hospital at 6-00/7-00 a.m. but at that time he did not inform the names of appellants to the complainant and according to the complainant's own version, the P.W. had told him

about the names of the accused persons at 5-00 p.m. This delay in providing the information of making subsequent statement thereafter is fatal to the prosecution case. The apex Court while dealing with such like situation in case of "Khalid Javed and another v. The State" (2003 SCMR 1419) has made following observations:--

"Delay in recording supplementary statement of the informant giving different version after lodging the F.I.R. would be an important factor which is likely to give rise to an inference that second version contained in the supplementary statement was introduced by the prosecution after deliberation and if it is so, the same will adversely affect the prosecution case."

In the instant case by not informing timely about the names of the assailants to the complainant by Muhammad Sharif (P.W.12) the complainant made his supplementary statement with much delay for which no explanation has been provided on the recorded so in the circumstances, it can validly be observed that the complainant and the P.W. after due deliberation had introduced the names of the appellants for the reasons best known to them. This delay is quite fatal to the prosecution case.

15. Regarding the status of supplementary statement, the apex Court in the case of Falak Sher supra which view has also been followed in Khalid Javed's case and Mushtaq Hussain's case (2011 SCMR 45) with the finding that report made under section 154, Cr.P.C. cannot be equated with the subsequent statement made by the complainant which could be treated as an improvement for falsely implicating the person that too with due deliberation and consultation. As per statement of P.W.9 and P.W.12, the appellants were already known to the complainant as well as to them as the parties were having business dealings inter se, therefore, the submission of learned counsel for complainant that only Muhammad Sharif (P.W.12) was having business dealings with the appellants, stands negated. In this manner, the identity of the appellant participating in the occurrence is not established from the evidence led by the prosecution.

16. The prosecution has also relied upon the testimony of P.W.9, a witness of Waj Takker who had seen the appellants fleeing in the car of Muhammad Iqbal, appellant. This statement of the witness has no independent corroboration. The witness as per his own statement residing at the distance of one acre from the place of occurrence and in the dark night his identification qua the appellants is not beyond any shadow of doubt. Further, he made his statement with considerable delay that he had identified the appellants while fleeing away. This situation has also been dealt with by the apex Court in Khalid Javed case by treating such like witnesses a chance witness and observed that strong and cogent evidence is required to corroborate their testimony. P.W.9 has failed to provide any independent source and explanation, as such, his testimony cannot be accepted as trustworthy statement. Another fatal blow which the prosecution has received at the hands of his own witness (P.W.12) is that he had thumb marked his statement which he made to the police as admitted by him in his cross-examination. In case of "State v. Abdul Khaliq" (PLD 2011 Supreme Court 554) such like statements, which were signed and thumb marked by P.Ws., have been discarded on the ground that it is not the requirement of law to sign or thumb marked a statement recorded under section 161, Cr.P.C. This important

factor has rendered the statement of P.W. nugatory and incurable illegality which had vitiated the statement.

17. A close scrutiny of the prosecution evidence as well as precedent law referred to above, there existed reasonable doubts regarding involvement of the appellants in the instant occurrence which is to be extended in favour of appellants.

18. When it has been observed that the identity of the appellants has not been established by the prosecution then other pieces of evidence which are of corroboratory in nature cannot be relied upon solely to say that it was the appellants who were armed with weapons and had fired at the deceased and injured the P.Ws.

19. Needless to say that prosecution has failed to bring home guilt of appellants, thus there is left no need to ponder upon defence plea.

20. Since, the case of the prosecution is not free from doubts, the benefit of which is to be extended to the appellants, therefore, we are inclined to allow the appeals in hand.

For the foregoing reasons, all the appeals are accepted by setting aside the impugned judgment. The conviction and sentence recorded against the appellants is also set aside. All the appellants are presently lodged in the jail who are set at liberty forthwith, if not required in any other case. Accordingly, Murder Reference No. 4 of 2009 sent by the learned trial Court is answered in negative and the death sentences awarded to the appellants are not confirmed.

HBT/G-17/L Appeals allowed.

2014 P Cr. L J 1373
[Lahore]
Before Syed Muhammad Kazim Raza Shamsi, J
MUHAMMAD ASHRAF---Petitioner
Versus
The STATE and another---Respondents

Criminal Miscellaneous No.13679-B of 2013, decided on 13th November, 2013.

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

----Ss. 497 & 498---Pre-arrest and post-arrest bail, grant of---Difference in criteria---Criteria for grant of post-arrest bail was totally different than the criteria for considering a petition for pre-arrest bail---For cases falling under S. 498, Cr.P.C., the main factor, which was to be considered by the court was malice of the police or the complainant for falsely implicating a person in the case, whereas in an application filed under S. 497, Cr.P.C. it was to be seen whether any question or point involved in the case needed further probe or

inquiry, and in case there was such need, then bail was usually granted under S. 497(2), Cr.P.C.

Karim Bakhsh v. The State 2000 SCMR 1405 rel.

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

----Ss. 497 & 498---Pre-arrest and post-arrest bail application---Grounds--- Points raised (by accused) in his pre-arrest bail application could be agitated by him in his post-arrest bail application.

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

----S. 497---Penal Code (XLV of 1860), S. 489-F---Dishonestly issuing a cheque---Bail, grant of---Failure of accused to comply with directions of court regarding depositing of disputed amount---Effect---Pending civil proceedings---Complainant gave Rs. 70 lac to the accused for purchase of land---Accused failed to perform terms of the agreement and allegedly offered Rs. 23 lac more for repudiating the agreement of sale and in such respect allegedly issued a cheque of Rs. 93 lac in favour of the complainant---Said cheque was dishonoured on presentation before the bank---Plea of complainant that accused was not entitled for post-arrest bail since he had given an undertaking before the Supreme Court to deposit the disputed amount for getting the relief of pre-arrest bail, and since such undertaking was not honoured by accused, he was arrested---Validity---Although accused gave an undertaking before the Supreme Court to deposit the disputed amount but because of his failure to do the same, relief of pre-arrest bail was not granted to him and the matter stood closed with withdrawal of the bail application---Such undertaking given by accused could not always stand in his way for seeking relief of bail, rather post-arrest bail application was to be considered on its own merits keeping in view the law governing it, without being influenced by the undertaking given by the accused---Complainant was allegedly offered Rs. 23 lac more by the accused for failing to perform the agreement, and such fact required probe to determine whether in fact disputed cheque of Rs. 93 lac was issued to repay consideration paid by complainant or it was issued to secure the future interest of the complainant---Challan against accused had already been submitted in court, therefore he was no more required for further investigation---Civil suit filed by complainant for specific performance of agreement to sell was pending in the civil court, wherein complainant was required to establish alleged repudiation of agreement by the accused and offer of returning Rs. 93 lac---Jurisdiction of civil court could not be pre-empted at bail stage by accepting story narrated in the F.I.R.---Sentence of offence alleged did not fall within the prohibitory clause of S. 497(1), Cr.P.C.---Accused was granted bail in circumstances.

Syed Ihtisham Qadir Shah for Petitioner.

Muhammad Ishaque, D.P.-G. with Muhammad Saleem, A.S.-I. for the State.

Khurram Liaquat Sheikh for the Complainant.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---By filing instant criminal miscellaneous petition the petitioner Muhammad Ashraf seeks his release on post-arrest bail in case F.I.R. No.891, dated 17-10-2012, which was registered under section 489-F, P.P.C. with Police Station B- Division, Sheikhupura.

2. Akbar Ali, the complainant of the case, while lodging the crime report had asserted that he had paid Rs.70 lac to the petitioner as earnest money for the purchase of land, which sale was agreed by the petitioner. He further narrated that before the date of execution of the sale deed the petitioner had offered him Rs.23 Lac for repudiating the agreement of sale of the land and later on in this respect a cheque valuing Rs.93 lac was issued in his favour, which was dishonoured by the bank on its presentation for encashment.

3. Learned counsel for the petitioner has contended that the petitioner is an old person having the age of more than 60 years, infirm and suffering from acute cardio-vascular disease, who has been advised for surgery; that the matter in hand relates to sale of the land and in this respect the cheque issued by the petitioner was not for the purpose of liquidating any liability, rather it was a guarantee cheque and in this respect the complainant of the case has also filed a suit for specific performance against the petitioner seeking a decree of possession by performance of the agreement in question. He has argued that it is a case in which the sentence provided for the offence charged against the petitioner does not attract the prohibition contained in section 497, Cr.P.C. and that his detention in the jail prior to the establishment of the charges would be pre-trial punishment, which sentence has not been recommended by law. In these circumstances, learned counsel has prayed for the relief as contained in the bail petition.

4. The petition has been opposed vehemently by the learned Deputy Prosecutor-General, assisted by the learned counsel for the complainant, by making submission that this Court had already dismissed pre-arrest bail application of the petitioner vide order dated 2-1-2013, whereafter the petitioner approached the apex Court where an undertaking for deposit of the disputed amount was given by the petitioner for having the relief of confirmation of his ad-interim pre-arrest bail and that undertaking was not fulfilled due to which reason the bail application was withdrawn on 11-3-2013, therefore, in view of this undertaking the liability of huge amount has been admitted by the petitioner proving the commission of an offence by him. It is further argued that this Court had discussed all points raised today in order dated 2-1-2013 while dismissing pre-arrest bail application, therefore, those points, which had already been considered, cannot be agitated through the instant petition and the petitioner is estopped by his conduct in this respect. Learned counsel has also relied upon the cases of Karim Bakhsh v. The State (2000 SCMR 1405) and Muhammad Nawaz v. The State (1990 ALD 650) to support his submissions. Learned counsel while summing up has prayed for dismissal of the bail petition.

5. Parties heard and record perused.

6. Learned counsel for the complainant while opposing the request for grant of bail has relied upon the aforesaid cases, which have been examined minutely and it is found that both cases do not relate to the offence falling under section 489-F, P.P.C. The case of

Muhammad Nawaz (supra) deals with the bail matter relating to the charge falling under offence of Zina (Enforcement of Hudood) Ordinance, 1979 whereas the case of Karim Bakhsh (supra) pertains to murder case in which the bail application was filed before the apex Court by that petitioner. Both these cases are not helpful to the complainant of instant case.

7. The submission of the learned counsel that while dismissing the pre-arrest bail petition, this Court had dealt with all points relating to the merits of the case, therefore, now those points cannot be agitated or considered for deciding this petition, has no substance for the reason that while dismissing the pre-arrest bail petition this Court has mainly concentrated on the point of malice of the complainant for involving the petitioner in the case, which the petitioner had failed to pinpoint. It has been held by the apex Court in various precedent cases that the criteria for grant of post-arrest bail is totally different than the criterian of considering a petition for pre-arrest bail. It has been further observed by the august Supreme Court that in the cases falling under section 498, Cr.P.C. the main factor, which is to be considered by the Court is malice of the police or the complainant for falsely implicating a person in the case (2009 SCMR 427) whereas in the application filed under the provisions of section 497, Cr.P.C. it is to be seen whether any question or point involved in the case needs any further probe or inquiry and in case the answer is found in the affirmative then the bail is usually granted under section 497(2), Cr.P.C. This difference between two matters of pre-arrest bail and post-arrest bail is to be kept in mind and it cannot be said that the points raised in the pre-arrest bail application cannot be agitated in a post-arrest bail petition. Furthermore, after dismissal of an application for pre-arrest bail the culprit is supposed to join police investigations as his person is required for the purpose where he makes his version and produces evidence in defence and the investigating agency after dealing with the same draws an inference about the involvement of the person in the case or otherwise.

8. The next objection of the learned counsel for the complainant that the petitioner had given undertaking before the apex Court to deposit the disputed amount for having the relief of pre-arrest bail, which undertaking was not honoured thus the petitioner is not entitled for the concession of bail, is equally untenable submission for the reason that the petitioner although had given an undertaking for deposit of the disputed amount for having the relief of pre-arrest bail but due to non-deposit of said amount the relief of pre-arrest bail was not granted to him and the matter stood closed there with the withdrawal of the bail application, resulting into confirmation of dismissal of bail application by this Court which was done on 2-1-2013, thereafter, the petitioner was arrested by the police. This undertaking of the petitioner cannot always stand in his way for seeking his relief of bail, rather the post-arrest bail application is to be considered on its own merits as well as keeping in view law governing the subject, without being influenced by the undertaking given by the petitioner.

9. So far as the merits of case of the petitioner are concerned, it is evident from record that the parties had agreed to sell and purchase the land in dispute and in this respect Rs.70 lac were given by the complainant to the petitioner as earnest money. Since the petitioner was not willing to perform the terms of that agreement thus he had offered more money to

the complainant in the form of Rs.23 lac and then he had issued a cheque in the total amount. This precise fact requires a probe to determine whether in fact the cheque in dispute was issued to re-pay consideration paid by the complainant to the petitioner or it was issued to secure the future interest of the complainant. This very fact is oozed out from the F.I.R. itself in which it is recorded that when the petitioner had insisted upon the cancellation of the agreement with the payment of Rs.23 lac, an extra amount, the complainant refused to annul the agreement and to receive that amount. Furthermore with the dismissal of the application for grant of pre-arrest bail the petitioner was arrested by the police and he is facing incarceration since 30-8-2013. His challan has been completed by the police and the same had been submitted in the court for further proceedings, so the person of the petitioner is not required for further investigations. The pendency of the civil suit filed by the complainant for having the decree for possession through specific performance of an agreement to sell also cannot be ignored lightly as in that suit the complainant is required to establish the repudiation of the agreement to sell allegedly made by the petitioner and offer of the petitioner for returning Rs.93 lac to the complainant, so the jurisdiction of civil court cannot be pre-empted at this stage by accepting the story narrated in the F.I.R. Needless to say that a person cannot be detained in the jail as a punishment and that the sentence of the offence charged against the petitioner does not fall within the prohibition as contained in section 497, Cr.P.C.

10. Keeping in view the afore-noted circumstances of this case, I found it a fit case for grant of bail, therefore, this petition is allowed and Muhammad Ashraf petitioner is admitted to bail on furnishing of bail bonds in the sum of Rs.50 lac (Rupees Five million only) with two sureties each in the like amount to the satisfaction of the learned trial Court.
MWA/M-294/L Bail granted.

2014 P Cr. L J 1517
[Lahore]
Before Syed Muhammad Kazim Raza Shamsi, J
MUHAMMAD YOUSAF---Appellant
Versus
MUHAMMAD YOUSAF and another---Respondents

Criminal Appeal No.1449 of 2011, decided on 19th June, 2013.

Penal Code (XLV of 1860)---

----S. 489-F---Dishonestly issuing cheques---Appreciation of evidence---Retrospective effect of S.489-F, P.P.C.---Scope---Trial Court acquitted accused on the ground that provision of S.489-F, P.P.C. was not promulgated at the time of commission of offence---Validity---At the time of issuance of disputed cheques, law did not exist for taking cognizance in respect of issuance of negotiable instrument drawn dishonestly and to avoid liability but it existed at the time of availing remedy before the Court, that was why F.I.R. was registered under S.489-F, P.P.C., much after promulgation of law---Lis should be dealt

with in accordance with law available at the time of accrual of right to sue in favour of a person---Although right to sue in favour of complainant existed on the date of issuance of cheques yet he did not set into motion the criminal machinery at that time, thus valuable right had accrued in favour of accused, of which he could not be deprived due to indolence of complainant---Trial Court keeping in view the fact that S.489-F, P.P.C. had no retrospective effect and was prospective in nature, did not commit any illegality nor order of acquittal was perverse or against canons of law, therefore, the same was maintained---Appeal was dismissed in circumstances.

Haji Sardar Khalid Saleem v. Muhammad Ashraf and others 2006 SCMR 1192 ref.

Colonial Sugar Mills 1905 Appeal Cases 369 rel.

Ch. Azeem Sarwar for Appellant.

ORDER

SAYED MUHAMMAD KAZIM RAZA SHAMSI, J.---The appellant had sold a Toyota Corolla Car to the respondent Muhammad Yousaf who in return had issued five cheques valuing Rs.650,000 in favour of the appellant which were dishonoured subsequently and the respondent did not pay the price of the car to the complainant. The cheques were issued by the respondent on 8-10-2001 and 18-4-2002 upon which F.I.R. No.117 dated 30-5-2004 was registered under section 489-F, P.P.C. with Police Station Rail Bazar District Faisalabad. The report under section 173, Cr.P.C. submitted in the court was entertained and the respondent filed an application under section 249-A, Cr.P.C. seeking his acquittal from the charge on the ground that at the time of issuance of cheques in dispute, the provisions of section 489-F, P.P.C. were not promulgated, thus he cannot be charged for the offence which was no offence at the time of its commission.

2. The learned trial Court after accepting the application of the respondent acquitted him from the charge on the same ground holding that the law was promulgated w.e.f. 25-10-2002 while the cheques in dispute were issued much prior to insertion of the offence in the Pakistan Penal Code, 1860. The appellant has prayed for the reversal of the judgment of acquittal through the instant appeal.

3. The learned counsel for the appellant has been heard who has relied upon the judgment of apex Court delivered in case reported as "Haji Sardar Khalid Saleem v. Muhammad Ashraf and others" (2006 SCMR 1192) by asserting that if the offence under section 489-F, P.P.C. was not inserted in the Code ibid at the time of issuance of the cheques, even then the court was bound to charge the respondent under sections 420, 468 and 471, P.P.C.

4. I have examined the judgment upon which the learned counsel for the appellant has placed reliance and it is found that in the reported case, the matter was quashing of the F.I.R. and the same did not relate to the decision of any criminal appeal. The facts of that case are altogether different than the facts of the instant case in which the appellant by making statement under section 154, Cr.P.C. has categorically alleged dishonestly issuance of the cheques by the respondent at the time when section 489-F, P.P.C. had not been inserted in the penal law. It is the admitted position on the record that at the time of

issuance of the disputed cheques, the law did not exist for taking cognizance in respect of the issuance of negotiable instrument drawn dishonestly and to avoid the liability, but it existed at the time of availing the remedy before the court that is why F.I.R. was registered under section 489-F, P.P.C. on 30-5-2004 much after the promulgation of the said provisions of law. It is settled principle of law that a lis shall be dealt with in accordance with the law available at the time of accrual of a right to sue in favour of a person and this principle has been envisaged in case of "Colonial Sugar Mills" reported as 1905 Appeal Cases 369, subsequently, followed in chain of cases. Although the right to sue in favour of the appellant had existed on the date of issuance of the cheques but he did not set into motion criminal machinery at that time, thus a valuable right has accrued in favour of respondent, of which he cannot be deprived due to indolence of appellant. The learned trial Court keeping in view these facts that section 489-F, P.P.C. has no retrospective effect and is prospective in nature has not committed any illegality nor the order passed under section 249-A, Cr.P.C. can be treated as perverse or against the canons of law, as such, the same is liable to be maintained.

5. For the foregoing reasons, the appeal in hand bereft of merits, is dismissed summarily under section 421, Cr.P.C.

MH/M-191/L Appeal dismissed.

2014 P L C (C.S.) 284
[Lahore High Court]
Before Syed Muhammad Kazim Raza Shamsi, J
ATTA MUHAMMAD and another
Versus
FEDERATION OF PAKISTAN through Secretary States and Frontier Regions Division, Islamabad and 2 others

Writ Petition No.31979 of 2012, decided on 21st June, 2013.

(a) Constitution of Pakistan---

----Art. 199---Constitutional petition--- Civil service--- Contractual appointment---Extension of contract---Scope---Petitioners had been appointed on contract after retirement---Authority refused for renewal of contract for further period due to unsatisfactory physical health---Petitioners were physically and mentally declared as fit by the Medical officer---Non-extension of contract did not amount to violation of fundamental rights---Competent Authority had found the petitioners unsuitable for the renewal of their contract appointment---Contract employee had no right whatsoever for his appointment or extension whatever the case might be---Constitutional petition was dismissed.

(b) Constitution of Pakistan---

----Art. 199---Constitutional petition---Civil service---Contractual appointment after retirement---Claim of further extension for contract---Policy of regularization of contract employees---Scope---Authority had refused to extend the contract of the petitioners---Validity---Services of the contract employees had ordered to be regularized in view of the government policy---Policy of regularization was not applicable to the case of the petitioners as after attaining the age of superannuation they had no right to continue the job till their death---Contract employee could not be equated vis-a-vis a regular employee connected with the affairs of the Federation---Petitioners were not entitled for extension of contract.

Tehsil Municipal Officer, TMA, Kahuta and another v. Gul Fraz Khan 2013 SCMR 13 and Federation of Pakistan through Secretary Justice and Parliamentary Affairs v. Muhammad Azam Chattha 2013 SCMR 120 rel.

(c) Constitution of Pakistan---

----Arts. 25 & 199---Constitutional petition---Civil service---Contractual appointment---Extension of contract---Authority had refused to extend the contract of the petitioners while contract of certain employees were extended---Plea of discriminatory treatment---Validity---Authority had extended the contractual appointment of those persons who had not attained the age of superannuation---Petitioners were given contractual appointment after superannuation---Case of petitioners was distinguishable from other employees---Question of mala fide and discriminatory treatment was not made out, in circumstances---Constitutional petition was dismissed.

Kashif Ali Chaudhry for Petitioner.

Iftikhar Shahid, Dy. A.-G. with Muhammad Usman Ghani, Project Director (Legal).

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.--- This petition filed under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 is directed against an order dated 18-12-2012 passed by respondent No.2, Commissioner Afghan Refugees Punjab, whereby he had directed respondent No.3, the District Administrator Afghan Refugees Camp Kot Chanda, Mianwali District, for not sending the case of the petitioner and 9 others for renewal of their contract period due to their physical health and working.

2. The grievance of the petitioners in this respect is that the petitioners remained on contract service since 2006 after attaining superannuation and they are physically and mentally fit as declared by the Medical Officer, therefore, the direction issued by respondent No.2 to respondent No.3 violates the fundamental rights of the petitioners as guaranteed by the Constitution. It is also the case of the petitioners that a list of 14 such employees was prepared by respondent No.3 but out of those 11 persons were denied right of renewal of their contract whereas proposal of other three persons for renewal was accepted and their contract was extended for another six months.

3. The Federation is represented by the learned Deputy Attorney-General, assisted by Muhammad Usman Ghani, Project Director (Legal), who pointed out that the petitioners are the contract employees with Commissioner Afghan Refugees Punjab as such are not regular employees in the service thus they have no right to say that their contract service may be extended for another term. While disputing the list of 14 persons, it is the contention of the respondents that only list of 13 persons was prepared out of whom services of two persons were extended on the ground that one Faqir Muhammad had not attained the age of superannuation whereas services of Meer Jan, another contract employee, were extended on the demand of the refugees that is why their names were dropped from the list. It is further submitted that on the vacancy of petitioner No.2 one Hadayat Ullah has been promoted on 1-1-2013, who is now working at his new post.

4. The submissions of the parties have been empathetically considered vis-a-vis available record and it is found that both petitioners were inducted in the office of the Commissioner of Afghan Refugees on contract which was extended after every six months according to the needs and suitability of an employee. In this connection the Commissioner respondent No.2 is the competent authority. The competent authority found the petitioners and others unsuitable for the renewal of their contract period thus asked respondent No.3 not to send their cases for renewal. The position of the contract employees has been settled by now in the various judgments handed down by the apex Court specifically holding that the contract employee has no right whatsoever for his appointment or extension whatever the case may be. Learned counsel for the petitioners has relied upon a judgment delivered by the Islamabad High Court, Islamabad in Writ Petition No.13 of 2013 (Miss Zakia Naurin and others v. Federation of Pakistan and others) decided on 31-12-2012 to say that in the judgment rights of the contract employees have been protected and they were also directed to be regularized in the permanent service. The judgment so referred by the learned counsel for the petitioners has been examined and it is found that in the judgment it was not held that the contract employees retained in the service after superannuation were entitled for their extension in the term, rather it was the case in which the services of the contract employees were ordered to be regularized in view of the Government policy implemented in the year 2011. That policy in any case is not applicable to the case of the present petitioners as after attaining the age of superannuation they have no right to continue the job till their death. On the other hand, while dealing with the question of rights of the contract employees the Apex Court in the cases of Tehsil Municipal Officer, TMA, Kahuta and another v. Gul Fraz Khan (2013 SCMR 13) and Federation of Pakistan through Secretary Justice and Parliamentary Affairs v. Muhammad Azam Chattha (2013 SCMR 120) had candidly settled down the principle that a contract employee cannot be equated vis-a-vis a regular employee connected with the affairs of the Federation. The principle laid down in the afore-noted cases covers the matter in hand disentitling the petitioners for the relief prayed for.

5. The submission of the learned counsel for the petitioners that discriminatory treatment has been given to the petitioners vis-a-vis two employees whose contracts were extended has no legs to stand for the reason that one of those persons had not attained the age of superannuation and his services could be regularized in accordance with the Government policy whereas the other person was kept in service on the public demand. The

case of the present petitioner is distinguishable from those persons therefore, the question of mala fide and giving discriminatory treatment in the circumstances is not made out. Moreover, at the place of petitioner No.2 another person has been promoted, who is enjoying his posting. The petitioners thus have failed to make out any case of violation of their fundamental rights as such the petition in hand is not maintainable.

6. For the foregoing reasons, the petition in hand having no merits is dismissed.
JJK/A-96/L Petition dismissed.

P L D 2014 Lahore 194
Before Syed Muhammad Kazim Raza Shamsi, J
MUHAMMAD AKRAM---Petitioner
Versus
The STATE and another---Respondents

Criminal Miscellaneous No.2306-M of 2013, decided on 11th October, 2013.

Criminal Procedure Code (V of 1898)---

----S. 426(2-B)---Penal Code (XLV of 1860), Ss.302(b) & 337-F(v)---Qatl-e-amd, causing Hashimah---Suspension of sentence, pending disposal of appeal---Accused had prayed for suspension of sentence and his release on bail, on the ground that against judgment of High Court, Supreme Court had granted leave to appeal---Validity---Supreme Court had granted leave to appeal to the parties to reappraise the evidence and to determine the questions as set down in the leave granting order; it would be premature at that stage to contend that the judgment of the Trial Court had been restored and judgment of High Court had been set aside by Supreme Court---Accused being the age of more than 60 years seemed to be an infirm person who was behind the bars since 27-10-2011, the date of judgment of the Trial Court, was entitled to the relief prayed for---Sentence of accused was suspended pending disposal of appeal by Supreme Court and he was admitted to bail, in circumstances.

Muhammad Ashraf v. The State 2013 PCr.LJ 403 ref.
Ch. Lehrasib Khan Gondal for Petitioner.
Muhammad Ishaque, DPG for the State.
Muhammad Sohail Dar for Complainant.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---By filing this petition under section 426(2-B) Cr.P.C. the petitioner prays for the suspension of the sentence and his release on bail on the ground that against judgment dated 2-5-2013 handed down by this Court, the apex Court had graciously granted leave to appeal to consider "whether the learned High Court fell in error in the facts and circumstances of this case to hold that the petitioner/convict Muhammad Akram could not be saddled with the charge of section 302(b),

P.P.C. since he was attributed an injury on the non-vital part of the body of Muhammad Arif deceased, whether petitioner/convict shared the common intention as he was ex-facie not connected with the motive part of the prosecution story and whether the learned High Court kept in view the principles of safe administration of justice laid down by this Court?"

2. The history of the case is that the petitioner was tried by the learned Additional Sessions Judge, Kharian in case F.I.R. No.178, dated 30-4-2009 registered at Police Station Saddar Kharian, under sections 302, 337-F(i), 337-F(vi) and 34, P.P.C. and convicted the petitioner under section 302(b), P.P.C. and sentenced to imprisonment for life. On appeal, bearing Crl. Appeal No.2183 of 2011, this Court vide judgment dated 2-5-2013 had set aside the conviction of the petitioner under section 302(b), P.P.C. and acquitted him but convicted under section 337-F(v), P.P.C. and sentenced to five years R.I. with the a direction to pay Rs.200,000/- as Daman to the legal heirs of the deceased.

3. The petitioner Muhammad Akram and co-convict Muhammad Ashraf filed two Crl. Petition No.591-L of 2013 and Crl. Petition No.562-L of 2013 respectively in which the apex Court had granted leave to appeal

4. During the course of arguments, learned counsel for the complainant has pointed out that leave to appeal has also been granted by the apex Court in the petition filed by the complainant but learned counsel has not produced any such order of the august Court in this respect. Learned counsel for the petitioner while relying upon the case of Muhammad Ashraf v. The State (2013 PCr.LJ 403) submitted that this Court enjoys jurisdiction under section 426(2-B), Cr.P.C. to admit a convict to bail in case the Apex Court had granted leave to appeal. Learned counsel for the complainant has controverted the argument with the submission that leave to appeal has also been granted to the complainant meaning thereby that the judgment rendered by this Court has been set aside and the judgment handed down by the learned trial Court has been maintained.

5 After having heard the learned counsel for the parties, this Court is of the view that the submission made by the learned counsel for respondent has no force for the simple reason that the apex Court had granted leave to appeal to the parties to reappraise the evidence and to determine the questions as set down in the leave granting order, therefore, at this stage, it would be pre-mature to say that the judgment of the learned trial Court has been restored and judgment of this Court has been set aside, by apex Court. Be that as it may, without commenting upon the merits of the case, keeping in view the fact that the august Supreme Court had granted leave to appeal to both parties; and that the petitioner is having the age of more than 60 years and seems to be an infirm person, who is behind the bars from the date of judgment of the learned trial Court i.e. 27-10-2011, is entitled to the relief prayed for.

6. In these circumstances this Court is inclined to allow this petition, consequently the sentence of the petitioner is suspended pending disposal of Crl. Appeal by the apex Court and he is admitted to bail on his furnishing of bail bonds in the sum of Rs.100,000/- with one surety in the like amount to the satisfaction of Deputy Registrar (Judl.) of this Court.

HBT/M-273/L Sentence suspended

2014 Y L R 187

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi, J

MUHAMMAD SHABBIR---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.5149-B of 2013, decided on 15th May, 2013.

Criminal Procedure Code (V of 1898)---

----S. 498---Penal Code (XLV of 1860), Ss.337-A(i), (iii), 337-F(i), 337-L(2), 354, 147 & 149---Causing Shajjah-i-Khafifah, Shajjah-i-Hashimah, Damiyah, Badi'ah---Anticipatory bail, refusal of---Contention of accused was that as case was of two versions, and the complainant party had suppressed the injuries while reporting the matter to the Police, accused was entitled for the benefit of concession of bail---Held, contention was untenable for the reason that in cross-version, simple injuries were attributed to the complainant side; and subsequently that cross-version was not accepted by the Investigating Agency, and same was cancelled---Accused remained unable to point out any mala fide on the part of the complainant to falsely implicate him in the case---Allegation against accused was that of fracturing the head bone of father of the complainant---Person of accused, in circumstances, was required for further investigation---Accused was not entitled for the concession of bail.

Tariq Mehmod for Petitioner.
Muhammad Ishaq, Deputy Prosecutor-General for the State.
Mian Pervaiz Hussain for the Complainant.
Muhammad Hanif, S.I. with record.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Muhammad Shabbir, petitioner seeks anticipatory bail in case F.I.R. No.47 dated 16-3-2013 registered with Police Station Safdarabad District Sheikhupura under sections 337A(i), 337A(iii), 337F(i), 337L(2), 354, 147 and 149, P.P.C. having an allegation that he while armed with "Iron Mongli" with which he had caused an injury at the head of father of the complainant.

2. Parties heard. Record perused.

3. The learned counsel for the petitioner had attempted to say that regarding the occurrence, a cross-version was also registered at their instance and in this manner, the complainant party had suppressed the injuries while reporting the matter to the police, as such, it is a case of two versions and the petitioner is entitled for the benefit of concession of bail. This submission of the learned counsel is untenable for the reason that in that cross-

version, simple injuries were attributed to the complainant side and subsequently that cross version was not accepted by the investigating agency and the same was cancelled. The petitioner remained unable to point out any mala fide on the part of the complainant to falsely implicate him in the case. He is an accused of fracturing the head bone of Ghualm Abbas, father of the complainant and further that his person is required for further investigations, as such, he is not entitled for the concession of bail. The petition in the circumstances, having no merits, is dismissed.

HBT/M-257/L Bail refused.

2014 Y L R 200
[Lahore]
Before Syed Muhammad Kazim Raza Shamsi, J
MUHAMMAD IQBAL---Petitioner
Versus
The STATE and others---Respondents

Criminal Miscellaneous No.7636-B of 2013, decided on 4th July, 2013.

Criminal Procedure Code (V of 1898)---

----S. 497(2)---Penal Code (XLV of 1860), Ss.302 & 34---Qatl-e-amd, common intention---Bail, grant of---Further inquiry---Contention that the "Lalkara" in the case was commanding in nature, and co-accused while acting upon the same had killed the deceased, was the question which could not be determined at bail stage as same needed detailed evidence---Calls allegedly made by accused prior to the occurrence and also thereafter, was an evidence which could be thrashed and scrutinized by the court of competent jurisdiction in appropriate proceedings---Accused, in the present case, was simply blamed for raising 'Lalkara' for killing the deceased, and in that connection, he had not been ascribed with any role of fire upon the deceased---F.I.R. had not revealed that accused was armed with any weapon at relevant time---Case of accused fell within the purview of S.497(2), Cr.P.C.---Accused was admitted to bail, in circumstances.

Ch. Abdul Ghaffar for Petitioner.
Muhammad Ishaq, Deputy Prosecutor General for the State.
Muhammad Tanveer Chaudhry for the Complainant.
Muhammad Panah, A.S.-I. with record.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Muhammad Iqbal, petitioner seeks his release on post-arrest bail in case F.I.R. No.1309 dated 5-11-2012 registered under sections 302, 34, P.P.C. with Police Station Sargodha Road District Faisalabad.

2. The allegation against the petitioner is that the complainant and his brother Waheed Ahmad alias Kukoo were standing in the Main Bazar Noorpur when the petitioner along with unknown accomplices attracted there and on the "Lalkara" raised by Muhammad Iqbal, petitioner, Shoaib alias Sabir, co-accused fired at Waheed Ahmad hitting on his left eye who succumbed to the injuries at the spot.

3. Parties heard. Record perused.

4. The submission of learned counsel for the complainant that the "Lalkara" was commanding in nature and co-accused of the petitioner while acting upon the same had killed Waheed Ahmad alias Kukoo, is the question which cannot be determined at this stage as it needs detailed evidence whether the "Lalkara" of the petitioner was commanding in nature and the co-accused had acted upon the same for killing an innocent person. The learned counsel has also relied upon the call-data which calls were allegedly made by the petitioner prior to the occurrence and also thereafter but again this evidence can be thrashed and scrutinized by the court of competent jurisdiction in appropriate proceedings. On the face of the record, the petitioner is simply accused of raising "Lalkara" for killing Waheed Ahmad and in this connection, he had not been ascribed with any role of fire upon the deceased. Even, it has also not been mentioned in the F.I.R. that he was armed with any weapon at that time. The case of the petitioner in this manner squarely falls within the purview of section 497(2), Cr.P.C., therefore, he is entitled for the concession of bail.

5. In view of the above, this petition is allowed and Muhammad Iqbal, petitioner is admitted 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 learned trial Court.

HBT/M-256/L Bail granted.

2014 Y L R 1847

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi, J

KHALID MAHMOOD---Petitioner

Versus

The STATE and another---Respondents

Criminal Miscellaneous No.4157-B of 2013, decided on 22nd January, 2014.

Criminal Procedure Code (V of 1898)---

----S.497---Penal Code (XLV of 1860), Ss.302 & 324---Qatl-e-Amd and attempt to commit Qatl-e-Amd---Bail, grant of---Deeper appreciation of evidence---Technical grounds---Accused sought bail on the ground that there was negative report of Arms Expert and crime weapon was recovered at his instance from house of co-accused---Validity---Accused was

principal accused and he could not be let off on technical grounds like negative report of Arms Expert and recovery of crime weapon at his instance from house of co-accused---Such were pieces of corroborative evidence, connected with material evidence and had no legal effect, if considered independently, from eye witnesses account and medical evidence---Statement of prosecution witness recorded under section 161, Cr.P.C. was available on record which supported allegations contained in F.I.R.---Allegations were further supported by postmortem of deceased---Bail was refused in circumstances.

Amir Masih's case 2013 SCMR 1524 ref.

Rizwan Ali v. State and others PLJ 2013 SC 762 rel.

Syed Badar Raza Gillani for Petitioner.

Ch. Muhammad Akbar, Deputy Prosecutor General with Nazar Abbas, S.I. for Respondent.

Sh. Muhammad Faheem for the Complainant.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---By filing instant criminal miscellaneous petition Khalid Mehmood petitioner prays for his release on post-arrest bail in case F.I.R. No.1250, dated 29-12-2010, registered at Police Station Mumtazabad, District Multan under sections 302, 324, 148 & 149, P.P.C.

2. As per allegations contained in the F.I.R. Muhammad Arif, the father of the complainant, after putting shutters of his shop down was returning to his house along with his employee Muhammad Sajid, when at about 9.35 p.m. on 28-12-2010 he was intercepted by the petitioner Khalid Mehmood, who was in the company of his brother-in-law Sheikh Riaz, Liaqat Ali and Rizwan and on seeing the deceased Muhammad Arif, the petitioner Khalid Mehmood made firing hitting on the front side of chest, arms and other parts of body of Muhammad Arif while Sajid, the employee, had also received injury at his right 'Putt'. The injured were shifted to the hospital where Muhammad Arif succumbed to the injuries. The motive for the occurrence allegedly was that the deceased was receiving threats from the petitioner, who happens to be his real brother, with whom he had a dispute of property.

3. Learned counsel for the petitioner while pre-empting the objection of learned counsel for the complainant, while providing history of earlier bail petitions, has pointed out that the petition in hand is fifth one, the first bail petition was withdrawn on the instructions of the petitioner, second was withdrawn to avail statutory ground, in the third bail petition a direction was issued by this Court to the learned trial Court for expeditious decision of the case and in the fourth petition this Court was of the view that no fresh ground was available to the petitioner in filing that petition, so that petition was dismissed in limine. He has submitted that the withdrawal of the successive bail applications by the petitioner was simplicitor and the ratio settled in 'Amir Masih's case' (2013 SCMR 1524) is not applicable to the case in hand. He has further argued that in view of the dictum laid down in the case of Rizwan Ali v. State and others (PLJ 2013 SC 762) the bail application cannot be dismissed merely on the ground of withdrawal of previous bail application, rather

it was the essence of the ratio of the judgment of the apex Court that the merits of the case be also discussed. Learned counsel in this regard has cited various judgments.

4. On merits of the case, learned counsel for the petitioner has pointed out that although allegation of firing has been levelled against the petitioner in which firing Sajid, an employee of the deceased Muhammad Arif, had also received injury but he (Sajid) has filed an affidavit and made a request for recording of his statement in which statement he had controverted the fact of culpable homicide and stated the case in hand was of dacoity, so in this manner the case of the prosecution has become dubious. He has also taken the shelter of the statement of the mother of the deceased, who has also negated the contents of the F.I.R. According to the learned counsel, in view of the statements of Sajid injured P.W. and mother of the deceased, the Police had declared the other assailants as innocent in the case. It is an additional ground of the learned counsel that it was dark night occurrence, therefore, there is probability that deceased was killed when he was being robbed by unknown persons and that it was not intentional murder of the deceased Muhammad Arif. Learned counsel has further submitted that Sajid P.W. of the case had also filed a criminal revision for the implementation of the orders of this Court in which a direction was issued to the Investigating Officer for recording statement of Sajid, injured if earlier not recorded and then to submit complete report under section 173, Cr.P.C. to the Court but that direction had not been complied with by the Investigating Officer. Additionally, negative report of Arms Expert and recovery of weapon from the house of co-accused Riaz have also been added by learned counsel with the prayer to allow petition in hand.

5. On the other hand, the petition has been opposed vehemently by the learned Deputy Prosecutor General, assisted by the learned counsel for the complainant, with the assertion that the complainant and the petitioner are uncle and nephew, inter se and the deceased was the real brother of the petitioner, so there are remote chances of mistaken identity of the assailants. It is further argued that the petitioner is specifically nominated accused of the F.I.R., who with his weapon had caused about 12 injuries on the person of the deceased which fact not only indicates his intention to do away deceased but also shows that he is a desperate and hardened criminal. Regarding the filing of fifth bail application, it is the argument after dismissal of fourth bail petition, the petitioner was required to seek indulgence of the Apex Court by filing a petition for his bail for the reason that the bail application was decided by this Court on its merits, whereafter with the similar ground this application is not maintainable.

6. I have given my deep consideration to the submissions made by the learned counsel for the parties and have also examined the record.

7. First of all I would like to take up the objection of the learned counsel for the complainant regarding the maintainability of the instant petition. This Court while dismissing Criminal Miscellaneous No.3605-B of 2013 on 1-8-2013 had observed as under:--

"This is forth application for grant of post-arrest bail. The first one was withdrawn after arguing the case at some length. This is not the withdrawal simplicitor. No fresh ground is available. This application is not maintainable. It is hereby dismissed."

This order passed by this Court indicates that fourth bail application of the petitioner was dismissed by this Court on the ground that no fresh ground was available to the petitioner and the earlier withdrawal of the bail application was not withdrawal simplicitor. Against such observation, in my opinion, it was mandatory for the petitioner to seek his remedy before the august Supreme Court instead of repeating the some in this Court. In this manner the petition in hand is not maintainable.

8. Although it is observed in the preceding para that the petition in hand is not maintainable, however, keeping in view the ratio settled in 'Rizwan Ali's case' (supra) the merits of the case are also taken into consideration. The submission of the learned counsel for the petitioner that Sajid, injured P.W., has termed the occurrence as of dacoity instead of culpable homicide as such instant case has become of two versions, is a submission having no substance for the reason that initially when the statement of said Sajid Ali was recorded under section 161, Cr.P.C. he did not term the occurrence as of dacoity, rather subsequently he by filing an affidavit has changed his stance. In this manner initially he is the prosecution witness, who is to be examined by the prosecution at its option during the trial of the case. His subsequent dereliction from the original stand does not make the case in hand of two versions, rather it is a case of resiling of the witness after conclusion of the investigations. It is the option of the prosecution to examine the witness and declare him hostile if he resiles from his statement made under section 161, Cr.P.C. or to give him up being won over but at this stage no such benefit can be extended in favour of the petitioner regarding the statement made by Sajid injured P.W. The petitioner, may, in case said P.W. is not supporting the prosecution, summon that witness as Court witness or the court may summon him under section 540, Cr.P.C., if it feels that his statement in the court may lead to a just conclusion of the case. Same is the position with the statement of the mother of the deceased, which at this stage does not extend any help to the petitioner, nor it has any bearing on the incriminating material collected by Investigating Officer against the petitioner. Further, the argument made by the learned counsel for the petitioner, if are examined in its true prespective would amount to appreciation of the evidence available on the record deeply which practice is not permissible by law.

9. Another ground taken by the learned counsel for the petitioner for seeking bail is delay in the conclusion of the trial, which according to the learned counsel is not attributable to the present petitioner but on the examination of the record it is found that the delay is being caused at the instance of the petitioner as trial Court is waiting for the complete report of the Investigating Officer to be submitted under section 173, Cr.P.C. after recording the statement of Sajid, injured P.W., as per direction of this Court dated 12-9-2012 passed in Writ Petition No.3813 of 2012. In this connection, Civil Revision No.133 of 2013 is pending in this Court in which petition proceedings of trial Court have been stayed. In this manner the delay in the conclusion of the trial is attributable to the present petitioner.

10. Now coming to the case of the prosecution, it is found that the petitioner is named in the crime report with a specific allegation of firing upon the deceased Muhammad Arif and causing 12 injuries with the firearm to him due to which he had kissed the dust. The petitioner in this manner is the principal accused of the case, who cannot be let off on technical grounds like negative report of Arms Expert and that crime weapon was recovered at instance of petitioner from house of co-accused Riaz which pieces of evidence are corroboratory pieces, connected with material evidence and have no legal effect, if are considered independently from eye-witnesses account and medical evidence. Till date the statement of Sajid P.W. recorded under section 161, Cr.P.C. is available on the record, which supports the allegations contained in the F.I.R. and these allegations are further supported by the postmortem of the deceased. In this backdrop, the petitioner remained unable to make out a case for grant of bail.

11. For the foregoing reasons, the petition in hand is bereft of merits is dismissed.

MH/K-12/L Petition dismissed.

2014 Y L R 2570

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi, J

MUHAMMAD JAMSHAID---Petitioner

Versus

EX-OFFICIO JUSTICE OF PEACE/ ADDITIONAL DISTRICT AND SESSIONS JUDGE, LAHORE and 2 others---Respondents

Writ Petition No.9812 of 2013, decided on 13th February, 2014.

Criminal Procedure Code (V of 1898)---

----S. 22-A---Registration of case---Respondent had secured a direction from Justice of Peace for registration of case against the petitioner on various grounds---Police had reported that occurrence alleged in the application filed by respondent under S.22-A, Cr.P.C. had not taken place---Justice of Peace despite that vide impugned order issued direction to the petitioner to make statement before the S.H.O.---Validity---Justice of Peace, did not disclose the commission of any cognizable offence against the petitioner---Justice of Peace, while passing impugned order, had not examined the Police report---Keeping the order of Justice of Peace in field, when application filed by respondent had been consigned, would amount to misuse of process of law---Impugned order passed by Justice of Peace was set aside, resulting into the dismissal of application filed by respondent under S.22-A, Cr.P.C.

Muhammad Shoaib Khokhar for Petitioner.
Wali Muhammad Khan, A.A.-G. and Aulad Hussain, S.I. for the State.
Mehmood Khan for Respondent No.3.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Pervaiz Akhtar respondent No.3 has secured a direction from learned Justice of Peace, Lahore for the registration of the case against the petitioner on various grounds in which case, the police had reported that the occurrence alleged in the application filed by respondent No.3 under section 22-A Cr.P.C. had not taken place but despite that the learned Justice of Peace vide order dated 7-3-2013 issued direction to the petitioner to make statement before the S.H.O. of the police station. This order is the subject-matter of the instant petition.

2. After having heard the learned counsel for the parties and perusing the record it is found that first Justice of Peace, does not disclose the commission of any cognizable offence against the petitioner and same was the position after the issuance of direction by the learned Justice of Peace that no such occurrence had even taken place. The learned Justice of Peace while passing the impugned order has not examined the police report. Now the situation is the same that in opinion of the police, the occurrence as reported in the application of respondent No.3 has never taken place and application of respondent was consigned. In view of these circumstances, keeping the order of learned Justice of Peace in field would amount the misuse of process of law.

3. In this view of the matter, the petition in hand is accepted and the order passed by the learned Justice of Peace dated 7-3-2013 is set aside resulting into the dismissal of the application filed by respondent No.3 under section 22-A, Cr.P.C.

HBT/M-129/L Petition accepted.

PLJ 2014 Cr.C. (Lahore) 38 (DB)
[Multan Bench Multan]
Present: Mazhar Iqbal Sidhu and Syed Muhammad Kazim Raza Shamsi, JJ.
UMAR FAROOQ alias BHOLA alias IMRAN--Appellant
versus
STATE—Respondent

Crl. A. No. 16 of 2008, M.R. No. 5 of 2008, heard on 11.9.2013.

Pakistan Penal Code, 1860 (XLV of 1860)--
----Ss. 302(b), 364 & 392--Conviction and sentence--Challenge to--Statement of CW indicated that the appellant was in his custody and he led the police officer to the places as mentioned by PWs in their statements but astonishingly the Police Inspector did not record the statement of any person who met him at those places nor he had prepared any document in this respect--All this prosecution evidence as discussed does not establish the identity of appellant, his hiring of deceased Dala, its snatching and subsequent murder--There are many important links missing from the chain of circumstances, thus reasonable doubts lurk

in one's mind regarding involvement of appellant as alleged in the complaint--Appellant has raised certain questions in his statement recorded under section 342, Cr.P.C.--which need to be considered--The appellant's stance is that he was booked in the case at the behest of complainant in Ex.D/B who had relations with complainant of instant case and as complainant bore grudge of murder of one therefore, PW with consultation of had falsely implicated him in the murder of deceased--Assertion alleged by appellant is not supported by any evidence--For this simple reason, the assertion is not believable--Prosecution has miserably failed in this respect--Trial Court has erred in recording the conviction of the appellant on the basis of this scanty and unconvincing evidence as such findings recorded by it are based upon non-reading of material evidence warranting the interference of High Court--Appeal was allowed. [P. 45] A, B & D

Duty of Prosecution—

----Bounden duty of the prosecution to home the guilt of the appellant beyond shadows of reasonable doubts by producing tangible, cogent, confidence and convincing evidence. [P. 45] C

Prince Rehan Iftikhar Sheikh, Advocate for Appellant.

Sardar Mahboob, Advocate for Complainant.

Malik Muhammad Jaffar, Deputy Prosecutor General for State.

Date of hearing: 11.9.2013.

JUDGMENT

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.--The accused Umar Farooq alias Bhola alias Imran son of Ghulam Nabi, Mushtaq Ahmad son of Noor Muhammad and Riaz Hussain son of Ghulam Hussain were tried in private criminal complaint filed under Sections 364, 302, 392 & 34, PPC read with Article 17 of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979, Police Station Snawan District Muzaffargarh as well as in case FIR No. 195 dated 04.10.2000 registered under Sections 302 & 392, PPC with Police Station Snawan, Kot Addu District Muzaffargarh and at the conclusion of the trial, the accused Mushtaq Ahmad and Riaz Hussain were acquitted of the charge and the accused Umar Farooq alias Bhola alias Imran (appellant) was convicted and sentenced by the learned Additional Sessions Judge, Kot Addu District Muzaffargarh, for committing "Qatl-i-Amd" of Mahmood Raza, in the following manner:--

u/S. 364, PPC Rigorous Imprisonment for 10-years alongwith fine of Rs. 10,000/-, in default whereof to suffer S.I. for three months.

u/S. 392, PPC Rigorous Imprisonment for 10-years with fine of Rs. 10,000/-and in default of payment of fine, to further undergo simple imprisonment for three months.

u/S. 302(b), PPC Sentence of Death as Ta'zir with direction to pay Rs. 100,000/- as compensation to the legal heirs of deceased as required u/S. 544-A, Cr.P.C. and in default of payment of compensation to further suffer six months S.I.

All the sentences were directed to run concurrently with the benefit of Section 382-B, Cr.P.C.

2. The learned trial Court has sent a Murder Reference No.5 of 2008 under Section 374, Cr.P.C. seeking confirmation of death sentence awarded to the appellant who has also challenged his conviction and sentences by filing separate appeal, both matters thus are being decided by this single judgment.

3. Briefly stated facts of the case are that the complainant Hamid Raza (PW-2) made a statement/complaint (Ex.CD) before Ghulam Qadir. ASI (CW.4) alleging that he runs a shop of spare parts in Qasba Sheikh Umar and his father owned a "Dala" bearing Registration No.8143/DNB, Model 1987; that on 03.10.2000, the complainant was sitting at his shop and it was about 7:00/8:00 p.m. when an unknown person (the description of whom is mentioned in the FIR) aged about 50/55 years, came to his brother Mahmood Raza and a deal was done against a fare of R.s.120/- to go to Kot Addu in the Dala and his brother Mahmood Raza proceeded alongwith the said person towards Kot Addu but did not return till night; the complainant made a search for his brother on next day and on the way Driver Nazeer Shah informed the complainant that he had seen Mahmood Raza at Kot Addu at about 8:00/9:00 p.m. alongwith a person sitting in front of the seat of Dala; during this search, the complainant came to know that dead body of a person was lying in the cotton crop in the field of Malik Abdul Rauf Kharwhereupon the complainant alongwith Muhammad Asif, Saleem Akhtar and Munir Hussain, PWs reached at the spot and identified the dead body of his brother Mahmood Raza which was soaked with blood having an injury over eyebrow of his right eye and other injury on the back of his head and Dala was not found there and that the complainant expressed his assurance that the aforesaid person who hired the Dala alongwith others in furtherance of their common intention, committed "Qatl-i-Amd" of his brother Mahmood Raza (deceased) and also snatched the Dala.

4. In view of afore noted facts formal FIR was registered under the aforementioned offences in which on 04.10.2000, through a supplementary statement made by the complainant, the aforesaid accused persons were nominated and the investigations were carried out; that during the course of investigation, the accused Mushtaq Ahmad and Riaz Hussain were declared innocent whereas Umar Farooq alias Bhola alias Imran, accused was found guilty. The discharge report regarding innocence of Mushtaq Ahmad and Riaz Hussain was not agreed upon by the learned Area Magistrate, as such, their names were placed in Column No.2 of the report submitted under Section 173, Cr.P.C. and challan was sent to the Court for trial.

5. After receipt of challan, the accused was charge-sheeted under Sections 302/392/109, PPC for Qatl-i-Amd of Mahmood Raza, deceased, to which he denied and claimed trial, as such, the case was fixed for prosecution evidence when the complainant Hamid Raza opted to file a private criminal complaint Ex.PD, under the offences mentioned in the beginning para of this judgment in which the respondents/accused were summoned to face trial. This private complaint was filed as the complainant was dissatisfied with police investigations.

6. In order to prove the charge, six witnesses were examined as prosecution witnesses whereas other seven witnesses were examined as complainant's witnesses. Ghulam Akbar, Inspector/SHO and Hafiz Noor Ahmad, S.I. CWs were given up being un-necessary whereafter complainant closed his evidence.

7. Dr. Nazeer Ahmad, (PW-1) on 04.10.2000 conducted post-mortem examination upon the dead body of Mahmood Raza, deceased and found the following two injuries on his body:

"(1) Wound of entry on right side of forehead. There was a wound on right side of forehead with measurement 1 X 1 cm. Wound was 1-1/2 cm from right eyebrow and 7 cm from right ear. The wound was clean cut. There was no blackening and tattooing seen.

(2) Wound of exit. There was wound on occipital region with size of 6 cm X 5 cm and was 7 cm from the left ear."

In the opinion of Medical Office; the death was caused by the fire-arm wound on head which caused brain damage leading to neurogenic shock and ultimately death. The probable time that elapsed between injuries and death was instaneous and between death and post-mortem 12 to 24 hours.

8. The evidence so recorded during the trial of the case was confronted to the appellant and co-accused (since acquitted) by recording their statements under Section 342, Cr.P.C. and in an answer to question "why this case against you and why the PWs deposed against him?" the convict/appellant set up his defence in the following words:

"I have falsely been involved in this case. I neither went to Sheikh Umar, nor I abducted Mahmood Raza, deceased, nor I committed the murder of the deceased. I neither hired Dala of the deceased nor robbed the same. I am innocent and this case against me is false and baseless. In fact, I am resident of Azad Kashmir where I had "Brotheri" enmity with various people and for that very reason my opponent got involved me in various heinous offences including the murder of Iqbal, complainant of that murder case was assured of my acquittal on account of my innocence in the said case. Present complainant Hamid Raza had friendly relations with the complainant party of Azad Kashmir. On having a chance of murder of Mahmood Raza, deceased complainant party of Azad Kashmir made connivance with their friend Hamid Raza present complainant and involved me in this false case. My opponents Nazar Hussain and others also set our house on fire, for which my mother filed a writ petition against police of Azad Kashmir and as such police also turned against me. I have falsely been implicated in this case on the asking of my opponents so that I may not com out of jail for ever. The PWs are interested witnesses and have deposed falsely."

9. The appellant did not opt to make statement under Section 340(2), Cr.P.C. to disprove the allegations levelled against him in the prosecution evidence but in his defence, he tendered a certified copy of order passed by the learned District Court, Mirpur (Azad Kashmir) Ex.DB, copy of evidence in the aforesaid criminal case Ex.DC, copy of order dated 12.03.2005 in file Bearing No.91/2000 under Sections 324/234/337 H.Z APC Ex.DD, copy of writ petition titled "Mst. Azmat Bibi Vs. The SHO and others" alongwith order of Hon'ble High Court of Judicate of Azad Jammu & Kashmir Ex.DE and closed his defence evidence.

10. The learned counsel appearing on behalf of the appellant argued that the incident reported in the crime report Ex,CD and subsequently in the private criminal complaint Ex.P/D is an unseen and blind occurrence and as per first version of the complainant made

in the FIR one unknown person had been mentioned therein thus it was incumbent for the prosecution to prove this case by producing convincing, confidence inspiring and cogent evidence; also by providing sufficient links of the chain of circumstances for bringing home the guilt of the appellant but no such evidence is available on the file connecting the appellant with snatching of Dala from the deceased Mahmood Raza and murdering him thereafter. The learned counsel has pointed out that PWs 3 to 5 are the persons who had lastly seen the deceased in the company of the appellant and others but the witnesses did not inform either the police or to the complainant when they immediately met with both of them that they had seen the deceased in the company of Umar Farooq, appellant, Mushtaq Ahmad and Riaz Hussain (since acquitted), Similarly, it is argued that PW.2 has not provided any source of information in his subsequent statement about the identity of the appellant and that the supplementary statement made by him on the following day of occurrence is a merely statement under Section 161, Cr.P.C. which cannot be treated as valid piece of information as held in the case of "Khalid Javed and another Vs. The State" (2003 SCMR 1419). The learned counsel has also pointed out the contradictions made by the complainant in his statement vis-a-viz the medical report in respect of injuries available on the dead body. He has also commented upon the defence taken by the appellant in his statement recorded under Section 342, Cr.P.C. that the appellant was involved in the case on the behest of enemies who had links with the present complainant. He maintained that as per version of CW.6, Javed Akhtar, Inspector the accused was in his custody on 04.07.2003 who led to the places where he stayed and performed certain acts but according to the learned counsel, the police officer did not prepare any document in this respect nor recorded the statement of the persons mentioned by him in his cross-examination, thus this lacuna left by the prosecution does not lead to the conviction of the appellant rather he is required to be acquitted honourably from the charge.

11. While controverting the submissions made by learned counsel for the appellant, the learned Deputy Prosecutor General assisted by learned counsel for the complainant has attempted to argue that the prosecution has produced tangible evidence to establish charge against appellant and in this respect has referred to the statements of PWs 3 to 6, CW.6 and CW.7 and has also relied upon the statement of PW.1, the Medical Officer. He argued that it was the appellant who had hired the Dala of deceased and took him to the places of his choices where he had snatched Dala from the deceased and murdered him in the cold blooded manner.

12. We have deeply appreciated the arguments made by learned counsel for the parties and examined the record.

13. Admittedly, the snatching of Dala and murder of Mahmood Raza, deceased had not been witnessed by any person and in this manner, the case in hand is based upon circumstantial evidence which circumstances are required to be proved through qualitative evidence to establish the charge which we found, is not forthcoming on the record. Initially, the complainant (PW.2) reported the matter to the police against an unknown person who in his presence had hired Dala of the deceased whereafter his deceased brother did not return. He in his crime report stated that when his brother did not return, he went out of his search and at Adda one Nazir Shah, Driver met him who informed him that he (Driver) had seen the deceased lastly at Kot Addu at about 8:00/9:00 p.m. alongwith unknown person but this

stance had been changed by the complainant in his supplementary statement where he had written that on 04.10.2000 Abid Hussain and Ghulam Hussain, PWs came for condolence in the evening time and told him that they had seen the accused Umar Farooq and two other on the night of 03.10.2000 purchasing sweets from the shop of Ghulam Hussain, PW (whose shop is situated near the place of business of the complainant). This somersault taken by the complainant casts serious doubt about the statement made by him whether Nazir Shah had told him about the presence of the deceased in Kot Addu or PW.3 had seen the deceased in the company of the accused at Qasba Sheikh Umar; thus the complainant has attempted to make dishonest improvement probably to strengthen his case. Falseness of the FIR lodged by the complainant is also established from another fact that he had noticed injury on the person of the deceased existing on his right eye's eyebrow and back of the head whereas in his statement he had changed this injury existing on the back of the head by stating that the deceased had received injury on his forehead which exited from the backside of the head. This contradiction is irreconcilable and further indicates that the complainant after examining the post-mortem report had brought his statement in the same line. Besides the statement of the complainant, which is not free of doubts, he has relied upon the statements of PWs 3 to 5 who had lastly seen the deceased with the appellant and two acquitted accused but this piece of evidence is also tainted with multiple contradictions and does not prove that these PWs had ever seen the deceased in the company of the appellant. PW.3 Abid Hussain deposed that he had seen the appellant alongwith Riaz Hussain and Mushtaq Ahmad sitting in a red car on 03.10.2000 within area of QasbaSheikh Umar where they were purchasing sweets from the shop of Ghulam Hussain, PW (not produced). Out of those three persons, the said PW had acquaintance with Riaz Hussain and Mushtaq Ahmad, accused but he did not bother to inquire from them as to where they were going and why they were purchasing and eating sweets. According to PW.3, Riaz told the name of third person sitting at rear seat of car as Umar Farooq, appellant. This witness has been introduced by the prosecution just to establish the contents of the FIR that one unknown person had hired Dala from the deceased and took him away and that unknown person was the appellant. It is admitted by PW.3 that he did not know the name of third person sitting in the car till he was told by Riaz. He also did not bother to join the investigations with the police at the police station rather he made his statement in the house on 04.10.2000 till which time he did not inform either the complainant or the police that he had seen three accused persons and the person hiring the Dala from the deceased was Umar Farooq, appellant. Similarly, PW.4, ShahidMustafa had seen the deceased on the same night of occurrence at 8:30 p.m. at Dara Chowk and on his inquiry the deceased told him that he was taking Umar Farooq, Riaz Hussain and Mushtaq Ahmad in his Dala. This part of statement of PW.4 contradicts Ex.CD, the FIR where Nazir Shah, Driver told complainant that he had seen deceased with one unknown at 8:30 p.m. at Kot Addu. According to the statement of this PW, be met with the complainant on 4.10.2000 at 5:00/6:00 a.m. in the morning, till which time FIR was not registered, but he did not disclose the names of Umar Farooq, Riaz Hussain and Mushtaq Ahmad to him. PW.5, Riaz Hussain had seen the Dala at 9:00 p.m. at Chowk Snawan and according to his statement some unknown person was driving and Riaz Hussain accused was also sitting in the said Dala who told PW.5 that he had purchased the Dala in exchange from the deceased with the intervention of Mushtaq Ahmad, accused but he did not tell the name of Umar Farooq, appellant to PW.5 who made statement to the police on 7.10.2000 after three days of the

occurrence. Ironically, the statement of PW.6, Javed Iqbal is totally on different footing as according to his statement, the appellant had stayed for a night at his shop at about 10:30 p.m. with the request that he be allowed to stay as his Dala was not in working condition and the witness had provided cot to him and in the morning, the appellant by toeing his Dala with other one, went towards Sham Kot. It is very strange that PW.6 had allowed an unknown person to his stay at his shop for a night. Normally, it is against general practice to help an unknown person in such manner. This statement of the PW clearly manifests that the same has been fabricated by the prosecution to get support to its case.

14. Further, as per statement of CW.7, he joined appellant in investigations in the jail of Mirpur, Azad Kashmir. This joining of appellant was done on 29.01.2003. The statement of CW.6 indicates that the appellant was in his custody on 7.04.2003 and he led the police officer to the places as mentioned by PWs 3 to 5 in their statements but. astonishingly the Police Inspector did not record the statement of any person who met him at those places nor he had prepared any document in this respect. All this prosecution evidence as discussed does not establish the identity of appellant, his hiring of deceased Dala, its snatching and subsequent murder. There are many important links missing from the chain of circumstances, thus reasonable doubts lurk in one's mind regarding involvement of appellant as alleged in the complaint.

15. The appellant has raised certain questions in his statement recorded under Section 342, Cr.P.C. which need to be considered. The appellant's stance is that he was booked in the case at the behest of Nazar Hussain, complainant in Ex.D/B who had relations with Hamid Raza, complainant of instant case and as Nazar Hussain bore grudge of murder of one Iqbal, therefore, PW.2 with consultation of Nazar Hussain had falsely implicated him in the murder of deceased Mahmood Raza. The assertion alleged by appellant is not supported by any evidence. For this simple reason, the assertion is not believable.

16. Since, it was the bounden duty of the prosecution to bring home the guilt of the appellant beyond shadows of reasonable doubts by producing tangible, cogent, confidence and convincing evidence but the prosecution has miserably failed in this respect. The learned trial Court has erred in recording the conviction of the appellant on the basis of this scanty and unconvincing evidence as such findings recorded by it are based upon non-reading of material evidence warranting the interference of this Court.

For the foregoing reasons, we are persuaded to accept this appeal which is accordingly allowed acquitting the appellant Umar Farooq alias Bhola alias Imran from the charges. He is in jail who shall be set at liberty forthwith if not required in any her case. Accordingly, death sentence awarded to the appellant is not confirmed and Murder Reference No. 5 of 2008 sent by the learned trial Court seeking confirmation of his death sentences is answered in the NEGATIVE.

(A.S.) Appeal allowed.

PLJ 2014 Cr.C. (Lahore) 80 (DB)
[Multan Bench Multan]
Present: Mazhar Iqbal Sidhu and Syed Muhammad Kazim Raza Shamsi, JJ.
NADEEM alias DIMA--Appellant
versus
STATE—Respondent

Crl. A. No. 280 of 2008 and M.R. No. 61 of 2008, heard on 10.9.2013.

Pakistan Penal Code, 1860 (XLV of 1860)--
----S. 302(b)--Conviction and sentence--Challenge to--Modification in sentence--Death sentence was commuted into imprisonment for life--Extenuating circumstances--Even otherwise, if this corroborative piece of evidence is not available with the prosecution then also the prosecution has the case in view of ocular account which is in line with the medical evidence--Trial Court had duly appreciated the evidence of the parties while recording the conviction of appellant through the impugned judgment which findings being unexceptionable are liable to be maintained--Trial Court has awarded normal penalty of death sentence to the appellant in view of the evidence available on the file but the genesis of occurrence has shrouded in mystery and there is nothing on file to suggest as to what happened immediate before the occurrence in the absence of PWs--Court treat this circumstance as extenuating for commuting the sentence of death into imprisonment for life--As already observed in the preceding para that the recovery of crime weapon has become inconsequential in view of the report of the Forensic Science Laboratory, therefore, this is another factor bringing the case the appellant out of normal penalty of death sentence--Appeal dismissed. [P. 86] A, B & C

2011 SCMR 379, rel.
Prince Rehan Iftikhar Sheikh, Advocate for Appellant.
Peer Masood-ul-Hassan Chishti, Advocate for Complainant.
Malik Muhammad Jaffar, Deputy Prosecutor General for State.
Date of hearing: 10.09.2013

JUDGMENT

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.--After having faced trial in case FIR No. 221 dated 18.06.2008 registered under Section 302, PPC at Police Station Danewal District Vehari, the appellant Nadeem alias Dima, at the conclusion of the trial was convicted and sentenced to death as Ta'zir under Section 302(b), PPC by the learned Additional Sessions Judge, Vehari for committing "Qatl-i-Amd" of Muhammad Sarwar. He was also directed to pay Rs.200,000/- as compensation to the legal heirs of deceased as required under Section 544-A, Cr.P.C., in default whereof he shall further undergo six months S.I.

2. Murder Reference No. 61 of 2008 under Section 374, Cr.P.C. has been sent by the learned trial Court seeking confirmation of death sentence awarded to Nadeem alias Dima, appellant.

3. Briefly stated facts of the case as per prosecution story are that the complainant Abdul Sattar (PW-9) made a statement/complaint (Ex.PH/1) before Zulfiqar Ali S.I. (PW.13) alleging in it that he is a carpet maker and Bashir Ahmad, PW also used to work with him; that his son Muhammad Sarwar was residing on the backside of Ludki Flour Mill, Iqbal Town, Vehari and on the fateful night of 18.06.2008, the complainant Abdul Sattar alongwith his co-villager Bashir Ahmad went to see his son Muhammad Sarwar at his house and they were conversating with each other alongwith Muhammad Sarwar in front of his house while sitting there and then at about 10:00 P.M. the complainant and Bashir Ahmad, PW went inside the house of Muhammad Sarwar who remained present in front of the house. After sometime, they saw that Muhammad Sarwar son of the complainant and Nadeem alias Dima, accused/appellant armed with pistol were quarrelling. Upon noise, the complainant and the witness came out of the house and in their view, the appellant Nadeem alias Dima accused made two successive fires with his pistol on his left and right side of chest which made their exits from backside of his body and Muhammad Sarwar fell on the ground; that the complainant and witness when step forwarded, they were threatened by the accused while raising Lalkara warning them not to come forward otherwise they will also be done to death and then the accused tied away with his weapon that Muhammad Sarwar was taken to hospital in serious injured condition where he succumbed to the injuries.

4. The motive behind the occurrence was that about 3/4 months prior to the occurrence, a quarrel took place between the deceased and accused due to which grudge, the accused committed the murder of Muhammad Sarwar.

5. After recording statement of the complainant, the Investigating Officer (PW.13) sent the same to Police Station for registration of formal FIR and he visited the place of occurrence where he prepared injuries statement Ex PC/1, inquest report Ex.PC, collected blood stained earth from the spot vide recovery memo. Ex.PD. He also collected empty cartridges (P-1/1-2) vide recovery memo. Ex.PE, prepared rough site-plan Ex.PK, took into possession bloodstained Chadar of deceased (P-2) vide recovery memo. Ex.PF and recorded the statements of witnesses under Section 161, Cr.P.C. On 21.06.2008, he got prepared the scaled site-plan of the place of occurrence from the draftsman Ex.PJ, Ex.PJ/1 and Ex.PJ/2. On 29.06.2008, he arrested the accused who during the investigation made disclosure and led to the recovery of crime weapon i.e. pistol .30-bore (P-3) which was taken into possession vide recovery memo. Ex.PG. He also prepared rough site plan (Ex.PL) of the place of recovery of pistol and recorded the statements of recovery witnesses under Section 161, Cr.P.C. He after concluding investigations and finding the accused guilty of offence, forwarded challan to the Court for further proceedings.

6. After receipt of challan, the accused was charge-sheeted under Section 302, PPC for Qatl-i-Amd of Muhammad Sarwar deceased, to which he denied and claimed trial. The prosecution in order to prove charge, examined 13-witnesses and gave up Qasim Ali, Shafi-ur-Rehman, Muhammad Abbas and Muhammad Saleem, PWs being un-necessary whereafter it closed evidence by tendering report of Forensic Science Laboratory (Ex.PM), report of Chemical Examiner (Ex.PN) and report of Serologist Ex.PO.

7. Dr. Abdur Rauf Khalid (PW-1) on 18.06.2008, firstly examined the deceased Muhammad Sarwar in injured condition and on 19.06.2008, he conducted postmortem

examination upon the dead body of Muhammad Sarwar, deceased and found the following four injuries on his body:--

"(1) There was an oval shaped wound 1 cm X 1 cm going deep into chest 8 cm infromedial to the right nipple. The margins of wound were inverted and blackened. There was corresponding cut on the vest i.e. the wound of entry.

(2) An oval shaped, wound 1 cm X 1 cm with going deep 20 cm above the right eliac crest. margins were everted and corresponding cut was on the vest. Wound of exit.

(3) An oval shaped wound 1 cm X 1 cm with blackened inverted margins going deep on left interior axillary line. 6 cm below the interior fold of left shoulder. Wound of entry.

(4) An oval shaped wound 1 cm X 1 cm going deep with blackened everted margins back of the center of the left chest 10 cm left lateral to vertebral column. Wound of exit."

In the opinion of Medical Officer, all the injuries were sufficient to cause death in ordinary course of nature. The probable time that elapsed between injuries and death was about one hour and between death and postmortem was about 9-hours.

8. The evidence so recorded during the trial of the case was confronted to the appellant by recording his statement under Section 342, Cr.P.C. and in an answer to question "why this case against you and why the PWs deposed against him?" the accused/appellant set up his defence in the following words:--

"I have falsely been implicated in this case. The deceased has oftenly at daggers drawn with his step son Sajjad and also with his two Ex-wives' brothers (solas). I was labourer with the deceased, so complainant of this case falsely implicated me in this case as escape goat in order to save the skin of his relatives. PWs are also closely related inter-se with the complainant. I am innocent."

9. The appellant did not opt to make statement under Section 340(2), Cr.P.C. to disprove the allegations levelled against him in the prosecution evidence, nor opted to produce evidence in his defence.

10. It is contended by learned counsel for the appellant that the occurrence as narrated in the crime report is an unseen occurrence and the presence of the complainant as well as the PWs is not established from the prosecution evidence. He added that some unknown persons had committed the murder of deceased Muhammad Sarwar and the appellant has falsely been implicated in the case. While elaborating his arguments, the learned counsel submitted that the deceased had contracted three marriages whereas he had divorced his two wives and now residing with Mst. Razia Bibi alongwith one Shahzad, his step-son in the same house. The learned counsel has explored the possibility that either Mst. Razia Bibi had managed the murder of Muhammad Sarwar or his step-son with whom the deceased used to quarrel, might have done him to death. He further argued on this point that the deceased was having serious disputes and quarrels with brothers of his previous wives possibility of the murder of Muhammad Sarwar, deceased by his ex-brothers-in-law cannot be ruled out. The learned counsel further attempted to argue that the motive as alleged by the complainant in his report is without any corroboration as according to the complainant,

the deceased had quarreled with the accused three months prior to the occurrence and there is no evidence on the record that during this interval, the parties ever had any scuffle with each other. He further pointed out that this quarrel between the deceased and appellant was never reported to the police, as such, this part of evidence is not reliable and cannot be believed blindly. He further goes on to argue that the crime weapon had falsely been shown to be recovered at the instance of the appellant which was planted by the police upon the appellant with the connivance of the complainant party. He has also challenged the veracity of statements of PW.9, the complainant and PW-10, Bashir Ahmad on the ground that they are closely related inter-se and interested in prosecution of the appellant. As a last leg of his arguments, the learned counsel submitted that the prosecution evidence is silent with regard to the fact as to what happened immediately before the occurrence between the deceased and the appellant, as such, the genesis of the occurrence has shrouded in mystery bringing the case out of pile of the capital punishment. In this connection, the learned counsel has relied upon the judgment of the Apex Court reported as "Zulfiqar Hussain and another Vs. The State" (2011 SCMR 379).

11. The learned Deputy Prosecutor General assisted by learned counsel for the complainant has controverted the arguments made by learned counsel for the appellant by submitting that it is a promptly lodged FIR which was registered at the Police Station within one and half hour after the occurrence in which the appellant is the specific single accused to whom attribution of firing has been made resulting into death of Muhammad Sarwar son of the complainant. He further argued that the prosecution has successfully proved motive of the case by producing the witnesses PW.9 and PW. 10 and the appellant could not get anything out of their mouths in this respect by conducting lengthy cross-examination. He maintained that the ocular account led by the prosecution is quite in line with the medical evidence as according to the complainant, the appellant had made two fires upon the deceased which fires were available on his body when the dead body was examined by the Medical Officer (PW.1). The learned State Representative has also discussed the point of recovery of weapon of offence which was recovered at the instance of the appellant during the investigation and submitted that all the evidence produced by the prosecution is convincing, cogent and trustworthy which was rightly believed by the learned trial Court while recording the conviction against the appellant. He prayed for dismissal of the appeal.

12. We have considered the submissions made by learned counsel for the parties and examined the available evidence. The case of the prosecution is that at 9:00 P.M. on 18.06.2008, the complainant Abdul Sattar alongwith his Bhanja Bashir Ahmad and Qasim Ali, Bhateja went to the house of his son Muhammad Sarwar in routine where they were sitting outside the house and then went into the house whereas Muhammad Sarwar sat outside in the street and when the complainant and PWs heard the noise of quarrel, they came out of the house and saw the appellant having scuffle with the deceased and within their view, the appellant made two shots on the body of Muhammad Sarwar which proved fatal who died an hour later. To prove this narration, PW.9 complainant and PW.10, Bashir Ahmad made consistent statements with respect to identification of the appellant, his presence at the spot, having scuffled with the deceased and firing upon the latter. The PWs were categorically cross-examined by the defence but both the PWs remained consistent in respect of their statements made on oath in the Court and did not give any concession to the defence. The objection of learned counsel for the appellant that the witnesses were quite

interested in the prosecution of the appellant being close relatives is untenable for the simple reason that mere relation of witnesses is not sufficient to disbelieve their testimony unless and until the said testimony is tainted with mala fide or ulterior motive. Both the witnesses are quite natural persons being one father of the deceased and other one is cousin residing within the range of 3-KM from the house of the deceased who in routine used to visit the deceased. Both the PWs have no ill-will or animosity with the appellant due to which reason they could be interested in his prosecution. In the absence of any such allegation and evidence thereon, their testimonies cannot be brushed aside simply on the ground that they were close relatives of the deceased.

13. Similarly, the seat, of injuries provided by PW.9 and PW.10 in their statements as well as in the crime report was found existed on the right and left side of the chest of Muhammad Sarwar by the Medical Officer Dr. Abdur Rauf Khalid (PW.1) in his report Ex.PB. The PWs have also supported the medical report when they deposed that the appellant was present at a distance of about 2-feet from the deceased when he made fires as according to the description of the injuries provided by PW.1, the inverted margins of wound were having blackening meaning thereby that the fires were made by the appellant from a very close range. This part of the prosecution evidence remained un-shattered during the cross-examination made by the defence which evidence is otherwise trustworthy and has the credibility. Although, the crime weapon was recovered at the instance of the appellant, by PW.13, Zulfiqar Ali Khan, S.I. who had also collected the crime empties from the place of occurrence vide recovery memo. Ex.PE but this part of recovery of pistol has become inconsequential in view of ballistic report Ex.PM which provides that crime empties C1 and C2 were perforated and identifiable data is not available, therefore, nothing can be opined as to whether or not the crime empties of .30-bore pistol marked as C1 and C2 had been fired from the pistol .30-bore in question. Even otherwise, if this corroborative piece of evidence is not available with the prosecution then also the prosecution has the case in view of ocular account which is in line with the medical evidence. The learned trial Court had duly appreciated the evidence of the parties while recording the conviction of appellant through the impugned judgment which findings being unexceptionable are liable to be maintained.

14. The learned trial Court has awarded normal penalty of death sentence to the appellant in view of the evidence available on the file but we found that the genesis of occurrence has shrouded in mystery and there is nothing on file to suggest as to what happened immediate before the occurrence in the absence of PWs, therefore, while relying upon judgment of the Apex Court reported as "Zulfiqar Hussain and another Vs. The State" (2011 SCMR 379) we treat this circumstance as extenuating for commuting the sentence of death into imprisonment for life. As already observed in the preceding para that the recovery of crime weapon has become inconsequential in view of the report of the Forensic Science Laboratory, therefore, this is another factor bringing the case of the appellant out of normal penalty of death sentence.

For what has been discussed above, the appeal in hand stands dismissed with the modification that the sentence of death awarded to the appellant Nadeem alias Dima is commuted into one imprisonment for life while the remaining sentences inflicted upon the appellant shall remain intact whereas he shall also be entitled for the benefit extended by

Section 382-B, Cr.P.C. In this background, we do not confirm the sentence of death awarded to the appellant Nadeem alias Dima and Murder Reference No. 61 of 2008 sent by the learned trial Court seeking confirmation of his death sentences is answered in the Negative.

(A.S.) Appeal dismissed.

PLJ 2014 Cr.C. (Lahore) 168 (DB)
[Multan Bench Multan]
Present: Sardar Muhammad Shamim Khan and Syed Muhammad Kazim Raza Shamsi, JJ.
MUHAMMAD SHAHID alias UMAR and 2 others--Appellants
versus
STATE and another—Respondents

Crl. Appeal No. 527 of 2011, heard on 26.6.2012.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 410--Arms Ordinance, 1965, S. 13--Criminal Appeal--Conviction and sentence--Challenge to--Quantum of sentence--Modification in sentence--Prosecution by producing convincing and cogent evidence proved that on suspicion the car was stopped coming from northern side and on the personal search, of the appellants, illicit arms were recovered regarding which weapons, the appellants could not justify their possession--Even the appellants were not having any documentary proof of the ownership of the car in which they were travelling--Evidence so led by the prosecution was properly thrashed out by the Court below while convicting and sentencing the appellants--Quantum of sentence awarded to the appellants was concerned, it was noticed that till date, appellants have sewed out the sentence of two years which to our mind was sufficient to meet the ends of justice--Accordingly, the quantum of punishment awarded to the appellants was reduced to one they have already served--However, the sentence of awarding fine and the period to be served in its default thereof, were maintained--With the aforementioned modification in the sentence, appeal stands dismissed. [P. 170] A & B
Mr. M. Basir Khan Sikhani, Advocate for Appellants.
Malik Jaffar Hussain, DPG for State.
Date of hearing: 26.6.2012.

JUDGMENT

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.--This criminal appeal filed under Section 410, Cr.P.C. is directed against the judgment dated 9.6.2011 passed by the learned Judge, Anti-Terrorism Court, Dera Ghazi Khan whereby he convicted Muhammad Shahid, Salamat Shah alias Ali and Muhammad Saleem alias Abu-Bakar under Section 13 of the Arms Ordinance, 1965 and awarded the sentence of imprisonment for seven years with fine

of Rs. 50,000/- each, in default thereof, they were directed to undergo six months simple imprisonment.

2. The trial was conducted by the Court in case FIR No. 13 dated 26.1.2011 registered under Section 13 of the Arms Ordinance, 1965 read with Sections 21-C and 11-F of Anti-Terrorism Act; 1997 with Police Station Vahova, District Dera Ghazi Khan.

3. The allegations against the appellants were that they were armed with pistol .30 bore with live bullets. It was further reported by the complainant that the accused related to proscribed organization Lashkar-e-Jhangvi. Formal FIR was recorded on the basis of afore-noted facts and after completion of the challan, the same was sent to the Court for trial.

4. The trial Court acquitted the appellants from the charges levelled under Sections 11-F and 21-C of Anti-Terrorism Act, 1997 but convicted them under Section 13 of the Arms Ordinance, 1965 and awarded sentence in the above terms.

5. It is contended by the learned counsel for the appellants that the evidence available on the record does not prove the case of the prosecution beyond any shadow of doubt; that with the declaration of acquittal in respect of the offence charged under Anti-Terrorism Act, 1997, the case of the prosecution has further become doubtful in nature; that the weapons recovered at the instance of the appellants were never sent to the laboratory for determining its workable condition and that the trial Court did not give weight to the defence version. The learned counsel prayed for the acquittal of the appellants from the charge.

6. Conversely, the contentions of the counsel have been controverted by the learned Deputy Prosecutor General asserting that at the time of search of the car of the appellants, they were found armed with weapons for which they did not have any authority rather the car in which they were travelling did not belong to them who could not produce the documents of ownership of that car, therefore, the conviction recorded by the learned trial Court is in accordance with the settled principle of law.

7. We have considered the submissions made by the learned counsel for the parties and examined the evidence on record.

8. The plea raised by the learned counsel for the appellants during the course of arguments that trial Court did not consider the defence evidence appears to be untenable for the reason that the appellants did not produce any evidence regarding the facts that the officer conducted their personal search had taken away huge amount of cash from their pockets and they also could not show where-from they had brought the huge cash nor disclosed their source of earning of that money. In this scenario, the learned trial Court had rightly disbelieved defence version in the impugned judgment.

9. On the other hand, the prosecution by producing convincing and cogent evidence proved that on suspicion the car was stopped coming from northern side and on the personal search of the appellants, illicit arms were recovered regarding which weapons, the appellants could not justify their possession. Even the appellants were not having any documentary proof of the ownership of the car in which they were travelling. The evidence so led by the prosecution was properly thrashed out by the Court below while convicting and sentencing

the appellants. We do not find any reason for interfering into the findings so recorded by the trial Court.

10. So far as the quantum of sentence awarded to the appellants is concerned, it is noticed that till date, appellants have served out the sentence of two years which to our mind is sufficient to meet the ends of justice. Accordingly, the quantum of punishment awarded to the appellants is reduced to one they have already served. However, the sentence of awarding fine and the period to be served in its default thereof, are maintained. With the aforementioned modification in the sentence, this appeal stands dismissed.

(A.S.) Appeal dismissed.

PLJ 2014 Cr.C. (Lahore) 186 (DB)
[Multan Bench Multan]
Present: Mazhar Iqbal Sidhu & Syed Muhammad Kazim Raza Shamsi, JJ.
MUHAMMAD NASIR--Appellant
versus
STATE—Respondent

Crl. Appeal No. 320 of 2008 and M.R. No. 150 of 2009, heard on 9.9.2013.

Pakistan Penal Code, 1860 (XLV of 1860)--
----S. 302(b)--Conviction and sentence--Challenge to--Mitigating circumstances--Modification in death sentence--Case of the prosecution on the fact of motive was not in line with the statement made by PW--In the FIR the motive for the occurrence daughter of deceased has been mentioned that Nikah of daughter of deceased was solemnized with "J" but was not produced as a witness to prove this fact that her Nikah was solemnized with "J" nor the said "J" was produced in the Court to substantiate this fact. Similarly, the report of Forensic Science Laboratory also lends a little support to the prosecution case as according to the said report, three crime empties were sent for examination out of which one crime empty C3 had been fired from .44-bore while C1 crime empty had not been fired from the same rifle. The empty C2 was without percussion cap, therefore, no opinion was given about that empty. According to the contents of this report, it was to be explained by the prosecution that in-fact all the crime empties were fired from the crime weapon but no such explanation is view of this weakness in the prosecution evidence, Court have no other option except to treat these facts as mitigating circumstances for commuting the sentence of death awarded to the appellant on two counts to the one imprisonment for life--Appeal dismissed. [Pp. 193 & 194] A

Sardar Mehboob, Advocate for Appellant.
Mr. Muhammad Amir Khan Bhutta, Advocate for Complainant.
Malik Muhammad Jaffar, D.P.G. for State.
Date of hearing: 9.9.2013.

JUDGMENT

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.--The appellant Muhammad Nasir son of Muhammad Waryam was tried in case arising out of FIR No. 206, dated 27.09.2007 registered under Sections 302/34, PPC at Police Station Haveli Koranga District Khanewal for committing "Qatl-i-Amd" of Muhammad Akram and Mst. Mumtaz Mai. The learned Sessions Judge, Kabirwala after conclusion of the trial of the case vide judgment dated 26.11.2008 convicted the appellant Muhammad Nasir and sentenced him to death sentence on two counts as "Ta'zir" under Section 302(b), PPC. He was directed to pay Rs. 200,000/- for each murder to respective legal heirs of each deceased as compensation under Section 544-A, Cr.P.C., in default whereof he shall undergo six months S.I. for each default.

2. Murder Reference No. 150 of 2009 under Section 374, Cr.P.C. has been sent by the learned trial Court seeking confirmation of death sentence awarded to Muhammad Nasir, appellant.

3. Succinctly, as per prosecution story, the complainant Mst. Allah Jawai (PW-8) made a statement before Muhammad Latif, S.I. (PW.10) when he was present at Zero Point Kot Islam at about 1.45 p.m. alleging that her marriage had taken place about 15-years back with Muhammad Akram (deceased) and about two years thereafter, Mst. Mumtaz Bibi (deceased) was also married to Muhammad Akram and they all were happily living with Muhammad Akram in his house at Saddhu Kawain; that on the fateful day i.e. 27.09.2007 at about 1.00 p.m. the complainant and all the family members were present in their house when suddenly accused/appellant Muhammad Nasir, armed with rifle .44-bore and .30-bore pistol alongwith two unknown armed persons came there; the accused/appellant while raising "Lalkara" made a straight fire on complainant's husband Muhammad Akram which hit on the left side of his back and made, its exit, the accused Muhammad Nasir made another fire with rifle .44-bore which also landed on the left side of his back whereupon Muhammad Akram died at the spot; that on the report of fire Mst. Mumtaz Bibi (deceased wife) ran towards Muhammad Akram when accused Muhammad Nasir made a straight fire at her with rifle .44-bore which hit on the left side of her chest and made its exit through her abdomen who also died at the spot. On the report of alarm raised by the complainant, PWs attracted at the spot who witnessed the occurrence and the accused persons made their escape good.

4. The motive for the occurrence was that about six months prior to the occurrence, the accused Muhammad Nasir and abducted Mst. Shani alias Samrana daughter of Muhammad Akram and Mst. Mumtaz Bibi (deceased), who later on was returned after 10/11 days through intervention of the "Punchaiyat" which matter was not reported to the police and on 25.09.2007 "Nikah" of said Mst. Samrana alias Shani was solemnized with one Jaffer and her Rukhsti was yet to take place: that due to this grudge, Muhammad Nasir, accused/appellant alongwith unknown persons committed murder of Muhammad Akram and Mst. Mumtaz Bibi.

5. After recording statement of the complainant, the investigating officer (PW-10) sent the same to Police Station for registration of formal FIR and he himself proceeded to the spot and prepared injuries statements Ex.PC and Ex.PK and inquest reports Ex.PD and Ex.PL of both the deceased. He Collected blood stained earth from the spot into two sealed parcels.

He also collected two empties of .44-bore rifle (P-7/1 and P-7/2) from near the body of Muhammad Akram (deceased) and one crime empty of .44-bore rifle from near the place of dead body of Mst. Mumtaz Bibi. He recorded the statements of PWs under Section 161, Cr.P.C. while dispatching the dead bodies to the mortuary under the escort of Muhammad lqbal, Constable (PW.3) who after autopsy produced before the I.O. the last worn clothes of both the deceased which were taken into possession vide recovery memos. Ex.PF and Ex.PG respectively. On 05.10.2007, he arrested the accused who during the investigation made disclosure and led to the recovery of crime weapons i.e. rifle .44-bore (P-9) alongwith 25-live bullets (P-10/1-25) and .30-bore pistol (P-11) alongwith two live bullets (P-12/1-2) which were taken into possession vide recovery memos Ex.PP and Ex.PQ. He also prepared rough site-plans (Ex.PS and Ex.PT) of both the places of recovery and recorded the statements of recovery witnesses under Section 161, Cr.P.C. He also recorded statements of PWs under Section 161, Cr.P.C. and after concluding investigations, forwarded challan to the Court for further proceedings.

6. After receipt of challan, the accused was charge-sheeted under Section 302, PPC for Qatl-i-Amd of Muhammad Akram and Mst. Mumtaz Bibi deceased, to which he denied and claimed trial. The prosecution in order to prove charge, examined 10-witnesses and gave up evidence of Umar Hayat, Muhammad Aslam and Zulfiqar, PWs whereafter it closed evidence by tendering reports of Chemical Examiner, Serologist and Forensic Science Laboratory Ex.PU, Ex.PW and Ex.PV.

7. Dr. Noor Muhammad Saggu (PW-1) on 27.09.2007 conducted the autopsy on the dead body of Muhammad Akram, deceased and found the following four injuries on his body:--

(i) A lacerated wound 2.5 cm X 2 cm on left front of chest. 3.5. cm above left nipple with everted edges. This was a wound of exit.

(ii) A lacerated wound 2.5 cm X 2 cm on left front of chest 7 cm below the mid clavicular line/point 2.5 cm medial to Injury No. 1.

(iii) A lacerated wound, circular with inverted edges present on back of left side of chest below border of Scapula and 14 cm below top of shoulder. That was a wound of entry.

(iv) A lacerated wound 2 X 1 cm on left side of back of chest 5 cm lateral to vertebral column.

In the opinion of Medical Officer, all the injuries were sufficient to cause death in ordinary course of nature.

8. Similarly, Dr. Aqila (PW.6) conducted the autopsy on the dead body of Mst. Mumtaz Bibi, on 27.9.2009 and observed following injuries on her persons:--

"(i) A lacerated circular wound with inverted edges and black margin 2 X 1.5 cm on right side and front side of chest 12 cm below the nipple of right breast.

(ii) A lacerated wound oval shape with everted edges 5 X 3 cm going deep in abdomen on left and from side of chest 6 cm below the left nipple of breast.

In her opinion both the injuries were sufficient to cause death in ordinary course of nature due to hemorrhage and shock by rupture of liver and spleen. The probable time elapsed between injuries and death was immediate and between death and post-mortem was 9 to 10 hours.

The evidence so recorded during the trial of the case was confronted to the appellant by recording his statement u/S. 342, Cr.P.C. and in an answer to question "why this case against you and why the PWs deposed against him?" the accused/appellant set up his defence in the following words:--

"I am a poor labourer. The residence of complainant and that of both the deceased was/is near to mine. Muhammad Akram deceased firstly married complainant Mst. Allah Jewai. After that Muhammad Akram developed illicit relations with his cousin Mumtaz Bibi deceased and abducted her. After this abduction, complainant Allah Jewai left the house of Muhammad Akram deceased. Muhammad Akram deceased and Mumtaz Bibi deceased had been residing in other District almost for three years where Mst. Samrana alias Shani was born. After that Punchaiyat of bratheri was held in which conditional compromise was arrived at. The condition was that Muhammad Akram and Mumtaz Bibi deceased would give hand of Mst. Samrana alias Shani to Noor Ahmad, brother of Mst. Allah Jewai complainant. Muhammad Akram and Mumtaz Mai both accepted this condition and came back to Mauza Siddhu Kawain Tehsil Kabirwala while Allah Jewai complainant came back to live with Muhammad Akram deceased. Later, the engagement ceremony of Mst. Samrana with Noor Ahmad (brother of complainant) took place. Prior to the alleged occurrence, Allah Jawai complainant and her brother asked for Nikah/Rukhsati of Mst. Samrana with Noor Ahmad. After this Allah Jewai, complainant and their brother used to quarrel with Muhammad Akram and Mumtaz Mai oftenly. In order to avenge this refusal Mst. Allah Jewai, complainant called her brothers Noor Ahmad etc. and murdered Muhammad Akram and Mumtaz Mai. The complainant is relative of Imran Iftikhar Hiraj resident of Sandian Wala Nazim UC, Kot Islam and Raza Hayat Hiraj, MNA (Ex-Federal Minister) and she only to save the skin of her brothers, involved me in this case, by concocting a false and malicious story due to political influence in collusion of local police. I was arrested by the police from my house on the day of alleged occurrence. Imran Iftikhar Hiraj is a landlord figure of locality. I and my family never supported his political Hiraj Group and due to this enmity, the complainant and Imran Iftikhar Hiraj and Raza Hayat Hiraj involved me in this false case. Although brother of Muhammad Akram deceased agitated but Raza Hayat Hiraj and Imran Iftikhar Hiraj threatened them of dire consequences and advised him to remain silent restrained him from becoming complainant of this case. The police was under the pressure of Imran Iftikhar Hiraj, Raza Hayat Hiraj. Police conducted the entire investigation with mala fide due to pressure of aforesaid Raza Hayat and Imran Iftikhar Hiraj while about 100 respectable persons of the locality went to Police Station and gave their statement before the I.O. regarding my innocence but the I.O. did not record their statements and did not join them into investigation. PWs are related to the complainant who have given false evidence only to save the complainant and her brothers dishonestly."

10. The appellant did not opt to make statement under Section 340(2), Cr.P.C. to disprove the allegations levelled against him in the prosecution evidence, nor opted produce evidence in his defence.

11. The learned counsel for the appellant Muhammad Nasir has argued that the prosecution has failed to prove its case by producing any independent and cogent evidence despite the best independent evidence was available to it nor the fact of recovery of crime weapons at the instance of the appellant could be established beyond any shadow of doubt. He submitted that in-fact the complainant Mst. Allah Jewai, first wife of the deceased residing with him in the same house where Mst. Mumtaz Mai, deceased second wife of the Muhammad Akram was also residing, was interested in marrying her brother Noor Ahmed with Mst. Samrana, daughter of deceased and when Nikhh of Mst. Samrana was solemnized with one Jaffer, she nourished a grudge and in the wake of this revenge, she planned to get rid of the parents of the girl. According to the learned counsel, the deceased Muhammad Akram had enticed away Mst. Mumtaz Mai, deceased and abandoned the village who returned with his wife Mst. Mumtaz Mai in the village through intervention of Panchaiyat in which it was the condition for their return that they would give the hand of their daughter Mst. Samrana to Noor Ahmad, brother of the complainant Mst. Allah Jewai; in this respect an engagement ceremony had also taken place in which the hand of Mst. Samrana was given to Noor Ahmad but subsequently, the Nikah of Mst. Samrana was solemnized with one Jaffer instead of Noor Ahmad which fact led to the present occurrence. The learned counsel has also taken the refuge of some political influences as mentioned by the accused in his statement recorded under Section 342, Cr.P.C. by mentioning that the police was under pressure of Hiraj Family and not only the innocent persons were booked in the instant case but the investigations were also carried out dishonestly. He added that about 100-respectable persons appeared before the investigating officer in support of claim of innocence of the appellant but the investigating officer had turned his deaf ear to their assertions. In the wake of these submissions, the learned counsel submitted that the appellant is an innocent person who had falsely been implicated in the instant case. Touching the merits of the case, it is the submission of learned counsel for the appellant that the presence of the PWs at the spot is not established and their statements regarding the occurrence are neither cogent nor confidence inspiring as the same suffer from material contradictions creating reasonable doubts about the involvement of the appellant in the instant case. He has also termed the recovery of crime weapon rifle .44-bore as bogus recovery which has been planted upon the appellant to strengthen the prosecution case. At the conclusion of arguments, the learned counsel prayed for acceptance of appeal and acquittal of the appellant from the charge of murder of Muhammad Akram and Mst. Mumtaz Mai.

12. The learned counsel appearing on behalf of the complainant while supporting the conviction recorded by the learned trial Court submitted that, the prosecution has successfully established the charge against the appellant by leading evidence on the factum of motive, recoveries, ocular account and authenticated medical evidence. He submitted that two innocent persons had lost their lives at the hands of appellant unjustifiably. It is further argued that the appellant has taken specific plea in his statement recorded under Section 342, Cr.P.C. but he had not led any evidence in support of the same, as such, the

said plea is not liable to be accepted. The submissions made by learned counsel for the complainant are in line with the arguments made by learned Deputy Prosecutor General.

13. Parties heard. Record perused.

14. Since, the appellant has taken a specific plea that he is not the real culprit rather the murder of deceased had taken place at the behest of the complainant herself, therefore, we tend to discuss the same before considering the merits of the prosecution evidence. In his statement, the appellant while answering Question No. 8 had firstly raised a plea that the deceased Muhammad Akram had enticed away Mst. Mumtaz Mai and abandoned the village who returned to the village through the intervention of Panchaiyat with the condition that the deceased would give hand of their daughter Mst. Samrana to Noor Ahmad, brother of the complainant Mst. Allah Jewai and in this connection, Mst. Samrana and Noor Ahmad had been engaged whereafter Mst. Allah Jewai, complainant demanded Rukhsati which demand was put off by the deceased persons on one pretext or other, thus Noor Ahmad etc. had murdered Muhammad Akram and his wife Mst. Mumtaz Mai out of this grudge. He further stated in his version that the complainant is the relative of Ex-Federal Minister thus she for saving the skin of her brother etc. had falsely implicated the appellant in the case in hand. In order to adjudge this plea of the appellant, we have gone through the whole evidence available on the record. First of all, the plea so raised by the appellant is liable to be brushed aside simply on the ground that he did not appear as his own witness in the witness-box as required under Section 340(2), Cr.P.C. to disprove the allegations levelled against him and to prove judicially his own plea; secondly he did not opt to lead any evidence in his defence in this respect. According to the appellant's version, about 100-persons appeared before the investigating officer to prove his non-involvement in the case but the investigating officer did not join them in the investigation nor recorded their statements. Had it been so then there was no bar for the appellant to produce some of those 100-persons in the Court as his own witness to prove the facts alleged by him in his own statement. He has also not produced any witness from Panchaiyat who made possible return of the deceased persons to the village on the condition of giving hand of Mst. Samrana to Noor Ahmad, brother of the complainant. Same is the position with the fact of engagement ceremony solemnized in respect of the engagement of Mst. Samrana and Noor Ahmad. It appears that the appellant has just raised this plea to save his own skin by taking refuge of political influence, which link could not be established through any evidence. Since, the appellant has miserably failed to establish his own defence version, as such, the same is disbelieved and is repelled.

15. Reverting back to the merits of the prosecution case, we have noticed that the occurrence had taken place in the daylight at about 1.00 p.m. when the appellant alongwith some unknown persons trespassed into the house of the complainant and made firing upon Muhammad Akram, deceased firstly and then upon Mst. Mumtaz Mai. This FIR was registered at the Police Station within an hour, as such, the chance of false implication of the appellant stood ruled out automatically. Similarly, the presence of complainant Mst. Allah Jewai (PW.8) at the spot cannot be brushed aside lightly for the reason that admittedly she was residing with her husband in the same house and it was quite natural for her to be present there. The learned defence counsel objected that Zafar lqbal, PW.9 came later on but this objection cannot negate the presence of PW.8 at the place of occurrence in

whose view, two persons were killed brutally. This statement of eye-witnesses is duly authenticated by Dr. Noor Muhammad Saggu (PW.1) and Lady Dr. Aqeela Bano Quroshi (PW.6) by making their statements on oath in the Court providing details of the seat of injuries sustained by the deceased persons, as pointed out by the complainant and Zafar lqbal, PW in their testimonies. The statements so made by PW.8 and PW.9 do not suffer from any glaring contradiction who remained consistent about the appearance of the appellant in their house, raising Lalkara and firing at the deceased Muhammad Akram and when his wife Mst. Mumtaz Mai came forward to rescue her husband, he also fired at her. The fires were made upon Mst. Mumtaz Mai from a close range as is apparent from the statement of PW.6 who reported that the wound was having black margins and the edges were inverted. The post-mortem examination was also conducted without loss of time which fact further clears one's mind about the non-substitution of the appellant for the real culprits. The rifle .44-bore was also recovered at the instance of the appellant which fact also corroborates the testimonies of PW.8 and PW.9 as well as the medical evidence produced on the file. All these facts lead to the irresistible conclusion that it was that appellant who had killed both the deceased with him crime weapon. The learned trial Court has duly appreciated the evidence on all these facts and reached at a conclusion that it was the appellant who had killed Muhammad Akram and Mst. Mumtaz Mai.

16. When examined the record, we also find that the case of the prosecution on the fact of motive is not in line with the statement made by PW.8. In the FIR (Ex.PH) the motive for the occurrence has been mentioned that Nikah of Mst. Samrana, daughter of the deceased was solemnized with Jaffer but Mst. Samrana was not produced as a witness to prove this fact that her Nikah was solemnized with Jaffer nor the said Jaffer was produced in the Court to substantiate this fact. Similarly, the report of Forensic Science Laboratory (Ex.PV) also lends a little support to the prosecution case as according to the said report, three crime empties were sent for examination out of which one crime empty C3 had been fired from .44-bore while C1 crime empty had not been fired from the same rifle. The empty C2 was without percussion cap, therefore, no opinion was given about that empty. According to the contents of this report, it was to be explained by the prosecution that in-fact all the crime empties were fired from the crime weapon but no such explanation is (sic) prosecution evidence, we have no other option except to treat these facts as mitigating circumstances for commuting the sentence of death awarded to the appellant on two counts to the one imprisonment for life.

For what has been discussed above, we have no hesitation in dismissing this appeal with the modification that the death sentence awarded to the appellant Muhammad Nasir is commuted into one imprisonment for life on two counts while the remaining sentences awarded to the appellant shall remain intact. In this background, we do not confirm the sentence of death awarded to the appellant Muhammad Nasir on two counts and Murder Reference No. 150 of 2009 sent by the learned trial Court seeking confirmation of his death sentences is answered in the Negative. Benefit of Section 382-B, Cr.P.C. is also extended to the appellant.

(A.S.) Appeal dismissed.

PLJ 2014 Cr.C. (Lahore) 233 (DB)
[Multan Bench Multan]
Present: Mazhar Iqbal Sidhu and Syed Muhammad Kazim Raza Shamsi, JJ.
QASIM ALI alias QASI--Appellant
versus
STATE—Respondent

Crl. A. No. 277 of 2008 and M.R. No. 38 of 2009, heard on 11.9.2013.

Interested Witnesses—

----Mere relationship of the witnesses with the deceased is not sufficient ground for disbelieving their statements unless it is shown that the same were, not confidence inspiring--The defence failed to shake credibility of prosecution witnesses, therefore, it is held that the statements made by the eye-witnesses are trust worthy and are credible. [P. 238] A
2009 SCMR 825, ref.

Pakistan Penal Code, 1860 (XLV of 1860)—

----Ss. 302/34--Conviction and sentence--Challenge to--Qatl-e-Amd--Modification in sentence--As per report of the Forensic Science Laboratory it is reported that the weapon was in working condition--In view of this report of the expert, the recovery of the weapon at the instance of the appellant has become inconsequential, which cannot be taken into consideration--Similarly except bald allegation of having illicit relations of the mother of the complainant with the appellant there was nothing on tie file to suggest whether any action was taken against the appellant for having developed such relations--In this manner, it cannot be said that the prosecution has proved the fact of the motive against the appellant beyond any shadow of doubt--After examining the whole evidence on the record, that the prosecution by producing convincing and cogent ocular and medical evidence had established the guilt of the appellant beyond any shadow of doubt and the finding recorded by the Court on these factors do not suffer from any illegality warranting interference of High Court--However, the Court has proceeded to award excessive punishment to the appellant by imposing death penalty for the reason that the prosecution could not establish its case on the factum that the appellant had fired upon the deceased with the weapon, which was recovered at his instance, therefore, Court treat this circumstance as extenuating for commuting the sentence of death into imprisonment for life--Appeal was dismissed with the modification that sentence of death was commuted into one imprisonment for life. [P. 239] B & C
Prince Rehan Iftikhar Sheikh, Advocate/Defence Counsel for Appellant.
Malik Muhammad Jaffar, D.P.G. for State.
Nemo for Complainant.
Date of hearing: 11.9.2013.

JUDGMENT

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.--The appellant Qasim Ali alias Qasi was tried in case FIR No. 85/2006, dated 21.02.2006 registered under Sections 302/34, PPC with Police Station Luddan, Vehari for the charge of Qatl-i-Amd of one Tahir Abbas. The learned trial Court, after conclusion of the trial, vide judgment dated 31.10.2008 convicted the appellant under Section 302(b), PPC and sentenced to death as `Ta'zir' with a direction to pay Rs. 200,000/- to the legal heirs of deceased Tahir Abbas, as required by Section 544-A, Cr.P.C., and in default whereof to undergo six months simple imprisonment. Liaqal Ali and Raiz Ahmad co-accused were acquitted of the charge, which judgment of acquittal has attained finality qua acquitted persons as the same has not been challenged in appeal.

2. Murder Reference No. 38/2009 has been sent by the learned trial Court as required under Section 374, Cr.P.C. seeking confirmation of death sentence awarded to Qasim Ali alias Qasi appellant.

3. The appellant Qasim Ali alias Qasi being aggrieved of his conviction and sentence has transmitted his appeal (Crl. Appeal No. 277/2008) through jail authorities. The appeal is being disposed of alongwith Murder Reference No. 38/2009, by this single judgment.

4. The complainant Murtaza (PW.4) put the criminal machinery into motion by making statement (Ex.PE) before the police stating that he is a labourer by profession and was residing with his parents and brothers. In the intervening night of 20/21.02.2006 he alongwith his brother Tahir Abbas and other family members was sleeping when at 1.30 a.m (night) Qasim alias Qasi son of Ali Muhammad armed with gun .12-bore double barrel, LiaqatAli son of Ali Muhammad empty handed and Raiz son of Muhammad Hussain empty handed, caste Daultana, all residents of Shahid Colony Luddan trespassed into his house by scaling over the wall and knocked the door, upon which the complainant and his brother Tahir Abbas came out. Qasim alias Qasi asked them to call their mother Shahnaz Bibi otherwise he will shoot them. Imtiaz Mai `Bhabhi' of the complainant went to fetch ShahnazBibi from the house of her brother Talib Hussain where she was sleeping and when Shahnaz Bibi did not come, the accused Qasim alias Qasi started abusing. At hue and cry Talib Hussain and Allah Rakhah alongwith so many people rushed to the place of occurrence and within the view of all persons Qasim fired with his gun .12-bore double barrel which hit on left shoulder of Tahir Abbas due to which he fell on the ground and died at the spot. Thereafter the accused persons fled away.

The motive behind the occurrence was that the complainant and other family members were having doubts that the accused Qasim alias Qasi had illicit relation with their mother Mst. Shahnaz Mai due to which the accused was forbidden to visit the house of the complainant one month back and on account of this grudge the accused in furtherance of their common object had committed the murder of Tahir Abbas. Accordingly aforesaid FIR (Ex.PE/1) was recorded in the Police Station.

5. Muhammad Aslam, Sub-Inspector (PW.8) after recording the statement of complainant Murtaza Ex.PE handed it over to Niaz Ahmad Constable for registration of the FIR (Ex.PE/1). He visited the place of occurrence and seized bloodstained earth vide recovery memo. Ex.PF, prepared injury statement Ex.PC, inquest report Ex.PB and handed over the dead body of deceased Tahir Abbas to Mubarik Ali constable for postmortem examination.

He recorded the statements of the PWs under Section 161, Cr.P.C. He also prepared rough site plan Ex.PH. On transfer of PW.8, the investigations were subsequently entrusted to Muhammad Yaqoob Sub-Inspector (PW.6), IrshedHussain Sub-Inspector (PW.9) and Zafar Ullah Sub-Inspector (PW.13). The police completed usual investigations and submitted the challan to the Court where the accused were charge sheeted. The accused professed innocence and claimed trial.

6. The prosecution has examined as many as fifteen witnesses to prove the charge against the accused. The ocular account mainly consists upon the statements of PW.4 Murtaza (complainant), PW.5 Talib Hussain (eye-witness), PW.11 Mst. Imtiaz Mai (eye-witness) as well as statements of PW.6 Muhammad Yaqoob Sub-Inspector, PW.8 Muhammad Aslam Sub-Inspector, PW.9 Irshad Hussain Sub-Inspector and PW.13 Zafar Ullah, Sub-Inspector, who conducted investigations. The medical evidence is based upon the statement of Dr. Muhammad Anwar, Medical Officer, DHQ Hospital, Vehari (PW.2), who conducted post-mortem examination on the dead body of deceased Tahir Abbas and found the following injuries on his body:

"1. A lacerated wound (inlet) with black margins without outlet at the front and inner side of upper part of left upper arm and axilla 9.5 cm x 8.5 cm x going inwards, cross structions in front with fractures of third to fifth ribs, then pleura and ultimately to right lung. Both lungs were destroyed badly. This injury was with fire-arm and was ante-mortem."

In the opinion of Medical Officer, the death occurred due to cardiorespiratory failure and hemorrhage with Injury No. 1 caused by fire-arm weapon which was sufficient to cause death when applied in ordinary course of nature. The probable time between injury and death was immediately after Injury No 1 and between death and postmortem within 24 hours.

7. The prosecution closed its evidence by giving up Allah Rakha, Noor Muhammad and Fiaz Ahmad being unnecessary and by tendering report of Serologist Ex.PP, report of Chemical Examiner Ex.PQ and report of Forensic Science Laboratory Ex.PN.

8. The prosecution evidence so recorded was confronted to the Qasim Ali alias Qasi accused/appellant, who made his statement under Section 342, Cr.P.C. and while answering Question No. 9 "why this case against you and why the PWs have deposed against you?" has stated as under:--

"The case is false. The PWs have deposed against me falsely."

He while replying Question No. 10, "Have you anything else to say?" stated as under:-

"I am innocent. I have committed no offence. Actually the complainant and PWs have suspicion against me that I had illicit relations with the mother of the complainant Mst. Shahnaz Mai. It was a dark night occurrence. Some other body has committed this occurrence but due to that suspicion the complainant has falsely involved me and my brother Liaqat Ali. In this case Mst. Shahnaz Bibi also filed application before the SHO P.S Luddan that her son (Tahir Abbas) was murdered by Zafar son of Ismail, Mazher son of Sher Muhammad, Muhammad Hussain son of Sher Muhammad, Noor son of Sikander and

Irshad son of Zafar, all Daultana by caste and residents of TibbiDaultana Luddan, Talib Hussain PW brother of Shahnaz Bibi was also PW in the said application, so I have been falsely involved in this case."

9. The appellant neither opted to make statement under Section 340(2), Cr.P.C. to disprove the allegations levelled against him in the prosecution evidence nor produced any evidence in defence.

10. Learned counsel appearing on behalf of the appellant Qasim Ali argued that the prosecution has relied upon testimonies of closely related and interested witnesses to bring home the guilt of the appellant, which testimonies of the witnesses do not inspire confidence and are shaky in nature. He further contended that it was the occurrence, which had taken place in the dark night and the prosecution has not provided any source of light in which the appellant could be identified and that he has been implicated in the case falsely just on suspicion that he was having illicit relations with Mst. Shahnaz Mai, the mother of the deceased Tahir Abbas. The next contention of the learned counsel in this respect is that in-fact some other persons had committed the murder of Tahir Abbas in the dark pitched night but that murder has been planted upon the appellant through the instant crime report. He asserted that the prosecution has failed to establish the charge of murder of Tahir Abbas against the appellant by producing convincing and cogent evidence, therefore, learned trial Court had erred in convicting and sentencing the appellant. In this connection, learned counsel submitted that the weapon allegedly recovered at the instance of the appellant was sent to the ballistic expert wherefrom a report was received that the weapon was in working condition and it was not reported that any bullet was fired from this. He has also pointed out that the prosecution could not establish that the appellant was having any relation with the mother of the deceased thus the motive alleged against the appellant is shrouded in mystery and on this basis his conviction and sentence is illegal and liable to be set aside.

11. On the other hand, learned Deputy Prosecutor General submitted that within 40 minutes of the occurrence the FIR was registered at the Police Station and in this manner the substitution of the appellant for the real culprit is not in sight. He further added that PW.4, 5 & 11 in their testimonies have categorically and consistently deposed that it was the appellant, who had trespassed into their house with lethal weapon and when he could not trace out. Mst. Shahnaz Mai in the house he killed her son Tahir Abbas. He further argued that on the disclosure of the appellant crime weapon was recovered from the place where he had concealed that weapon, which corroborates the testimonies of the eye-witnesses as well as with the postmortem report furnished by PW.2 Dr. Muhammad Anwar.

12. We have emphatically considered the submissions made by the learned counsel for the parties and examined the record, which has led us to the genesis of the case that on the fateful night the appellant had trespassed into the house of the complainant and in the presence of the witnesses he had asked about Mst. Shahnaz Mai and when he could not get her, he killed her son Tahir Abbas. PW.4 Murtaza, PW.5 Talib Hussain and PW.11 Mst. ImtiazMai corroborated these facts in their testimonies, which statements were duly cross-examined by defence but the appellant failed to negate his presence at the spot at the time of occurrence. The witnesses are also consistent with the seat of injury and the weapon with which he was armed at that time.

13. The contention of the learned counsel for the appellant that the PWs were interested in his prosecution and were also closely related to each other, therefore, their testimonies are not trust worthy, is a sham argument as mere relationship of the witnesses with the deceased is not sufficient ground for disbelieving their statements unless it is shown that the same were not confidence inspiring. The defence failed to shake credibility of prosecution witnesses, therefore, it is held that the statements made by the eye-witnesses are trust worthy and are credible. In this respect we are fortified by judgment of Apex Court in the case of Talib Hussain Vs. the State (2009 SCMR 825).

14. The next objection of the learned counsel that the appellant has been substituted with the real culprits is also ill-founded for the simple reason that the appellant was known to the complainant side as the appellant was, as per evidence, frequent visitor of their house from which visits he was restrained, which became the cause for the murder of Tahir Abbas. It is a case in which the FIR was registered within 40 minutes of the occurrence, which fact also negates the objection raised by the learned counsel for the appellant.

15. The other contention of the learned counsel for the appellant that Mst. Shahnaz Mai had changed the culprits of the incident by moving an application Marks DA to the SHO of the Police Station is without force for the reason that the Investigating Officer PW.8 Muhammad Aslam has refuted that any application was made by the lady. The application available on the record when examined, it is found that in that application there is no clear allegation against nominated persons for the murder of her son, rather is stated therein that the persons mentioned in the application were restraining applicant from the prosecution of the murder case of her son, which allegation tend to show that in-fact the persons mentioned in the application had not killed Tahir Abbas, rather they were merely attempting to restrain her from the prosecution of that case, which case had already stood registered at the Police Station. Even if this application moved by Mst. Shahnaz Mai is accepted as correctly filed by her then also no further action was taken upon that application by any authority, where-after that lady did not file private criminal complaint or for that matter appear in the Court as Court witness to state that the appellant was not the real culprit and other persons nominated by her were her accused. She did not appear in the Court nor had filed any complaint in this respect, therefore, the application, if any, had no bearing on the merits of the instant case.

16. PW.13 Zafar Ullah Sub-Inspector on 29.9.2006 had arrested the appellant, who had already been declared proclaimed offender and on his disclosure and pointation gun .12 bore double barrel was recovered from his residential room which weapon subsequently was sent to Forensic Science Laboratory for determination whether the fire was made from the same or not. As per report of the Forensic Science Laboratory Ex.PN it is reported that the weapon was in working condition. In view of this report of the expert, the recovery of the weapon at the instance of the appellant has become inconsequential, which cannot be taken into consideration. Similarly except bald allegation of having illicit relations of the mother of the complainant with the appellant there is nothing on the file to suggest whether any action was taken against the appellant for having developed such relations. In this manner, it cannot be said that the prosecution has proved the fact of the motive against the appellant beyond any shadow of doubt.

17. After examining the whole evidence on the record, we have reached at a conclusion that the prosecution by producing convincing and cogent ocular and medical evidence had established the guilt of the appellant beyond any shadow of doubt and the finding recorded by the Court on these factors do not suffer from any illegality warranting interference of this Court. However, the Court has proceeded to award excessive punishment to the appellant by imposing death penalty for the reason that the prosecution could not establish its case on the factum that the appellant had fired upon the deceased with the weapon, which was recovered at his instance, therefore, we treat this circumstance as extenuating for commuting the sentence of death into imprisonment for life.

18. For what has been discussed above, the appeal in hand stands dismissed with the modification that the sentence of death awarded to the appellant Qasim Ali alias Qasi is commuted into one imprisonment for life while remaining sentences inflicted upon the appellant shall remain intact. The appellant shall be entitled for the benefit of Section 382-B, Cr.P.C. In this background, we do not confirm the sentence of death awarded to the appellant Qasim Ali alias Qasi and Murder Reference No. 38/2009 sent by the learned trial Court seeking confirmation of his death sentence is answered in NEGATIVE.

(A.S.) Appeal dismissed.

PLJ 2014 Cr.C. (Lahore) 277

Present: Syed Muhammad Kazim Raza Shamsi, J.
MUHAMMAD NAWAZ--Petitioner
versus
STATE, etc.—Respondents

Crl. Misc. No. 7687-B of 2013, decided on 28.6.2013.

Criminal Procedure Code, 1898 (V of 1898)—

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 365-B--Bail, grant of--Allegation of--Abduction--Brother of the petitioner as per record had contracted marriage with Mst. "I" and in this connection a Nikahnama was executed--This execution of the Nikahnama absolved the petitioner from the liability of abduction of the victim--Not only the Nikahnama, the victim had also lodged a private criminal complainant in which she made a statement admitting her Nikah with "M"--It appears that subsequently when the victim joined her family she had resiled from her Nikah and made statement under Section 164, Cr.P.C. in this connection--Victim of the case had taken contradictory versions as stated above, which have made the case of the petitioner as one of further inquiry entitling him for the grant of bail. [P. 278] A

Mr. Shahid Ali Shakir, Advocate for Petitioner.
Mr. Muhammad Ishaque, DPG with for State.
Mr. Muhammad Sarwar Awan, Advocate for Complainant.

Date of hearing: 28.6.2013.

Order

Muhammad Nawaz petitioner seeks his release on bail in case FIR No. 278, dated 8.5.2013, registered under Section 365-B, PPC with Police Station Samanabad, District Faisalabad, having an allegation that he had enticed away Mst. Iqra, daughter of the complainant.

2. Parties heard and record perused.

3. Muhammad Asif, brother of the petitioner Muhammad Nawaz, as per record had contracted marriage with Mst. Iqra on 6.5.2013 and in this connection a Nikahnama was executed. This execution of the Nikahnama absolved the petitioner from the liability of abduction of the victim. Not only the Nikahnama, the victim had also lodged a private criminal complaint in which she made a statement admitting her Nikah with Muhammad Asif. It appears that subsequently when the victim joined her family she had resiled from her Nikah and made statement under Section 164, Cr.P.C. in this connection. The victim of the case had taken contradictory versions as stated above, which have made the case of the petitioner as one of further inquiry entitling him for the grant of bail.

4. In view of the above, the petition is allowed and Muhammad Nawaz petitioner is admitted to bail on furnishing of bail bonds in the sum of Rs. 50,000/- (Rupees Fifty Thousand only) with one surety in the like amount to the satisfaction of the learned trial Court.

(A.S.) Bail granted.

PLJ 2014 Cr.C. (Lahore) 373
[Multan Bench Multan]
Present: Syed Muhammad Kazim Raza Shamsi, J.
MUHAMMAD KHALID & 2 others--Petitioners
versus
STATE and another—Respondents

Crl. Misc. No. 5984-B of 2013, decided on 15.1.2014.

Criminal Procedure Code, 1898 (V of 1898)—

----S. 498--Pakistan Penal Code, (XLV of 1860), Ss. 452, 448, 511, 148 & 149--Bail before arrest--Confirmed--Allegation of trespass--Allegation of trespassing into the house of the complainant has been disbelieved by the police so offence under Section 452, PPC has been deleted meaning thereby that the stance of the petitioners that they were the owners of the house in dispute has been accepted--When, it is so on the record then charging of offence under Section 448, PPC against the petitioners needs detailed probe--It also goes without saying that all the family members have been involved in the case in hand which fact speaks a lot about the mala fide of the complainant of the case, this malice on the part of the

complainant for falsely implicating the petitioners in the case in hand, this petition was allowed and interim pre-arrest bail already granted to the afore-noted petitioners was confirmed. [Pp. 373 & 374] A

Ch. Muhammad Shafiq, Advocate with Petitioners.
Ch. Muhammad Akbar, Deputy Prosecutor General for State.
Date of hearing: 15.1.2014.

Order

The petitioners Muhammad Khalid and others had purchased the property subject matter of the instant case from one Mst. Kashi Fazal and the complainant Mushtaq Ahmad being cousin of said lady claiming that property as his own, had made an allegation against the petitioners for attempting to dispossess him from the place vide FIR No. 413/2013 which was registered at Police Station Tulamba District Khanewal under Sections 452, 448, 511, 148, 149, PPC.

2. After having heard learned counsel for the parties and perusing the record, it is found that the allegation of trespassing into the house of the complainant has been disbelieved by the police so offence under Section 452, PPC has been deleted meaning thereby that the stance of the petitioners that they are the owners of the house in dispute has been accepted. When, it is so on the record then charging of offence under Section 448, PPC against the petitioners needs detailed probe. It also goes without saying that all the family members have been involved in the case in hand which fact speaks a lot about the mala fide of the complainant of the case, Keeping in view this malice on the part of the complainant for falsely implicating the petitioners in the case in hand, this petition is allowed and interim prearrest bail already granted to the afore-noted petitioners is confirmed subject to their furnishing 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 learned trial Court.

(A.S.) Bail confirmed.

PLJ 2014 Cr.C. (Lahore) 447
Present: Syed Muhammad Kazim Raza Shamsi, J.
AURANGZEB--Petitioner
versus
STATE and another—Respondents

Crl. Misc. No. 13860-B of 2013, decided on 27.11.2013.

Criminal Procedure Code, 1898 (V of 1898)—

----S. 498--Pakistan Penal Code, (XLV of 1860), Ss. 379, 148, 149, 382 & 440--Pre-arrest bail--Confirmed--Matter in dispute was related to land and petitioner appeared to be co-owner with complainant of case whereas property in dispute was still undivided between

parties--Since petitioner was also an owner of every inch of joint land, therefore, offence as alleged in FIR was not made out until and unless property was partitioned--In this manner petitioner is found entitled for concession of bail as such ad-interim pre-arrest bail already granted to petitioner. [P. 448] A

Mr. A.D Bhatti, Advocate for Petitioner.
Mr. Muhammad Ishaque, DPG for State.
Mr. Ghulam Mustafa Ch. Advocate for Complainant.
Date of hearing: 27.11.2013.

Order

Aurangzeb petitioner was held disentitled for the relief of bail by the learned Addl. Sessions Judge, Nankana Sahib on the ground that he had participated in the occurrence and his co-accused Mushtaq and 3 others were admitted to bail although they were also nominated for the same offence of depriving the complainant from the wheat crop. In this connection case FIR. No. 351/2013, was registered at Police Station Mangtanwala, District Nankana Sahib under Sections 379, 148, 149, 382 & 440, PPC, in which case the petitioner prays for anticipatory bail.

2. The complainant of the case Walayat Ali has also prays for cancellation of the bail granted to Mushtaq and others by filing separate Crl. Misc. No. 15946-BC/2013, which is being disposed of through this order.

3. After having heard the learned counsel for the parties and perusing the record, it is found that the matter in dispute is related to the land and Aurangzeb petitioner appears to be co-owner with the complainant of the case whereas the property in dispute is still undivided between the parties. Since the petitioner is also an owner of every inch of joint land, therefore, the offence as alleged in the FIR is not made out until and unless the property is partitioned. In this manner the petitioner is found entitled for the concession of bail as such ad-interim pre-arrest bail already granted to the petitioner Aurangzeb is confirmed on furnishing of bail bonds in the sum of Rs.50,000/- (Rupees Fifty Thousands only) with one surety in the like amount to the satisfaction of learned trial Court whereas on the same rationale the petition filed by Walayat Ali complainant seeking cancellation of bail granted to Mushtaq and others is disposed of.

(A.S.) Bail confirmed.

PLJ 2014 Cr.C. (Lahore) 464
[Multan Bench Multan]
Present: Sardar Muhammad Shamim Khan, J.
MUHAMMAD USMAN--Petitioner
versus
STATE and another—Respondents
Crl. Misc. No. 4195-B of 2013, decided on 8.10.2013.

Criminal Procedure Code, 1898 (V of 1898)—

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 496-A & 376--Bail, grant of--Allegation of committing zina-bil-jabr with abductee at different places--Factum of marriage was admitted--Genuineness of nikahnama--Delay of two months and seven days--Abductee contracted marriage out of her own free will with accused--Contention of affidavit--She was not abducted by any body rather she was going to marry with accused out of her own free will--Suit for restitution of conjugal rights and suit for jactition of marriage were pending before Family Courts--Further inquiry--Held: According to the version of the complainant she was taken to different places by the accused persons but she did not raise any hue and cry at any public place--The petitioner was arrested and he was behind the bar for a period of more than five months--Petition was accepted and petitioner was admitted to post arrest bail. [P. 467] A & B

Rana Asif Saeed, Advocate for Petitioner.
Mr. Hassan Mahmood Khan Tareen, D.P.G. for State.
Haji Muhammad Tariq Aziz Khokhar, Advocate for Complainant.
Date of hearing: 8.10.2013.

Order

Muhammad Usman petitioner seeks post arrest bail in a case registered against him vide F.I.R No. 437/2012 dated 05.12.2012, offences under Sections 496-A/376, PPC at P.S. Sara-e-Sidhu District Khanewal.

2. According to the FIR, on 28.09.2012 at about 8/9:00 p.m., Muhammad Usman petitioner alongwith other co-accused Muhammad Bilal, Muhammad Azhar and Abid abducted Mst. Rashida Bibi complainant and took her to the house of one Gul Muhammad. It has further been alleged in the FIR that Muhammad Usman (petitioner), Azhar and Abid kept on committing Zina bil Jabr with her at different places. Hence, instant FIR was registered.

3. Learned counsel for petitioner contended that there was an extra ordinary delay of two months and seven days in lodging the FIR; that in-fact on 29.09.2012 Mst. Rashida Bibi alias Asia Bibi the alleged abductee contracted marriage, out of her own free will, with the petitioner and Nikahnama was duly registered at concerned union council; that before contracting marriage with the petitioner Mst. Rashida Bibi alias Asia Bibi sworn an affidavit contending therein that she was not abducted by any body rather she was going to marry with Muhammad Usman, out of her own free will; that Mst. Rashida Bibi alias Asia Bibi filed a private complaint titled "Mst. Asia Bibivs. Muhammad Ramzan etc." for the offences under Sections 452/506, PPC against her father and brothers wherein factum of her Nikah with the petitioner was admitted by her; that Mst. Rashida Bibi alias Asia Bibicomplainant also filed an application before learned Magistrate Khanewal, for lodging her at Dar ul Aman (women) Khanewal, wherein no allegation of abduction and Zina-bil-Jabr was levelled against the petitioner; that petitioner has filed a suit for restitution of conjugal rights against Mst. Rashida Bibi whereas Mst. Rashida Bibi alias Asia Bibi has filed a suit for jactitation of marriage against the petitioner which are pending adjudication

before learned Judge Family Court concerned; that petitioner was arrested in this case on 18.04.2013 and he is behind the bar since his arrest. Thus, it is submitted that by accepting this petition petitioner is entitled to be released on bail.

4. Learned DPG and learned counsel for the complainant have opposed this petition on the grounds that petitioner was nominated in the FIR; that there was specific allegation against the petitioner that he alongwith other co-accused nominated in the FIR forcibly abducted Mst. Rashida Bibi and kept on committing Zina-bil-Jabr with her at different places; that complainant/victim had already contracted Nikah with one Qamar Abbas; that during investigation petitioner was declared guilty by the police; that the offences alleged against the petitioner come within the purview of prohibitory clause of Section 497 Code of Criminal Procedure. Thus, it is submitted that petitioner is not entitled to be released on bail.

5. I have heard the arguments advanced by the learned counsel for parties and perused the record with care.

6. It has been noticed that the alleged occurrence took place on 28.09.2012 whereas the matter was reported to the police on 05.12.2012 with an extra ordinary delay of two months and seven days for which no proper explanation has been furnished by the complainant. Surprisingly after the alleged abduction of Mst. Rashida Bibi alias Asia Bibi her parents did not lodge FIR at Police Station. Copy of Nikahnama duly registered at concerned union counsel has been placed on the record which shows that on 29.09.2012 Mst. Rashida Bibi alias Asia Bibi contracted marriage with Muhammad Usman petitioner and on the same day before contracting marriage she sworn an affidavit contending therein that she was not abducted by any body and she was going to contract marriage out of her own free will, with Muhammad Usman petitioner. Mst. Rashida Bibi alias Asia Bibi filed a private complaint titled "Mst Asia Bibi vs. Muhammad Ramzan etc." for the offences under Sections 452/506, PPC against her parents and other family members and on the same day i.e. 22.10.2012 her statement was recorded by the learned Magistrate wherein she admitted the factum of her marriage with the petitioner. In her said statement, she categorically contended that she was not abducted by any of the accused. Mst. Rashida Bibi alias Asia Bibicomplainant filed an application before learned Magistrate Khanewal, for lodging her at Dar ul Aman (women) Khanewal, wherein she categorically admitted that Muhammad Usman petitioner was her husband and that she was not abducted by any of the accused. Muhammad Usman petitioner has filed a suit for restitution of conjugal rights against Mst. Rashida Bibi whereas Mst. Rashida Bibi alias Asia Bibi has filed a suit for jactitation of marriage against the petitioner and both the aforementioned suits are pending adjudication before learned Judge Family Court Khanewal. Learned Judge Family Court after recording evidence of both the parties would come to the conclusion regarding genuineness or otherwise of Nikahnama of the petitioner with Mst. Rashida Bibi alias Asia Bibi. It has further been noticed that according to the version of the complainant she was taken to different places by the accused persons but she did not raise any hue and cry at any public place. The petitioner was arrested in this case on 18.04.2013 and he is behind the bar for a period of more than five months.

7. For what has been discussed above, case of the petitioner comes within the ambit of further inquiry, therefore, instant petition is accepted and petitioner is admitted to post

arrest bail subject to his furnishing bail bonds in the sum of Rs.200,000/- (Rupees two lac only) with one surety in the like amount to the satisfaction of the learned trial Court.

(R.A.) Bail accepted.

PLJ 2014 Cr.C. (Lahore) 472 (DB)
Present: Sayyed Mazahar Ali Akbar Naqvi and Syed Muhammad Kazim Raza Shamsi, JJ.
TANVEER AHMAD & another--Appellants
versus
STATE & others—Respondents

Crl. A. No. 1554 of 2010, M.R. No. 389 of 2010 and Crl. Misc. No. 2701-M of 2012, decided on 8.4.2014.

Pakistan Penal Code, 1860 (XLV of 1860)—

----S. 302(b)--Conviction and sentence--Challenge to--Modification in sentence--Legal heirs of deceased with their free will and own volition had arrived at a compromise with accused--Although the legal heirs of deceased had forgiven accused had compounded offence falling u/S. 302(b), PPC but a non-compoundable offence u/S. 392, PPC was also charged against them, under which appellants were convicted and sentenced; so that compromise cannot be read in terms of S. 392, PPC--Section 392, PPC provided minimum sentence of three years whereas had served more than five years of their sentence, therefore, in view of compromise between the parties and that legal heirs had been compensated, the period of sentence which appellants had served out might meet ends of justice--Interest of minors had been well safeguarded and widow has also received her share as Badl-i-Suleh, therefore, sentences to one undergone were modified. [Pp. 474 & 475] A

Sardar Faiz Rasool Jalbani, Advocate for Appellants.
Mirza Abid Majeed, D.P.G. for State.
Date of hearing: 8.4.2014.

JUDGMENT

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.--The accused Tanveer Ahmad son of Jumma Khan and Irfan Ali son of Rehmat Ali, were tried in case FIR No. 112 dated 4.7.2009 registered under Sections 392, 302, 411 & 34, PPC with Police Station Ahmad Abad, District Narowal by learned Additional. Sessions Judge, Narowal who vide his judgment dated 9.6.2010, convicted the appellants as under:--

Tanveer Ahmad: convicted under Section 392, PPC and sentenced to fourteen (14) years rigorous imprisonment, find to pay fine of Rs.20,000/-, in default of payment, to further undergo two months simple imprisonment.

Under Sections 302(b) & 34, PPC convicted as Ta'zir and sentenced to Death for committing Qatl-i-Amd of Muhammad Ashfaq deceased, further burdening him with compensation of Rs. 1,00,000/- to be paid to the legal heirs of deceased Muhammad Ashfaq as required by Section 544-A, Cr.P.C. and in default of the payment of the amount, he was directed to further undergo six months simple imprisonment.

Irfan Ali: convicted under Section 392, PPC and sentenced to fourteen (14) years rigorous imprisonment, further burdening him to pay fine of Rs.20,000/-, in default of payment of fine, to further undergo two months simple imprisonment.

Under Sections 302(b) & 34, PPC convicted as Ta'zir and sentenced to imprisonment for life for committing Qatl-i-Amd of Muhammad Ashfaq, deceased, further burdening him with compensation of Rs. 1,00,000/- to be paid to the legal heirs of deceased as required by Section 544-A, Cr.P.C. and in default of the payment of the amount, he was directed to further undergo six mouths simple imprisonment.

Benefit of Section 382-B, Cr.P.C. has been extended in favour of both the accused.

All the sentences were ordered to run concurrently.

Both the accused were acquitted from the charge of Section 411, PPC.

Murder Reference No. 389/2010 was sent to this Court for the confirmation of death sentence awarded to the appellant Tanveer Ahmad.

3. The appellants Tanveer Ahmad and Irfan Ali, have challenged their convictions and sentences by filling Criminal Appeal No. 1551 of 2010, wherein they have filed Crl. Misc. No. 2701-M-2012 under Section 345, Cr.P.C. seeking permission to compound the offences. The criminal miscellaneous along with the documents was sent to the learned Sessions Judge, Narowal for verification of legal heirs of deceased and the compromise entered into between the parties.

4. The learned Sessions Judge, Narowal has sent a report on 15.11.2012, mentioning that Muhammad Ashfaq, deceased survived by Raheela Bibi (widow), Muhammad Usman aged 14-years, Muhammad Afzaan aged 12-years, Abdul Rehman aged 7-years (minor sons), Neha Ashfaq, aged 10-years and Esha Ashfaq aged 8-years (minor daughters) of deceased. The legal heirs of the deceased were identified by SHO Police Station Ahmad Abad and Tehsildar concerned Halqa. Mst. Raheela Bibi (widow) of the deceased made her statement in the Court to the effect that she had pardoned the appellants Tanveer Ahmad and Irfan Ali in the name of Allah Almighty in lieu of Badl-e-Suleh amounting to Rs. 13,00,000/- and has waived her right of Qisas. She further deposed in her statement that she has received compensation amount to her extent to the tune of Rs. 1,62,500/- and has no objection on the acquittal of the accused of the case. Mst. Raheela Bibi, mother of the minor legal heirs also made her statement on their behalf and received Rs. 2,84,385/- and Rs. 1,42,500/- for each minor son and daughter, respectively as Diyat amount in the form of Defence Saving Certificates and has shown no objection on appellants acquittal from the case. After recording the Statement of the widow, the learned Sessions Judge was of the opinion that the widow of Muhammad Ashfaq deceased had voluntarily forgiven the appellants and had

entered into compromise without any duress and coercion, on her own behalf and on behalf of minor legal heirs of deceased Muhammad Ashfaq.

5. Learned Deputy Prosecutor General has also perused the report submitted by the learned Sessions Judge, Narowal and has shown no objection on the grant of permission to compound the offence and acquittal of the appellants Tanveer Ahmad and Irfan Ali. However, he argued that the appellants have further been convicted and sentenced under Section 392, PPC which offence is non-compoundable, therefore, compromise between parties cannot be given effect in respect of this offence.

6. We have also examined the report sent by the learned Sessions Judge, Narowal and are of the view that the legal heirs of deceased Muhammad Ashfaq, with their free will and own volition had arrived at a compromise with the appellants which apparently, is not the result of any coercion and undue influence. Although the legal heirs of deceased Muhammad Ashfaq, have forgiven the appellants and have compounded offence falling under Section 302(b), PPC but a non-compoundable offence i.e. under Section 392, PPC was also charged against them, under which appellants were convicted and sentenced; so this compromise cannot be read in terms of Section 392, PPC. Learned counsel facing with this situation, submitted that Section 392, PPC provided minimum sentence of three years whereas appellants have served more than five years of their sentence, therefore, in view of compromise between the parties and that legal heirs have been compensated, the period of sentence which appellants have served out may meet ends of justice. The submission so made by learned counsel has substance that interest of minors have been well safeguarded and widow has also received her share as Badl-i-Suleh, therefore, we intend to maintain conviction of appellants under Section 392, PPC but modify their sentences to one undergone by them up-till now. In the circumstances, Crl. Misc. No. 2701-M/2012, is accepted and Criminal Appeals No. 1554 of 2010, is allowed to the extent of charge under Section 302(b), PPC with the result that conviction and sentence awarded to the appellants Tanveer Ahmad and Irfan Ali by the learned trial Court, is set aside and they are acquitted of the charge of murder of Muhammad Ashfaq deceased. however, their conviction under Section 392, PPC is maintained and to this extent appeal is dismissed; however, sentence awarded under Section 392, PPC is modified to one which appellants have served out. They shall be entitled to benefit of Section 382-B, Cr.P.C. Remaining sentence in respect of fine is maintained.

7. Death sentence of the appellant convict Tanveer Ahmad is Not confirmed and Murder Reference No. 389/2010 is answered in the Negative.

(A.S.) Order accordingly.

PLJ 2014 Cr.C. (Lahore) 531 (DB)

Present: Sayyed Mazahar Ali Akbar Naqvi and Syed Muhammad Kazim Raza Shamsi, JJ.

SHAUKAT ALI & others--Appellants

versus

STATE, etc.—Respondents

Crl. Appeal No. 257-J of 2010 and M.R. No. 417 of 2010, heard on 9.4.2014.

Criminal Procedure Code, 1898 (V of 1898)—

----S. 302(b)--Conviction and sentence--Challenge to--Quantum of sentence--Modification in sentence--Quantum of sentence awarded by trial Court to appellant was concerned, that prosecution, although, had alleged that deceased had some quarrel with appellant some days prior to occurrence over flying kites but none of witnesses had uttered a word about this fact--Appellant had also made an allegation against PW, husband of lady that he had killed his wife--In this scenario, there were two versions on file in respect of motive part of occurrence which tend to show that prosecution has not clearly led evidence in support of its charge over quarrel between deceased and appellant nor defence has placed on record any evidence in support of this fact, so what happened immediately before occurrence is not evident from record--It was on file that appellant was having some liaison with deceased lady and if, it is so, then it was prosecution to establish as to why appellant had taken such a drastic step of killing lady--Since, this factor has not been answered by prosecution in so many words, so what was in mind of appellant at time of commission of offence, cannot be ascertained with certainty--Similarly, other factor that co-accused of appellant, have been acquitted on basis of exoneration made from complainant side, infliction of death sentence upon appellant seems to be harsh and would not be in accordance with spirit of law--Death sentence of appellant commuted into one imprisonment for life. [P. 538] A

Ms. Nighat Saeed and Mr. Maqbool Ahmad Qureshi, Advocates Counsel for Appellant.
Sardar Faiz Rasool Jalbani, Advocate for Complainant.
Mirza Abid Majeed, Deputy Prosecutor General for State.
Date of hearing: 9.04.2014.

JUDGMENT

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.--The appellant Shaukat Ali son of Faroze Din, aged about 29-years was tried by the learned Additional Sessions Judge, Ferozewala District Sheikhupura in case FIR No. 185, dated 04.04.2005, registered under Sections 302, 34, PPC (later on Section 452, PPC was added) at Police Station Ferozewala District Sheikhupura for committing Qatl-i-Amd of one Mst. Yasmin Kanwal, wife of the complainant. The learned Court, at conclusion of the trial, vide judgment dated 25.05.2010, convicted the appellant Shaukat Ali, under Sections 302(b)/34, PPC and sentenced him to Death with a direction to pay Rs.100,000/- as compensation to the legal heirs of deceased, as required by Section 544-A, Cr.P.C., and in default whereof to suffer six months simple imprisonment.

2. Murder Reference No. 417/2010 has been sent by the learned trial Court, as required under Section 374, Cr.P.C., seeking confirmation of death sentence awarded to the appellant Shaukat Ali.

3. Being aggrieved of the findings of learned trial Court, the appellant Shaukat Ali, has challenged his conviction and sentence by filing Crl. Appeal No. 257 of 2010 through jail authorities, which is being disposed of alongwithaforesaid Murder Reference by this single judgment.

4. Ikram Siddique, complainant (PW.4) set into motion the criminal machinery by making his statement (Ex.PC) on 04.04.2005, before Ashiq Ali, (PW.10) Inspector of Police Station Ferozewala District Sheikhupura, who was on patrolling duty at Barkat Town, in which he stated that he runs a printing shop at Urdu Bazar, Lahore and on the fateful day, at 4:00/5:00 P.M., on receiving a phone call, when he reached his house, he found his relatives Khalil Ahmad and Tanvir Hussein, waiting for him and they told him that they both were present in the house of complainant when Shaukat Ali (appellant), Muhammad Shahid as well as Muhammad Sharif, all armed with Chhurries and Feroze Din, armed with sota, forcibly entered into his (complainant's) house; that Shaukat Ali, appellant made a Chhurri blow on the left side of the chest of Mst. Yasmin Kanwal, Muhammad Shahid made his Chhurri blow on the chest of the lady; similarly, Muhammad Sharif made Chhurri blows on different parts of the lady and Feroze Din, gave a sota blow on the person of Mst. Yasmin Kanwal, who succumbed to the injuries at the spot.

5. The motive for the occurrence, as narrated by the complainant, was that 4/5 days prior to the occurrence, when the aforesaid persons were flying kites on their roof, the deceased Mst. Yasmin Kanwal, refrained them upon which some quarrel took place between them.

6. During the course of investigations accused Muhammad Shahid, Feroze Din and Muhammad Sharif were declared innocent whereas Shaukat Ali, appellant was found guilty of the charge of murder of Mst. Yasmin Kanwal, accordingly report under Section 173, Cr.P.C., was submitted to Court where the charge was framed against all the accused persons to which they did not plead guilty and claimed trial.

7. When trial proceedings were in the way, on 12.9.2007, Muhammad Ikram, complainant of the case and Mst. Jamila Bibi, mother of the deceased, made their statements before the learned trial Court deposing that accused Muhammad Sharif, Feroze Din and Muhammad Shahid were not their accused, so they had no objection on their acquittal, upon which statements, the learned trial Court, vide order dated 27.10.2007, acquitted the aforementioned accused of the charge.

8. The prosecution in order to prove the charge against the accused Shaukat Ali, had examined as many as twelve witnesses. The ocular account consists upon the statements of the complainant Ikram Siddique (PW.4) and eye-witnesses Khalil Ahmad as well as Tanvir Hussain (PW.2 and PW.3), who deposed about the crime scence, Munawar Hussain, constable (PW.1) escorted the dead body for postmortem examination and thereafter had received the last worn clothes of the deceased; PW.5, Asghar Ali, ASI, drafted the FIR; Naseer Ahmad, Constable as well as Muhammad Khan, Constable (PW.6 and PW.9), the witnesses of recovery of Chhurri (P-5); PW.7 Ch. Hamid-ud-Din Chisti, prepared the scaled

site-plan, Ali Hussain, PW.8 identified the dead body at the time of postmortem examination; PW.11, Asghar Ali, ASI/Moharrar, kept the case property in his custody and Shahbaz Ahmad, PW.12, is Ward Body who identified the handwriting on the postmortem examination report as the lady Doctor Ms. Nuzhat Jabeen, who conducted autopsy over the dead body of Mst. Yasmin Kanwal, was not present at that time while PW.10, Ashaq Ali, Inspector/Investigating Officer deposed about the investigations conducted by him. The lady Doctor Ms. Nuzhat Jabeen, who conducted the postmortem examination on the dead body of deceased Mst. Yasmin Kanwal found following injuries on her person:--

"1. An incised wound 3 X 1/2 cm on right eyebrow bone deep on outer aspect.

2. 3 X 2 cm incised penetrating wound on left nipple of breast penetrated into chest cavity.

3. 3 X 2 cm incised on left medial side of breast 3 cm lateral to midline.

4. 6 X 2 cm incised wound on front and mid of chest in the middle of left and right breast.

5. 7 X 5 cm area on left anterior, posterior and lateral aspect of deltoid region.

6. 1 X 1 1/2 cm incised wound on left post axillary line of chest 9 cm below left axilla bone deep.

7. 1 1/2 X 1 cm incised wound penetrating into chest cavity perfuse blood is coming out in the same line and 9 cm below the Injury No. 6.

8. 2 X 1 cm incised wound going deep and down into left buttock.

9. 2 X 1/2 cm incised wound on the front and upper side of chest in midline at Membrane bone deep."

In her opinion, the death was occurred due to shock and haemorrhage, which was by the collective effect of all above injuries, particularly, Injuries No. 2 and 7. These all were ante mortem in nature and caused by sharp weapon. It was sufficient to cause death in ordinary course of nature. The probable time between injuries and death was immediate to 1/2 hour while between death and postmortem was within 12 hours.

9. The prosecution closed its evidence by tendering the report of Chemical Examiner regarding weapon of offence i.e. Chhurri Ex.PK and report of Chemical Examiner regarding bloodstained earth Ex.PL.

10. The prosecution evidence so recorded was confronted to Shaukat Ali, accused/appellant, who made his statement under Section 342, Cr.P.C. and while replying to a question "Why this case has been registered against you and why PWs have deposed against you?" stated as under:--

"deceased Yasmin wanted to marry with him but her parents got her married with Ikram, PW without her wishes. Due to this reason, relations between the deceased Yasmin and Ikram remained strained constantly. The deceased demanded divorce from Ikram, PW time

and again as she could not live with him happily. This factum created grudge and enmity on part of Ikram, PW as well as family members of deceased against him considering that he was the bone of discard between them. On the fateful day, quarrel arose between deceased and Ikram, PW on her demand of divorce. This infuriated Ikarm, PW who in heat of passion, gave successive Chhurri blows to Yasmin, deceased, resulting in her death."

11. The appellant did not opt to make statement under Section 340(2), Cr.P.C. to disprove the allegations levelled against him in the prosecution evidence.

12. Learned trial Court after hearing the arguments of the parties convicted and sentenced the appellant Shaukat Ali, in the aforementioned terms.

13. Learned counsel for the appellant has opened the case with the submissions that it is a case in which four persons, namely, Muhammad Shahid, Feroze Din, Muhammad Sharif and Shaukat Ali, have been shown armed with Chhurries and sota who, in prosecution of their common object, inflicted various injuries on the body of Mst. Yasmin Kanwal, deceased of the case but during the investigations of the case, the mother of the deceased, namely, Mst. Jamila and PW.A had filed affidavits before the Investigating Officer, exonerating Muhammad Sharif, Muhammad Shahid and Feroze Din from the charge of murder of Mst. Yasmin Kanwal by stating that these three persons had not participated in the occurrence. According to the learned counsel, on the statements made before the Court, all the above three persons were acquitted from the charge of murder of Mst. Yasmin Kanwal. It is the argument of learned counsel that in view of exoneration of three accused persons, who were attributed specific injuries in the crime report, the case of appellant is on better footing than his co-accused, as only single blow to deceased was attributed, so in this background, the evidence led by the prosecution to establish the charge cannot be relied upon to convict appellant. He submitted that according to the crime report, Muhammad Shahid, accused had inflicted injury with the Chhurri on the body of deceased whereas Muhammad Sharif had also caused several injuries to the deceased lady but they had not faced trial in the Court rather on the statements of mother and husband of the deceased, were acquitted from the charge. Maintained that the prosecution has badly failed to establish that the appellant was present at the place of occurrence, armed with chhurri and had caused any injury to the deceased; according to the learned counsel, the statements made by PWs 2 to 4 in this respect, suffer from material contradictions, thus no safe reliance can be placed thereon. It is the stand of the appellant that in-fact, the deceased lady wanted to marry the appellant and had demanded divorce from her husband who had got infuriated and killed his wife himself and in this manner, the appellant has falsely been implicated in the case in hand. It is further maintained that the motive for the occurrence stated in the FIR is that the deceased had a quarrel with the appellant a few days prior to the occurrence over kites flying and appellant, in order to vindicate his revenge, had killed the lady according to the learned, has not been proved by the prosecution through the statements of witnesses. He has also challenged the factum of recovery of the knife/chhurri on the ground that same weapon was planted upon the appellant. In the backdrop of these arguments, the learned counsel for the appellant has prayed for acquittal of the appellant from the charge.

14. Conversely, the learned Law Officer assisted by learned counsel for the complainant has vehemently opposed the acquittal of the appellant from the charge and while supporting

the judgment handed down by the learned trial Court argued that although, out of four persons, three persons were discharged from the case on the Statements of the concerns but the evidence led by the prosecution squarely fits noose around the neck of the appellant that he was the person who had inflicted injuries upon the person of the deceased lady and killed her. In this connection, the Statements of PWs 2 to 4 have been referred to by learned counsel vis-a-viz the statement of the Investigating Officer, PW.10 to say that the witnesses have fully established the charge against the appellant. It is the submission of learned counsel that the appellant could not negate his presence from the spot which otherwise has been established through the statements of PWs 2 to 4 in clear manner. The maintenance of conviction awarded to the appellant through the impugned judgment has been prayed

15. We have considered the submissions made by learned counsel for the parties and perused the record.

16. So far as the contention of learned counsel that three co-accused have been exonerated by the prosecution and that the evidence cannot be read against the appellant is concerned, it is noticed with concern that all the three persons were close relatives of the appellant who were, perhaps entangled in this case due to their relationship with him and when a better sense prevailed upon the minds of near and dears of the deceased, they appeared in the Court and made statements regarding their innocence. This exoneration, in any case, does not affect the case of appellant. Further, the motive was not attributed to those three acquitted persons rather as per version made in the FIR, it was the appellant who was restrained by the deceased from flying the kites on the roof when a quarrel had taken place between the two persons some days prior to the occurrence. In support of this allegation, there was nothing on file against the acquitted accused persons rather this motive was alleged only and only against the appellant. Although, PWs 2 to 4, in their examination-in-chief had implicated those acquitted persons but in their cross-examination, they admitted that they have been acquitted from the charge on the basis of the affidavits filed by Mst. Jamila Bibi and Ikram Siddique. PWs 2. to 4 had never deleted the names of the appellant from their statements rather they had candidly pointed out towards the appellant that he, at the relevant time, was armed with chhurri and had inflicted injuries on the person of deceased. The other submission of learned counsel for the appellant that the statements made by the witnesses of ocular account suffer from material contradictions in respect of time and other allied issues, is concerned, that has also no substance for the simple reason that the witnesses are consistent upon the time, date and place of occurrence vis-a-viz the weapon with which the appellant was armed at the relevant time, so in the presence of this solid evidence, if some minor discrepancy had occurred in their statements that contradictions do not negate the presence of the appellant at the spot or the presence of the witnesses. Even, the relationship of the witnesses of ocular account cannot stand in the way of making their statements against the appellant for the simple, reason that one of them was the brother of the deceased while other one was the Mamoo, whose presence at the time of occurrence at the spot was quite natural as they had come to visit the house of their sister and niece, respectively and no ill-will has been alleged against them by appellant for which reason, he was falsely named in the case same is the position with the objection of the learned counsel regarding the recovery of crime weapon which was made by the Investigating Officer, PW.10. Mere fact that some independent person was not joined at the time when the weapon was recovered is no ground to dislodge the factor of recovery of the

weapon at the instance of the petitioner. Even, according to the norms prevailing in the society, a third person usually avoids to be the witness in a murder case due to fear of his own life. The learned trial Court while convicting the appellant has attended to all these factors and had drawn valid and legal conclusions and inferences therefrom which judgment being unexceptionable is liable to be maintained.

17. So far as the quantum of sentence awarded by the learned trial Court to the appellant is concerned, in our view, the prosecution, although, had alleged that the deceased had some quarrel with the appellant some days prior to the occurrence over flying kites but none of the witnesses had uttered a word about this fact. The appellant had also made an allegation against PW. 4 Ikram Siddique, the husband of the lady that he had killed his wife. In this scenario, there are two versions on the file in respect of motive part of the occurrence which tend to show that the prosecution has not clearly led evidence in support of its charge over the quarrel between the deceased and the appellant nor the defence has placed on record any evidence in support of this fact, so what happened immediately before the occurrence is not evident from the record. It is on the file that the appellant was having some liaison with the deceased lady and if, it is so, then it was the prosecution to establish as to why the appellant had taken such a drastic step of killing the lady. Since, this factor has not been answered by the prosecution in so many words, so what was in the mind of the appellant at the time of commission of offence, cannot be ascertained with certainty. Similarly, the other factor that the co-accused of the appellant, namely, Muhammad Shahid, Feroze Din and Muhammad Sharif have been acquitted on the basis of exoneration made from the complainant side, the infliction of death sentence upon the appellant seems to be harsh and would not be in accordance with the spirit of law. Keeping in view these facts, we intend to commute the death sentence of the appellant Shaukat Ali, into one imprisonment for life.

18. For the foregoing reasons, the appeal in hand, bereft of merits, is dismissed with the modification that the death sentence awarded to Shaukat Ali, appellant; is commuted to imprisonment for life while remaining sentence in respect of award of compensation to the legal heirs of the deceased, shall remain intact. However, the appellant shall be entitled to the benefit of his previous incarceration. In this manner, the Murder Reference sent by the learned trial Court is answered in negative and death sentence awarded to the appellant Shaukat Ali, is not confirmed.

(A.S.) Appeal dismissed

PLJ 2014 Cr.C. (Lahore) 510 (DB)
[Multan Bench Multan]
Present: Mazhar Iqbal Sidhu and Syed Muhammad Kazim Raza Shamsi and, JJ.
KHUDA BAKHSH & others--Appellants
versus
STATE & others—Respondents

Crl. A. Nos. 339 of 2008, 32, 106 of 2009 and M.R. No. 43 of 2009, heard on 9.9.2013.

Pakistan Penal Code, 1860 (XLV of 1860)—

----Ss. 302(b), 34, 364, 109, 148 & 149--Conviction and sentence--Challenge to--Committing Qatl-i-Amd--Benefit of doubt--Fact of recovery of crime weapon, as deposed by Sub-Inspector PW, also appeared to be doubtful simple reason that as per his own admission Investigating Officer after recovering pistol at instance of appellant had not sealed parcel neither at place of recovery nor while delivering it to Mohrrir of Police Station--This fact of non-sealing parcel leaves a room for doubt that crime weapon could have been tampered with or fabricated in `Maalkhana'--There was nothing on file to suggest that said weapon was ever sent to ballistic expert for his opinion nor record bears any report of Forensic Science Laboratory, therefore, it appeared that pistol 30 bore has been planted upon appellant in order to strengthen prosecution case--After appreciating whole evidence on record and analyzing same, a irresistible conclusion that prosecution has failed to establish its case beyond any shadow of doubt against appellants and there was no reason existed on record regarding involvement of appellants in occurrence as alleged in FIR as well as in testimonies of PWs, which benefit is to be extended in their favour--Appeal allowed. [P. 519] A & B

Ch. Khalid Mehmood Arain, Advocate for Appellant (in Crl. Appeal No. 339 of 2008).
Mr. Muhammad Nadeem Kanju, Advocate for Appellant (in Crl. A. Nos. 32 and 1606 of 2009).
Malik Muhammad Jaffar, D.P.G. for State.
Nemo for Complainant.
Date of hearing: 9.9.2013.

JUDGMENT

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.--The appellants Khuda Bkhsh, Muhammad Iqbal, Fateh Sher and Muhammad Saleem were tried in case FIR No. 217, dated 13.8.2003 registered under Sections 302, 364, 109, 148 & 149, PPC with Police Station Talumba, Tehsil Mianchannu, District Khanewal for committing Qatl-i-Amd of one Sajjad Hussain. The learned trial Court, after conclusion of the trial, vide judgment dated 23.12.2008 convicted and sentenced the appellants in the following manner:--

1. Khuda Bakhsh s/o Abdul Wahhab.

Death sentence under Section 302(b)/34, PPC for committing Qatl-e-Amad of deceased Sajjad with fine of Rs.100,000/- and in default whereof to undergo one year imprisonment.

2. Muhammad Iqbal s/o Waryam.

Rigorous Imprisonment for life under Section 302(b), PPC for abetment of Qatl-e-Amd of the deceased Sajjad with fine of Rs.100,000/- and in default whereof to undergo one year imprisonment.

3. Fateh Sher s/o Ali Muhammad.

Rigorous Imprisonment for life under Section 302(b), PPC for abetment of Qatl-e-Amd of the deceased Sajjad with fine of Rs. 100,000/- and in default whereof to undergo one year imprisonment.

4. Muhammad Saleem s/o Imam Bakhsh.

Rigorous Imprisonment for life under Section 302(b), PPC for abetment of Qatl-e-Amd of the deceased Sajjad.

However the benefit under Section 382-B, Cr.P.C. was extended to the convicts Muhammad Iqbal, Fateh Sher and Muhammad Saleem.

2. Murder Reference No. 43/2009 has been sent by the learned trial Court as required under Section 374 Cr.P.C. seeking confirmation of death sentence awarded to Khuda Bakhsh appellant.

3. Khuda Bakhsh has preferred Crl. Appeal No. 339/2008, Muhammad Iqbal and Fateh Sahir filed Crl. Appeal No. 32/2008 while Muhammad Saleem filed Crl. Appeal No. 106/2009. The appeals are being disposed of alongwith Murder Reference No. 43 of 2009, by this single judgment.

4. Briefly the prosecution story as narrated by the complainant Husnain Ahmad (PW.1) in FIR (Ex.PG) was that on 12.8.2003 at about 4.00 p.m the complainant and his brother Sajjad Hussain were present at their home when accused persons namely Muhammad Sarwar Sanpal, Muhammad Saleem and Muhammad Afzal came to their house on motorcycle and made some conversation with his brother separately and took away his brother alongwith them, who did not come back till late night. According to the complainant he had enmity with Chiryana 'bradri' and it came to his notice that Muhammad Iqbal and Fateh Sher Chiryana have claimed that they had made arrangement of Sajjad Hussain deceased, therefore, he went for search of his brother and in the way Muhammad Afzal and Abdul Ghaffar PWs informed him that they had seen Sajjad Hussain going on a motorcycle with Muhammad Younas and Muhammad Saleem towards Mianchannu, upon which the complainant alongwith aforesaid PWs went to the house of Muhammad Younas and inmates of the house informed that deceased Sajjad Hussain had gone to Mouza Dargra alongwith Younas Sial and Muhammad Saleem to receive amount from Khuda Bakhsh Chaddhar. Keeping in view the previous enmity, the complainant alongwith Muhammad Afzal and Abdul Ghaffar PWs reached at Mouza Dangra to the `Bheni' of Khuda Bakhsh Chaddar at 11.30 Noon and they saw that his brother Sajjad Hussain deceased was encircled by Muhammad Saleem, Muhammad Younas, Muhammad Afzal, Khuda Bakhsh and two unknown persons. Upon seeing the complainant and PWs, accused Saleem raised `Lalkara' to Khuda Bakhsh, who was armed with pistol .30-bore, that predecessors of Sajjad Hussain have come, complete your work and within the view of the complainant and PWs Khuda Bakhsh accused fired with his pistol 30-bore hitting on the back side is neck of Sajjad Hussain, who fell down and the accused Khuda Bakhsh, Muhammad Saleem, Muhammad Afzal, Younas and two others persons fled away from the spot towards north side in the crops of cotton. The complainant rushed to his brother Sajjad Hussain but he succumbed to the injuries.

The motive behind this occurrence was that three years prior to the occurrence Sajjad Hussain deceased had murdered a person of Chirriyana `bardari' namely Falak Sher and due to this grudge. Muhammad Iqbal, Fateh Sher wanted to get murder of Sajjad Hussain.

5. The police completed usual investigation and submitted the challan to the Court where the accused were charge sheeted. The accused professed innocence and claimed trial. The prosecution examined twelve witnesses to prove charge. The learned trial Court at conclusion of trial, acquitted Muhammad Afzal son of Mehmood and Muhammad Sarwar son of Shahamand from the charge whereas Khuda Baksh, Fateh Sher, Muhammad Iqbal and Muhammad Saleem were convicted and sentenced in the afore-noted terms.

6. The prosecution has examined as many as eleven witnesses to bring home the charge against the accused. The ocular account mainly consists upon the statements of Mukhtar Hussain Shah Inspector (PW.9) Muhammad Afzal Inspector/SHO (PW.11), who conducted the investigations, the complainant Husnain Ahmad (PW.1) and eye-witness Abdul Ghaffar (PW.2). The medical evidence is based upon the statement of Dr. Shahid Hussain Shah SMO RHC, Tulamba (PW.5), who conducted post-mortem examination on the dead body of deceased Sajjad Hussain and found the following injuries on his body:

1. A lacerated about circular wound with inverted edges 1 cm x 1 cm going deep on the right cheek 1 cm above the right lower jaw.

2. A lacerated wound with everted edges 0.5 cm x 0.5 cm going deep on the left side of the neck 4 cm below the left mastoid bone. Piece of bullet recovered from the wound.

Cervical vertebrea fractured spinal card in cervical region injured. Right mandible fractured. Neck muscles fractured. Cerotid vessels ruptured on right side.

In the opinion of Medical Officer, the death was caused due to hemorrhage (internal and external) shock and injury to the spinal cord which was due to Injury No. 1 & 2. Both injuries were caused by firearm weapon and both were ante-mortem. Injury No. 1 was entry wound while Injury No. 2 was exit wound. These injuries were sufficient to cause death in natural course of life. The duration between injuries and death was five to ten minutes while duration between death and postmortem examination was five to six hours.

7. The prosecution closed its evidence by giving up Rana Fawad Ahmad Inspector/SHO, Muhammad Asfar Khan Constable, Muhammad Ashraf Constable, Muhammad Rafique Constable, Allah Ditta Constable and Amir sonof Gull Muhammad being unnecessary and tendering report of Serologist Ex.PK and report of Chemical Examiner Ex.PJ.

8. The prosecution evidence so recorded was confronted to the accused persons. Khuda Bakhsh appellant by recording his statement under Section 342, Cr.P.C., who answered Question No. 8 "why this case against you and why the PWs deposed against you?" has stated as under:--

"I am not the culprit of this murder. It was perpetrated by some unknown persons since the actual culprit was not traced and since the dead body of deceased was found lying near my house, therefore, I was involved in this case falsely. In actual fact no one saw this occurrence. PWs being close relative of the complainant have deposed falsely."

Fateh Sher appellant in the similar type of Question No. 7 set up his defence in the following words;--

"The witnesses are closely related with each other. They have cooked up a false story against me for their ulterior motives but there is nothing on record against me in their evidence."

The appellants Muhammad Iqbal while answering to similar type of Question No. 7. stated as under:--

"The witnesses are closely related with each other. They have cooked up a false story against me for their ulterior motives but there is nothing on record against me in their evidence."

The appellants Muhammad Saleem in the similar type of Question No. 7 set up his defence in the following words:--

"I am not resident of the place of occurrence nor I known complainant, deceased and other accused. I have no motive against the deceased. I had no concern with Fateh Sher and Iqbal accused. I have falsely been implicated in this case. In fact I was PW. I witnessed the occurrence. I myself informed the police but the complainant party falsely implicated me to this case. I was under custody from very beginning. I am innocent."

9. The appellants neither opted to make statements under Section 340(2), Cr.P.C. to disprove the allegations levelled against them in the prosecution evidence nor produced any evidence in defence.

10. Learned counsel appearing on behalf of the appellants while opening the arguments submitted that the case in hand relates to the murder of one Sajjad Hussain allegedly committed by the appellants in order to satisfy their ego of the murder of their close relative Falak Sher but the prosecution has miserably failed to establish the charge of murdering Sajjad Hussain deceased by producing convincing and cogent evidence. While referring to the statements of PW.1 and PW.2, the complainant and the other eye-witness Abdul Ghaffar, learned counsel argued that the complainant party was having enmity with one Saleem, who in the company of Afzal and Younas had taken away the deceased on some pretext and the complainant party allowed Saleem etc. to take the deceased with them, which assertion of the complainant appears to be improbable. He added that in the murder case of Falak Sher his brother and the complainant himself were charged and were in judicial lockup when one Nasir, brother of the complainant, was murder by Falak Sher's relatives and the case was compounded with the intervention of some influential personalities and all these proceedings had taken place three years prior to the occurrence during which time no untoward incident had taken place between the parties. Learned counsel argued that this part of the motive alleged by the complainant in his statement is based upon his farfetched imagination. He has also pointed out that neither appellant Khuda Bakhsh was known to the complainant nor some other persons were having any terms with him then the prosecution was bound to establish as to why Khuda Bakhsh alone fired at the deceased when he was not having any ill-will with the complainant party. He maintained that it was the stance of the complainant that one Iqbal and other appellants had provided

greed money for the assassination of Sajjad Hussain but no evidence was led on this fact as to whom the greed money was provided and when it was delivered to the assailants. Besides this learned counsel has also pointed out glaring contradictions in the statement of PW.1, the complainant, and submitted that PW.2 is the chance witness, who per chance had met the complainant in the way when the complainant was searching for his brother on the next day of his missing. Learned counsel seems to be astonished on the fact that the appellants were waiting for the arrival of the complainant and PWs and when the complainant and others were insight of the assailants they raised `Lalkara' and killed Sajjad Hussain deceased. He further argued that the deceased was having many enemies as he was involved in many criminal cases thus he could have killed by some enemy and the appellants have been falsely implicated in this case by substituting them with the real culprits. Learned counsel has also referred to the cases as mentioned by PW.1 in his own statement and enmity between the complainant and the deceased viz-a-viz their other brother Qaiser Abbas, who was occupying the land allocated to their father under Horse Breeding Scheme. Learned counsel goes on to argue that there is a glaring contradictions in the medical evidence viz-a-viz the statements of PW.1 and 2. According to the statement of PW.5 the single injury was caused with firearm on the right cheek of the deceased while the PWs as well as the Investigating Officer PW.9 pointed out the injury at the back near to the neck of the deceased. While relying upon the cases of `Ghulam Rasul vs. Wazir Khan and others' (1989 SCMR 1172) and `Muhammad Arif vs. The State' (2012 SD 632), learned counsel submitted that this disparity in both pieces of evidence is irreconcilable thus the benefit of doubt is to be extended in favour of the appellants. He has also criticized the recovery of crime weapon at the instance of Khuda Bakhsh and submitted that PW. 11 in his statement had admitted that after recovering the pistol at the instance of the appellant Khuda Bakhsh he did not make it in the sealed parcel at the place of occurrence nor the same was sealed at the time when the same was handed over to the Mohrrir of the Police Station for safe custody. In the wake of this argument learned counsel submitted that this piece of evidence is of no consequence and there is every likelihood that the recovery of pistol was tampered with by the police and planted upon the appellant. He has also questioned the conviction recorded against co-appellants Iqbal, Fateh Sher and Muhammad Saleem by submitting that the prosecution could not establish the charge of abetment, conspiracy or any other allegation against these appellants, therefore, their conviction was not rightly recorded by the learned trial Court. In the wake of these arguments learned counsel has prayed for acceptance of the appeals and acquittal of the appellants from the charge of murder of Sajjad Hussain.

11. Learned Deputy Prosecutor General has controverted the submissions made by the learned counsel for the appellants and argued that the matter was reported within one and half hour to the Police and the complainant after travelling for six long kilometers had immediately approached the police for taking action against the culprits thus it is a promptly lodged FIR in which the appellants were specifically nominated showing them armed with lethal weapons and one of them while using his weapon had killed an innocent person without any justifiable cause. He has also maintained that the prosecution through convincing and cogent evidence had proved the factum of motive for which reason Sajjad Hussain was done to death and argued that with the help of Saleem, the appellant, and his other co-accused namely Younas and Afzal the deceased was brought to the Dera of Khuda Bakhsh for his murder. Regarding contradictions in the medical and ocular account, learned

DPG submitted that the lapse had occurred due to panic when the complainant had seen his own brother lying dead at the spot and he could not make distinction between the cheek and neck and reported that the fire shot was made at back near to the neck. He further submitted that the existence of the fire on the cheek is exactly on the same side where according to the complainant the bullet had hit on the neck of the deceased, thus it was not possible for a layman to make any distinction between cheek and the neck. On the fact of non-sealing and making the parcel of recovered pistol by the Investigating Officer it is the argument of the State representative that the assailants cannot be let off merely on the basis of irregularities committed by the Investigating Officer and that the recovery of crime weapon is a merely corroborative piece of evidence and the case cannot be decided on the sole non-recovery of weapon of offence when other evidence is sufficiently available on the file to believe the involvement of the appellants in the case. While concluding the arguments, learned DPG requested for the dismissal of the appeals.

12. We have given our anxious thoughts to the arguments advanced by the learned counsel for the parties and have also analyzed the evidence on the file. After examining the record, we have reached at the conclusion that the learned trial Court while recording the conviction of the appellants has not properly appreciated the prosecution evidence available on the record and in a slipshod manner proceeded to decide the case. In this connection we have examined the evidence of the prosecution on the fact of motive for the occurrence and noticed that there was enmity between the parties regarding the murder of Falak Sher and one Nasir from each side thus in the presence of this enmity it seems to be strange that Sajjad Hussain deceased had accompanied with one of his enemy i.e. Muhammad Saleem, who according to the prosecution had took him. This fact seems to be not a normal act of the deceased as he had faced charge of the murder of Falak Sher, a close relative of the Saleem, but despite that he accompanied him. Secondly, the reason for disbelieving this part of the prosecution evidence is that the complainant in his statement did not explain as to whether in the whole three years from the time when both panics had came out of the gallows, they had any fight and quarrel or some untoward incident had taken place between them showing the grudge in hearts of both parties due to the murder of Falak Sher and Nasir. PW.1 had admitted in his statement that they had enmity with `Chiryana bradri' and when it is so admitted by the complainant then allowing his brother to go with members of `Chiryana' family is very strange act on his part. Similarly it is in the evidence that the complainant party was not known to Khuda Bakhsh, who allegedly had fired at the deceased then question arises as to for what reason he had done to death Sajjad Hussain. The little clue of the question is available in the statement of PW.1 that Iqbal etc., members of `Chiryana' family, had provided the greed money for the murder of Sajjad Hussain but this part of the statement of the complainant does not provide any detail as to whom the money was handed over and at which time this planning was done. If for the sake of argument it is admitted as correct that some greed money was provided to Khuda Bakhsh for the murder of Sajjad Hussain then there is another query as to why Khuda Bakhsh had killed Sajjad Hussain in front of his own house that too in the daylight. Normally the hired assailants secretly commit such offence but in the instant case it has been done by the appellant in front of his own house in the daylight time. So keeping in view this thirsty question, the thirst of which could not be quenched by the prosecution, it can be concluded that the appellant had no motive to kill the deceased for taking revenge for the murder of

Falak Sher, which revenge they had already taken by killing Nasir, the brother of the complainant.

13. Coming to the statement of PW.1 as an eye-witness, it is found that the said statement does not inspire confidence as the same suffers from lot of contradictions, which contradictions lead to the fact that the complainant had not witnessed the occurrence nor he was present at the place of occurrence at the relevant time. The record shows that allegedly Muhammad Saleem had taken the deceased from his Dera on 12.8.2013 at `Sham waila' but the complainant did not come out of his house for the search of his brother when he did not turn back before night. As per his own statement he started search of the deceased on the next day i.e. on 13.8.2013 at about 7.30 a.m in the morning when in the way he met with PW.2 and one Muhammad Afzal. There is no explanation of this fact on the record as to why the complainant slept peacefully in his own house when his brother had accompanied their common enemy i.e. Muhammad Saleem. Similarly the presence of PW.2 alongwith one Afzal in the way does not satisfy the judicial mind and it appears that they were chance witnesses, who per chance have met the complainant in the way and told him that they had seen the deceased in the company of the convicts. It is so because PW.2 was residing at that time 25-miles away from the Chak of the complainant. It is also noticed with concern that the statement of PW.2 that he did not ask the deceased when he saw him in the company of Saleem and others as to why he was accompanying them when they had animosity of murder with Muhammad Saleem. These facts stated above clearly indicate that the allegations contained in the crime report are based upon a cooked up story, which has no legs to stand. After analyzing the statements of the eye-witnesses we are not inclined to accept the same as these do not stand on the touchstone of truthfulness nor inspire confidence.

14. Taking the case of the prosecution on the fact of medical evidence, it is noticed that PW.1 and PW.2 in their testimonies have consistently stated that Khuda Bakhsh appellant had fired with his pistol and the bullet had hit on the back side of his neck. This statement was made by the complainant in his crime report and PW.9, Investigating Officer, has recorded the same injury in the inquest report Ex.PF and Ex.PL. The complainant while appearing as PW in the trial of other co-accused of this case had improved his statement regarding attribution of the injuries, where he had provided the injury on the back side of the neck but while appearing against the present appellants he had changed his version and stated that the bullet had hit the deceased on the right side near the ear in the back side of the ear. Obviously this change was made by the complainant after examining the postmortem report Ex.PD where the injury has been provided by the medical officer on the right cheek 1 cm above the lower jaw. This was the entry wound. This contradiction made by the complainant is irreconcilable and the benefit of this doubt is to be extended in favour of the appellants. This disparity further goes to establish that neither the complainant nor his PWs had witnessed the occurrence as they were not present at the spot at that time. In this connection, the judgments cited by the learned counsel for the appellants squarely applicable to the facts and circumstances of the instant case. Accordingly, it is held that the ocular account is not in line with the medical evidence.

15. The fact of recovery of crime weapon, as deposed by Muhammad Afzal Sub-Inspector PW.11, also appears to be doubtful for the simple reason that as per his own admission the

Investigating Officer after recovering the pistol at the instance of the appellant had not sealed the parcel neither at the place of recovery nor while delivering it to the Mohrrir of the Police Station. This fact of non-sealing the parcel leaves a room for doubt that the crime weapon could have been tampered with or fabricated in the `Maalkhana'. There is nothing on the file to suggest that the said weapon was ever sent to ballistic expert for his opinion nor the record bears any report of Forensic Science Laboratory, therefore, it appears that the pistol .30 bore has been planted upon the appellant Khuda Bakhsh in order to strengthen the prosecution case.

16. After appreciating the whole evidence on the record and analyzing the same, we have reached at a irresistible conclusion that the prosecution has failed to establish its case beyond any shadow of doubt against the appellants and there is no reason existed on the record regarding the involvement of the appellants in the occurrence as alleged in the FIR as well as in the testimonies of the PWs, which benefit is to be extended in their favour.

17. For what has been discussed above, the appeals in hand are allowed and the conviction and sentences recorded against the appellants are set aside. Khuda Bakhsh appellant is hailing in the jail who shall be set at liberty forthwith, if not required in any other case. Muhammad Iqbal, Fateh Sher and Muhammad Saleem appellants are on bail, their bail bonds are cancelled and the sureties are relieved of their liability.

18. The death sentence awarded to Khuda Bakhsh appellant is not confirmed and Murder Reference No. 43/2009 sent by the learned trial Court seeking confirmation of his death, sentence is answered in the negative.

(A.S.) Appeals allowed.

PLJ 2014 Cr.C. (Lahore) 542
Present: Syed Muhammad Kazim Raza Shamsi, J.
Mian SAJID JAHANGIR & 2 others--Petitioners
versus
STATE etc.—Respondents

Crl. Misc. No. 9015-B of 2013, decided on 22.11.2013.

Criminal Procedure Code, 1898 (V of 1898)—

----S. 498--Pakistan Penal Code, (XLV of 1860), S. 462(c)--Anticipatory bail--Confirmed--Petitioners have not been found involved in commission of offence as alleged in FIR, so police has not recommended their prosecution--So far as allegation against petitioner regarding pilferage of gas was concerned, it was noticed from file that huge amount of about Rs. 10-Crore had already been deposited by petitioner as required by law for contesting case before trial Court where his liability would be determined after recording evidence of parties--It was yet to be determined by Court whether petitioner was involved in any pilferage of gas and that departmental liability against petitioner was in accordance

with allegations contained in crime report--Since, requirement of law of depositing 40% of amount has already been complied with by petitioner therefore, at this stage, it would not be appropriate to send them behind bars for offence which needs evidence and was yet to be established on record--In case, relief prayed for was not granted to petitioners, they shall suffer undue harassment and humiliation, so it was a tit case for exercise of discretion in favour of petitioners--Anticipatory bail was confirmed. [P. 544] A

Mr. Azam Nazeer Tarar, Advocate for Petitioner.
Mr. Muhammad Ishaq, D.P.G. for State.
Rana Zia-ul-Islam Manj, Advocate for Complainant.
Date of hearing: 22.11.2013.

Order

Mian Sajid Jahangir and two others by filing instant criminal miscellaneous petition have prayed for their anticipatory bail in case FIR No. 309 dated 9.4.2013 which was registered against them at Police Station Kahna Nau, Lahore under Section 462-C, PPC.

2. Sharafat Ali, Distribution Officer of Sui Northern Gas Company, Lahore had conducted a raid at Basfa Textile and Spinning Mills, Lahore and found four generators in the mill which were being operated on the gas by having illegal connection from the main line of the gas company.

3. Learned counsel for the petitioners inter-alia contended that the petitioners had not committed any theft of gas nor they were running any generators on the gas; that the department had fixed liability of stolen gas to the tune of Rs. 23-Crore against the petitioners out of which approximately an amount of Rs. 10-Crore has been deposited by the petitioners as 40% of the amount as plea bargain; that the matter is to be thrashed out in the evidence before the Court whether the petitioners were involved in the theft of the gas or the liability determined against them is made out from the record and in case any such liability is determined by the Court of competent jurisdiction, the petitioners shall liquidate that liability; that during the period when allegedly the petitioners had tampered with the main line of the company and for that period, the amount has been determined by the department, the petitioners had paid Rs. 1.5-Crore in respect of electricity charges which were claimed by the WAPDA authorities so during that period when the petitioners were using that electricity, there was no need for the petitioners to pilferage the gas from the main line of the company and Petitioners No. 1 and 2 being minor and having no nexus, have been declared by the police as not involved in the commission of offence, therefore, prayed for confirmation of interim pre-arrest bails of the petitioners.

4. The petition has been opposed by the learned Standing Counsel of Sui Gas Company with the submissions that the raiding party had found the pilferage of the gas; that the petitioners side were running four generators with the gas stolen from the main line and in this connection the pipe was taken into possession through which the gas was being stolen by the petitioners. He has admitted that the petitioners had deposited 40% of the amount determined by the department, but submitted that in-fact the liability was determined by the department for the stolen gas and offence of committing theft still remains on the record.

He has also referred to certain documents showing that the petitioners had admitted the pilferage of gas, therefore, according to the learned counsel they are not entitled for any concession of pre-arrest bail.

5. Parties have been heard and record perused.

6. The petitioners Mian Sajid Jahangir and Babar Jahangir have not been found involved in the commission of offence as alleged in the FIR, so the police has not recommended their prosecution. So far as the allegation against Mian Jahangir Saleem, Petitioner No. 3 regarding pilferage of gas is concerned, it is noticed from the file that huge amount of about Rs. 10-Crore had already been deposited by the petitioner as required by law for contesting the case before the learned trial Court where his liability would be determined after recording evidence of the parties. It is yet to be determined by the Court whether the petitioner was involved in any pilferage of the gas and that the departmental liability against petitioner's is in accordance with the allegations contained in the crime report. Since, the requirement of law of depositing 40% of the amount has already been complied with by the petitioners, therefore, at this stage, it would not be appropriate to send them behind the bars for the offence which needs evidence and is yet to be established on the record. In case, the relief prayed for is not granted to the petitioners, they shall suffer undue harassment and humiliation, so it is a fit case for exercise of discretion in favour of the petitioners.

7. In view of the above, the petition in hand is allowed and interim pre-arrest bails already granted to all the three petitioners are confirmed subject to their furnishing bail-bonds in the sum of Rs. 1,000,000/- (Rupees One Million only) each with two sureties each in the like amount to the satisfaction of learned trial Court.

(A.S.) Bail confirmed

PLJ 2014 Lahore 908
[Multan Bench Multan]
Present: Syed Muhammad Kazim Raza Shamsi, J.
MUHAMMAD RAMZAN--Petitioner
versus
STATE & 15 others—Respondents

P.S.L.A. No. 26 of 2005, decided on 26.3.2014.

Pakistan Penal Code, 1860 (XLV of 1860)—

----Ss. 302, 324, 337-A(i), 337-A(ii), 337-H(ii), 337(2), 337-F(i), 148 & 149--Special leave to appeal--Appreciation of evidence--Prosecution has miserably failed to prove motive of occurrence--No weapon of offence was recovered at instance of respondents rather most of them were declared innocent during investigations--In his private criminal complaint, petitioner had shown accused persons armed with sotas also but in FIR lodged for occurrence, he did not mention so, thus complainant has himself disowned his version and made improvements in private criminal complaint which fact proved to be fatal to his case--

Accused were rightly acquitted by trial Court in private complaint--Validity--Scope of interference in appeal against acquittal is most narrow and limited, because in an acquittal presumption of innocence is significantly added to cardinal rule of criminal jurisprudence, that an accused shall be presumed to be innocent until proved guilty--Interference in a judgment of acquittal is rare and prosecution must show that there are glaring errors of law and fact committed by Court in arriving at decision, which would result into grave miscarriage of justice--Petition was dismissed. [P. 911] A

PLD 2011 SC 554 & PLD 1985 SC 11, rel.

Mr. Tahir Mehmood, Advocate for Petitioner.

Malik Waqar Haider, Advocate for Respondents No. 5, 6 and 7.

Mr. Muhammad Aamir Khan Bhutta, Advocate for Respondents No. 2 to 4, 9, 12 and 14.

Ch. Muhammad Akbar, D.P.G. for State.

Date of hearing: 26.3.2014.

JUDGMENT

For committing Qatl-i-Amd of Atta Muhammad, deceased, Respondents No. 2 to 16 were summoned in the private criminal complaint lodged by the petitioner under Sections 302, 324, 337A(i), 337A(ii), 337H(ii), 337L(2), 337-F(i), 148 and 149, PPC in which case at the conclusion of the trial, vide judgment handed down on 30.05.2005, the learned Additional Sessions Judge, Muzaffargarh, had acquitted all of them from the above said charges. Aggrieved of the decision of the learned trial Court, the petitioner has assailed the impugned judgment by filing this petition seeking special leave to appeal.

2. Vide order dated 1.4.2010, the petition was admitted for regular hearing and the respondents were summoned by this Court, According to information provided, Respondent No. 3 Muhammad Ramzan, has died, so, the petition to his extent is abated and the same is disposed of accordingly.

3. Succinctly, the allegation levelled in the private criminal complaint is that the petitioner party was constructing shop of Fazal Hussain when all of sudden, the respondents armed with respective weapons emerged there the respondent Saleh Muhammad made a fire shot with his Kalashnikov at Atta Muhammad which fire missed then Muhammad Ramzan, respondent caught hold of Atta Muhammad from his right arm while Karim Bakhsh, respondent made a sota blow on his head, Muhammad Saleem gave a sota blow on the chest of Atta Muhammad while Ghulam Ali hit with his sota at the left arm of the deceased and Muhammad Aslam, respondent made repeated sota blows on the back of the deceased who fell on the ground and succumbed to the injuries at the spot; that Ijaz and Nazir respondents injured the petitioner while inflicting sota blows on his head and different parts of the body of the petitioner; that Kora and Sajjad, respondents injured Bilal Hussain and Nazar Hussain with their sotas; that respondent Abdul Sattar, injured Mujahid Hussain with his sota; that on hearing the firing and hue and cry of the petitioner party, Mst. Aziz Mai when came at the spot, the respondent Iqbal made sota blow on her while Irshad respondent had created sense of terror by making firing with his pistol; that PWs attracted at the spot and the respondents-accused fled away with their respective weapons. The crime report bearing FIR No. 09/2004 under Sections 337-H(ii), 302, 148, 149, PPC was registered at Police Station Shah Jamal District Muzaffargarh in this respect, in which, during

investigations, seven accused were declared innocent by the Investigating Officer, so being aggrieved by the police investigations, the petitioner opted to lodge the criminal complaint in which all the respondents were acquitted of the charge, hence, this petition.

4. The motive for the occurrence was that respondents while armed with weapons destroyed the crops of the deceased and forcibly constructed metalled road into his agricultural lands against which occurrence, the deceased Atta Muhammad had approached the concerned learned Sessions Court for registration of criminal case against the respondents and on the day of occurrence, the deceased Atta Muhammad was getting construction of a shop on the land by his brother-in-law (hum zulf), so as to close the disputed road upon which, the occurrence took place.

5. The respondents were summoned and charge sheeted under the aforesaid offences and after recording complainant's evidence, same was put to the respondents in statements recorded under Section 342, Cr.P.C.

6. It is the submission of learned counsel for the petitioner that the prosecution proved its case to the hilt by producing cogent and confidence inspiring evidence which evidence was not appreciated by the learned trial Court while acquitting the respondents from the charge, so the judgment of acquittal suffers from misreading and non-reading of the evidence available on record; that it is a day light occurrence so, there is no chance of substitution of the respondents; that a criminal complaint arising out of the same occurrence was also instituted by the respondent side which ought to have been decided alongwith the criminal complaint lodged by the present petitioner but it was not done and that the impugned judgment is perverse, nullity and the same is not sustainable in the eyes of law.

7. The learned Law Officer assisted by both the learned counsel for the respondents has opposed the submissions made on behalf of the petitioner and supported the findings recorded by the learned trial Court while asserting that there many contradictions and discrepancies in the prosecution evidence and prosecution tried to improve its version in its evidence than the version recorded in the FIR. It is denied that the respondents had ever filed private criminal complaint regarding the same occurrence which fact of non-filing of complaint is established from their plea of alibi raised in statements recorded under Section 342, Cr.P.C.; that the petitioner side has effected compromise and exonerated Karim Bakhsh and others, therefore, complainant has left with no grievance against them.

8. Parties have been heard at length and the impugned judgment has been gone through minutely with their respective assistance.

9. After having heard learned counsel for the parties and perusing the impugned judgment, it is noticed that the learned trial Court, after deeply appreciating the evidence of the parties and the arguments advanced from both the sides reached at the conclusion that there are contradictions in the statements of the PWs as in his summary Statement, the petitioner stated that Atta Muhammad, deceased caught hold of Muhammad Ramzan, accused from his right arm but surprisingly, he contradicted this fact in his statement made on oath. Further, the prosecution has miserably failed to prove the motive of the occurrence rather it seems that the occurrence did not take place as narrated by the prosecution. No weapon of offence was recovered at the instance of the respondents rather most of them were declared

innocent during the investigations. There is another factor to be noticed that in his private criminal complaint, the petitioner had shown the accused persons armed with sotas also but in the FIR lodged for the occurrence, he did not mention so, thus the complainant has himself disowned his version and made improvements in the private criminal complaint which fact proved to be fatal to his case. The learned trial Court with cogent and strong reasons given in the impugned judgment, has rightly acquitted the respondents-accused from the charges levelled against them in the private criminal complaint as the prosecution miserably failed to bring home the guilt of the respondents beyond any shadow of doubt which findings of the Court are not perverse, illegal, capricious and same are not the result of misreading or non-reading of the evidence available on the record which findings are based upon accepted principles of criminal jurisprudence, as such, there is no justification to differ with the same. The scope of interference in appeal against acquittal is most narrow and limited, because in an acquittal the presumption of innocence is significantly added to the cardinal rule of criminal jurisprudence, that an accused shall be presumed to be innocent until proved guilty. Interference in a judgment of acquittal is rare and the prosecution must show that there are glaring errors of law and fact committed by the Court in arriving at the decision, which would result into grave miscarriage of justice. In this respect reliance can be placed upon the judgments reported as "The State vs. Abdul Khaliq etc." (PLD 2011 Supreme Court 554) and "Ghulam Sikandarand another vs. Mamaraz Khan and others" (PLD 1985 Supreme Court 11).

10. Upshot of the above discussion is that no discrepancy, perversity or illegality is found in the impugned judgment, as such, this petition having no merits, is dismissed.

(A.S.) Petition dismissed

PLJ 2014 Lahore 912

Present: Syed Muhammad Kazim Raza Shamsi, J.

MUHAMMAD YAQOOB--Petitioner

versus

SHO, P.S. RAZA ABAD FAISALABAD and 5 others—Respondents

W.P. No. 15436 of 2013, decided on 22.5.2014.

Criminal Procedure Code, 1898 (V of 1898)—

----S. 22-A--Constitution of Pakistan, 1973, Art. 199--Constitutional petition--Allegation of cheating with forgery--Some forgery was made in Nikahnama with respect to amount of dower--Suit for cancellation of Nikah Namawas filed by respondent which was contested and trial Court had framed an issue in such respect--Another suit for return of dowry articles was filed by wife--This fact of pendency of suits in respect of same cause of action, pending before a Court of competent jurisdiction where it would be determined whether any forgery was conducted by petitioner in respect of Columns No. 13 and 15 of Nikah Nama or not, setting into motion, criminal machinery is not advisable due to fear of conflict of judgments of two Courts--No doubt, civil and criminal cases can proceed side by side but

ultimately matter is to be decided by family Court and till that time criminal proceedings were required to be stayed--Petition was accepted. [P. 913] A

2010 SCMR 1835, ref.
Haji Khalid Rehman, Advocate for Petitioner.
Mr. Khawar Ikram Bhatti, Addl. Advocate General for Respondent No. 1.
Rana Fayyaz Siddique, Advocate for Respondents.
Date of hearing: 22.5.2014.

Order

The learned Ex-Officio Justice of Peace, Faisalabad vide order dated 17.6.2013 had issued a direction to the SHO of the police station concerned to record the version of Respondent No. 2 and to proceed with it in accordance with law. The said order has been assailed through the instant constitutional petition.

2. The petition was filed by Respondent No. 2 under Section 22-A, Cr.P.C. alleging that some forgery was made in his Nikah Nama with respect to the amount of dower which was enhanced to the tune of Rs.1,00,000/- from Rs.1000/- and it was further recorded in the relevant column that the petitioner would give three marlas house as dower. An allegation of cheating with forgery has been alleged by petitioner Muhammad Yaqoob. The Court on finding a commission of a cognizable offence has issued a direction through the impugned order.

3. After having heard the learned counsel for the parties and perusing the record it is found that in respect of same Nikah Nama a suit for cancellation of Column No. 13 of the Nikah Nama was filed by Liaquet Ali Respondent No. 2 which was contested and the learned trial Court had framed an issue in this respect. Reportedly the suit is still pending. Further another suit for return of dowry articles has also been filed by the wife of Respondent No. 2. This fact of pendency of the suits in respect of the same cause of action, before a Court of competent jurisdiction where it would be determined whether any forgery was conducted by the petitioner in respect of columns No. 13 and 15 of the Nikah Nama or not, setting into motion, the criminal machinery is not advisable due to the fear of conflict of judgments of two Courts. No doubt, civil and criminal cases can proceed side by side but ultimately the matter is to be decided by the family Court and till that time the criminal proceedings are required to be stayed. In the case of Ikhlaq Hussain Kiani (2010 SCMR 1835), the Hon'ble Supreme Court had stayed the proceedings in the criminal case till the decision of the dispute by a Civil Court.

4. In view of this legal position on the record, I am not inclined to agree with the findings of learned Ex-Officio Justice of Peace, therefore, the same are set aside by accepting this constitutional petition. Resultantly, the application filed by Respondent No. 2 under Section 22-A, Cr.P.C. is dismissed.

(A.S.) Petition accepted.

PLJ 2014 Cr.C. (Lahore) 589 (DB)
[Multan Bench Multan]
Present: Mazhar Iqbal Sidhu and Syed Muhammad Kazim Raza Shamsi, JJ.
GHULAM ZAKIRYA SHAH--Appellant
versus
STATE—Respondent

Crl. A. No. 42 of 2009 and M.R. No. 41 of 2008, heard on 23.9.2013.

Pakistan Penal Code, 1860 (XLV of 1860)—

----S. 302(b)--Conviction and sentence--Challenge to--Death sentence was converted into imprisonment for life--It has been established that witnesses in company of deceased were going to attend marriage ceremony in another village when incident had taken place--Even otherwise, it was a daylight occurrence and appellant party was known to complainant side--FIR was also registered within an hour of occurrence leaving no room for any doubt for consultation and deliberation--Deceased also did not mention about motive of occurrence, when he made statement in hospital--Further, it was also noted from record that appellant did not repeat fire upon deceased although latter was completely at his mercy--Recovery of weapon allegedly made by Police at instance of appellant also appears to be doubtful as report of Forensic Science Laboratory did not indicate that weapon sent to Lab was same weapon, which was used in occurrence--It was reported that weapon received in laboratory was in working condition thus recovery of weapon at instance of appellant has no legal consequence as there was no evidence on record that same weapon was used for killing of deceased--Analysis of prosecution evidence as made in preceding paras establishes that PWs were present at place of occurrence, who had seen appellant while making firing upon deceased thus charge against appellant has duly been established against him for killing deceased--However, prosecution has remained failed to establish motive for occurrence as well as fact that weapon recovered at instance of appellant was same, which he used for killing deceased--In view of these facts, High Court inclined to commute death sentence awarded to appellant into imprisonment for life--Appeal dismissed. [Pp. 595 & 596] A, B & C

M/s. Malik Muhammad Saleem and Malik Imtiaz Haider Maitla, Advocates for Appellant.
Mr. Abdul Qadoos, D.P.G. for State.
Mr. Nadeem Ahmad Tarar, Advocate for Complainant.
Date of hearing: 23.9.2013.

JUDGMENT

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.--Ghulam Zakirya Shah along with his co-accused Allah Ditta Shah and Baqir Ali Shah were tried in a case FIR No. 226 dated 27.10.2007 registered under Sections 302/324/34, PPC at Police Station Daira Din Panah, District Muzaffargarh for committing murder of one Ghulam Mustafa. The learned trial Court at the conclusion of the trial, vide judgment dated 03.7.2008 convicted Ghulam

Zakirya Shah appellant and acquitted co-accused Allah Ditta and Baqir Ali Shah. The following sentences had been awarded to Ghulam Zakirya Shah son of Ghulam Mustafa:--

Ghulam Zakirya son of Ghulam Mustafa Shah

Death Sentence under Section 302(b), PPC as "Tazir" with a compensation of Rs. 2,00,000/- to be paid to the legal heirs of Ghulam Mustafa deceased as required by Section 544-A, Cr.P.C. and in default of the payment of the amount, he was directed to further undergo six months simple imprisonment.

2. Murder Reference No. 41/2008 has been sent by the learned trial Court as required under Section 374, Cr.P.C. seeking confirmation of death sentence awarded to Ghulam Zakirya Shah while Ghulam Zakirya Shah appellant has also assailed his conviction and sentence by filing Criminal Appeal No. 42/2009. Both the matters are being disposed of by this single judgment.

3. Briefly, the facts as alleged by Muhammad Bakhsh (PW-6) the complainant before Akbar Ali S.I. (PW-10) in his statement FIR Ex-PA, are that the occurrence in this case for the murder of Ghulam Mustafa had taken place at 5.00 p.m. on 27.10.2008. According to him, he (complainant) along with Sajjad Hussain son of Haji Yar Muhammad (PW-7) and Muhammad Ashraf (given up PW) were going to Mauza Bait Qaim Wala on a motorcycle and when they reached Mauza Khai Doim near Pul Nala Kot Sultan Wala, they saw, Ghulam Mustafa (deceased) with Sajjad Hussain son of Niaz Hussain near the agricultural land of Ghulam Zakirya Shah. Appellant with Allah Ditta and Baqir Ali Shah approached there on motorcycle from Western side. Baqir Ali Shah was driving motorcycle while Ghulam Zakirya and Allah Ditta were boarded on rear seat of the motorcycle. Appellant Ghulam Zakirya Shah was having firearm at that time. Baqir Ali Shah stopped motorcycle and raised a lalkara that they would teach a lesson to Ghulam Mustafa for insulting them. Allah Ditta (accused) caught hold Ghulam Mustafa (deceased) and Ghulam Zakirya Shah (convict) made a direct fire with his pistol .30 bore which landed on the left flank of Ghulam Mustafa deceased and went through and through. After receiving the fire, Ghulam Mustafa fell on the ground. He (complainant), Sajjad Hussain and Muhammad Ashraf made an attempt to overpower accused persons but they extended threats to them of dire consequences and fled away along with their weapons towards Eastern side.

The motive of occurrence as mentioned in Ex.PC is that two days prior to the occurrence an altercation had taken place between Ghulam Zakirya Shah accused and Ghulam Mustafa deceased at Taunsa Mor where Ghulam Mustafa deceased gave a slap to Ghulam Zakirya and on the basis of this grudge, accused Ghulam Zakirya Shah committed Qatl-i-Amd of Ghulam Mustafa deceased. On the basis of the contents of Ex.PC, a formal FIR (Ex.PA) was recorded.

4. The police completed usual investigations and submitted the challan against all the three accused persons namely Ghulam Zakirya Shah, Allah Ditta Shah and Baqir Ali Shah in which they were charge-sheeted on 28.3.2008 under Sections 302/34, PPC. The accused professed innocence and claimed trial. The prosecution examined ten witnesses to prove the charge. The learned trial Court at conclusion of trial, convicted Ghulam Zakirya Shah

appellant in the manner noted in preceding para while acquitted accused Allah Ditta Shah and Baqir Ali Shah.

5. Muhammad Bakhsh (PW-6) and Sajjad Hussain (PW-7) deposed about murder of Ghulam Mustafa, Dr. Muhammad Iqbal Baloch (PW-8) had furnished the medical evidence while Akbar Ali S.I (PW-10) deposed about his investigations conducted in the case.

6. PW.8 Dr. Muhammad Iqbal Baloch on 27.10.2007 examined Ghulam Mustafa (injured) brought by Fiaz Hussain 1695-C and found the following injuries on his body:--

Injuries:--

(1) A lacerated circular wound 0.5 cm x 0.5 cm with inverted margin going into the abdomen below the left side of abdomen just below the left side of the chest blackening and charring is present around the wound. Wound is bleeding severely. Hole mark present on the Kameez correspond with the wound present on the body.

(2) A lacerated circular wound 1 cm x 0.5 cm with everted margin going out of abdomen at the right side of abdomen at mid axillary line at the lower part. Wound was bleeding severely. Hole mark present on the Kameez corresponding with wound present on the body.

After emergency treatment, patient was referred to Nishtar Hospital, Multan for further treatment and report. Duration of injuries within one to two hours. Kind of weapon used was firearm. After conducting medical examination, he issued MLC Ex.PG and handed over the copy of the same to Fiaz Hussain 1665-C.

7. On the same day at 10.00 p.m. dead body of Ghulam Mustafa was brought to THQ. Hospital Kot Adu for its postmortem examination, where PW.8 conducted autopsy and found the following injuries:--

INJURIES:--

(1) Lacerated circular wound was 0.5 cm x 0.5 cm with inverted margin going in at the left side of the abdomen just 1 cm below the mid axillary line. Wound is 18 cm away from left nipple. Blackening and charring present around the wound. (Entrance wound).

(2) Lacerated circular wound was 1cm x 0.5 cm with everted margin going out at the lower part of right side of abdomen at mid axillary line. Wound is 7.5 cm above the iliac crest. Wound was bleeding. (Exit wound).

In the opinion of Medical Officer, death was caused due to firearm injury. The said injury was grievous and fatal to life. All the injuries were ante-mortem, and the cause of death was due to hemorrage and shock due to firearm injuries which were sufficient to cause death in ordinary course of nature. Probable time elapsed between injuries and death was within 2 to 3 hours and between death and postmortem was about 3 to 5 hours.

8. The prosecution closed its evidence by giving up Sajjad Hussain and Muhammad Ashraf (PWs) being unnecessary. Report of Chemical Examiner Ex.PQ, Serologist Ex.PR and report of Forensic Science Laboratory regarding pistol Ex.PP were also placed on record.

9. The prosecution evidence so recorded during the trial of the case was confronted to the appellants by recording their statements under Section 342, Cr.P.C. and in an answer to Question No. 08 "why this case against you and why the PWs deposed against him?" Ghulam Zakirya Shah set up his defence in the following words, which was adopted by co-accused Allah Ditta Shah and Baqir Ali Shah:--

"It is a blind murder. PWs and complainant reached place of occurrence after receiving information about occurrence. Ghulam Mustafa deceased was injured by some unknown persons. There is previous enmity between us and one Sajjad Hussain son of Niaz Hussain. I have submitted an application before I.G. Police Punjab on 23.10.2007 against Sajjad Hussain Shah son of Niaz Hussain Shah, Memo. Shah, brother of Sajjad Hussain Shah, Ghulam Abbas Shah son of Khadim Hussain Shah, Muhammad Shafi son of Allah Wasaya and Niaz Hussain father of Sajjad Hussain, copy of which I produce Ex.DA. The allegation of murder of Ghulam Mustafa deceased has been levelled against us at the instance of Sajjad Hussain Shah because Sajjad Hussain Shah and Ghulam Mustafa deceased were very close friends.

Sajjad Hussain Shah purchased land comprising 1-kanal from me vide Mutation No. 525 dated 18.10.2007 Ex.DB. He wanted to get possession of said one kanal at the front on road side which I resisted, therefore, enmity developed between us and Sajjad Hussain Shah. Baqir Shah and Allah Ditta accused have been falsely involved in this case because Baqir Shah is husband of my sister and Allah Ditta accused is my real brother."

The appellants did not opt to want to make statements under Section 340(2), Cr.P.C. but placed on file documents Ex.D/A and Ex.D/B and closed their defence.

10. Learned counsel for the appellant Ghulam Zakirya Shah while opening the case has submitted that the occurrence as reported in the crime report was not witnessed by any of the PWs, who reached at the place after receiving the information about the same. Added that the deceased Ghulam Mustafa was injured by some unknown person due to his previous enmity and appellant has falsely been booked due to his animosity with one Sajjad Hussain son of Niaz Hussain. It is argued that said Sajjad Hussain wanted front of land of appellant to which appellant resisted and in this respect he had filed an application with Police high-ups for initiation of action against Sajjad Hussain and others. He further criticized the testimonies of the eye-witnesses with the submission that both PWs were closely related with the deceased as well as inter-se thus had interest in the prosecution of the appellant. He has also challenged the legality of the dying declaration Ex.PL allegedly made by the deceased Ghulam Mustafa on the ground that the same did not bear the signatures of the Medical Officer, who had permitted the Investigating Officer to take the statement of the injured. He further maintained that PW.7 was mentioned in the dying declaration as a witness of the occurrence but PW.7 in his statement did not utter single word about the same. According to the learned counsel in this manner this piece of evidence has rendered inadmissible and cannot be relied upon for maintaining the conviction of the appellant. Learned counsel has further argued that PWs.6 & 7 had concealed the real motive of the occurrence by mentioning that the appellant had come to take revenge of his insult. He has also negated that any weapon of offence was recovered at the instance of the appellant and submitted that the weapon had been planted for the reason that PWs could not mention the bore of the weapon, which allegedly was used in the

commission of the offence. Even the Investigating Officer was not conscious about the bore of the weapon as he had inquired from the Medical Officer about the nature of the weapon as admitted by PW.8 Dr. Muhammad Iqbal Balouch. Lastly, it is the argument of the learned counsel that as per medical report the fire was made from a very close range but this distance of making fire at the deceased is not established from the statements of the PWs as well as from the scaled site plan Ex.PN. In the background of these submissions, learned counsel prayed for the acceptance of the appeal and acquittal of the appellant from the charge.

11. The submissions made by the learned counsel for the appellant have been controverted by the learned Deputy Prosecutor General assisted by learned counsel for the complainant by submitting that the deceased before his death had made statement Ex.PL before the Investigating Officer specifically nominating the appellant and his co-accused for causing injuries to him, which statement remained unchallenged on the record thus it is a material piece of evidence leading to the involvement of the appellant in the occurrence. He further argued that the prosecution had proved the charge against the appellant through reliable and trustworthy ocular account consisting upon the statements of PW.6 and PW.7. According to the learned counsel the weapon of offence was recovered at the instance of the appellant and the injuries mentioned by the eye-witnesses in their testimonies have been corroborated through the medical evidence, therefore, learned trial Court did not commit any illegality in awarding the normal penalty of death to the appellant.

12. The parties have been heard and record perused.

13. The case of the prosecution is that on 27.6.2007 at about 5.00 p.m the complainant in the company of others was going to attend the marriage in Mauza Bait Qaim Wala when they were intercepted by the appellant and his co-accused and two of the accused namely Allah Ditta and Baqir Ali Shah caught hold of Ghulam Mustafa deceased when the appellant fired hitting on the left lumber-region of the injured, which went through and through. After the occurrence the assailants fled away with their weapons. The motive for the occurrence statedly is an altercation between the deceased and the appellant in which the deceased had slapped the appellant due to which grievance Ghulam Mustafa was killed by the appellant. To prove the allegation as stated above the prosecution had examined PW.6 Muhammad Bakhsh, the brother of the deceased and Sajjad Hussain PW.7 whose sister was married with the deceased while the deceased's sister was married to PW.7 as a cross-marriage. The statements made by both PWs have been found quite in line with the first information report as well as with the report provided by PW.8, the Medical Officer. Both witnesses have consistently identified the appellant, who was armed with weapon and had fired at the deceased, which hit on the left side of his lumber-region. The cross-examination made on the statements of these PWs is not suggestive of the fact that the witnesses were not present at the place of occurrence at the relevant time, rather it has been established that the witnesses in the company of the deceased were going to attend the marriage ceremony in another village when the incident had taken place. Even otherwise, it is a daylight occurrence and the appellant party was known to the complainant side. The FIR was also registered within an hour of occurrence leaving no room for any doubt for consultation and deliberation. The objection of the learned counsel for the appellant that PWs did not provide the nature of the weapon and its bore thus this defect is fatal to the

prosecution case, is without substance for the reason that the PWs were not firearms expert for telling the description of the weapon and it was sufficient when they pointed out that the appellant was armed with a firearm. This mentioning of the firearm is also supported from the medical evidence, which describes that the injury was made with such like weapon. In this manner the eye-witness account is quite in line with the medical evidence and this piece of evidence was properly appreciated by the learned trial Court while convicting the appellant under Section 302(b), PPC.

14. The complainant (PW.6) in his FIR had narrated that two days prior to the occurrence the deceased had altercation with the appellant at Tounsa More and in that occurrence the deceased had slapped the appellant, which proved fatal to the life of the deceased. Both these witnesses i.e. PW.6 and PW.7 are not the direct witnesses of the altercation, which had allegedly taken place between two persons nor they had provided any source wherefrom they came to know that the appellant and the deceased had some fight. This fact has been admitted by PW.6 in his cross-examination that at the time when the altercation took place between the parties he and PW.7 were not present. Deceased also did not mention about motive of occurrence, when he made statement Ex.PL in the hospital. Further, it is also noted from the record that the appellant did not repeat fire upon the deceased although the latter was completely at his mercy. The recovery of the weapon allegedly made by the Police at the instance of the appellant also appears to be doubtful as the report of the Forensic Science Laboratory Ex.Pp does not indicate that the weapon sent to the Lab was same weapon, which was used in the occurrence. It was reported that the weapon received in the laboratory was in working condition thus the recovery of the weapon at the instance of the appellant has no legal consequence as there is no evidence on the record that the same weapon was used for the killing of the deceased Ghulam Mustafa.

15. The analysis of the prosecution evidence as made in the preceding paras establishes that the PWs were present at the place of occurrence, who had seen the appellant while making firing upon the deceased Ghulam Mustafa thus the charge against the appellant has duly been established against him for killing the deceased. However, the prosecution has remained failed to establish the motive for the occurrence as well as the fact that the weapon recovered at the instance of the appellant was the same, which he used for killing the deceased. In view of these facts, we are inclined to commute the death sentence awarded to the appellant into imprisonment for life.

16. For what has been stated above, the appeal in hand is dismissed. However, the sentence of death awarded to the appellant Ghulam Zakirya Shah is converted into imprisonment for life maintaining the remaining sentence awarded to him by the learned trial Court. The benefit of Section 382-B, Cr.P.C. is also extended to the appellant. In this manner Murder Reference No. 41/2008 seeking confirmation of sentence of death awarded to Ghulam Zakirya Shah is answered in the NEGATIVE and death sentence is NOT CONFIRMED.

(A.S.) Appeal dismissed

PLJ 2014 Cr.C. (Lahore) 708
Present: Syed Muhammad Kazim Raza Shamsi, J.
MUHAMMAD WAKEEL--Petitioner
versus
STATE and another—Respondents

Crl. Misc. No. 2516-B of 2014, decided on 28.2.2014.

Criminal Procedure Code, 1898 (V of 1898)—

----Ss. 161 & 497--Pakistan Penal Code, (XLV of 1860), Ss. 392, 411, 452 & 380--Bail, grant of--Delay of 13 day in lodging FIR--Statements of witness were not recorded--Further inquiry--Validity--This delay in recording statements of witnesses itself casts doubt regarding story narrated by complainant in FIR--Admittedly occurrence was not seen by any person, therefore, involvement of petitioner in case in hand in these circumstances calls for further inquiry, entitling him for concession of bail. [P. 709] A

Mr. Waqar-ul-Hassan Butt, Advocate for Petitioner.
Mr. Abdul Rauf Wattoo, DPG for State.
Mr. Hassan Raza Sheikh, Advocate for Complainant.
Date of hearing: 28.2.2014.

Order

Muhammad Wakeel petitioner prays for his release on post arrest bail in case FIR No. 394, dated 02.5.2013 registered under Sections 392, 411, 452 & 380, PPC with Police Station Nawab Town, Lahore

2. As per contents of the FIR some unknown persons had broken open the house of the complainant and had taken away valuables as described in the report. Subsequently one of the alleged accused was arrested by the police and on the basis of the statement made by that accused the petitioner was booked in the case in hand.

3. Parties heard and record perused.

4. The occurrence as reported in the FIR had taken place on 19.4.2013 at about 2.00 p.m, which was reported to the police with a delay of 13 days for which no plausible explanation has been provided. It is also a fact that after registration of the FIR on 02.5.2013 the Investigating Officer did not record the statements of the witnesses under Section 161, Cr.P.C. which was recorded on 11.8.2013 when co-accused Khalid was arrested by the Police. This delay in recording the statements of the witnesses itself casts doubt regarding the story narrated by the complainant in the FIR. Admittedly the occurrence was not seen by any person, therefore, the involvement of the petitioner in the case in hand in these circumstances calls for further inquiry, entitling him for the concession of bail.

5. In view of the above, the petition in hand is allowed and petitioner Muhammad Wakeel is admitted to bail on furnishing of bail bonds in the sum of Rs.100,000/- (Rupees One Lac only) with surety in the like amount to the satisfaction of learned trial Court.

(A.S.) Bail allowed

PLJ 2014 Cr.C. (Lahore) 753
Present: Syed Muhammad Kazim Raza Shamsi, J.
MUHAMMAD ASIF--Petitioner
versus
STATE and another—Respondents

Crl. Misc. No. 7846-B of 2013, decided on 2.7.2013.

Criminal Procedure Code, 1898 (V of 1898)—

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 392 & 411--Bail, grant of--Police investigation has been completed and his person was not required for further investigation--Petitioner cannot be detained in jail as a punishment before conclusion of his trial--Even otherwise, petitioner was not nominated accused of case nor his identification parade was got conducted--He appears to be previously non-convict--Bail allowed. [P. 753] A

Mr. Waqar-ul-Hassan Butt, Advocate for Petitioner.
Mr. Muhammad Ishaque, DPG for State.
Date of hearing: 2.7.2013.

Order

Muhammad Asif petitioner seeks his release on bail in case FIR No. 73 dated 20.3.2012 registered against him under Sections 392 & 411, PPC with Police Station Saddar Kamalia, District Toba Tek Singh having an allegation that he along with his co-accused had committed dacoity in the house of the complainant and took away valuables.

2. Parties heard. Record perused.

3. The petitioner is facing incarceration since 31.3.2012 whose trial has yet not been concluded. As some articles have been recovered at the instance of the petitioner, therefore, police investigation has been completed and his person is not required for further investigation. The petitioner cannot be detained in the jail as a punishment before the conclusion of his trial. Even otherwise, the petitioner is not the nominated accused of the case nor his identification parade was got conducted. He appears to be previously non-convict.

4. In view of above, this petition is allowed and Muhammad Asif petitioner is admitted to bail subject to his furnishing bail bonds in the sum of Rs. 1,00,000/- with one surety in the like amount to the satisfaction of the learned trial Court.

(A.S.) Bail allowed.

PLJ 2014 Cr.C. (Lahore) 889 (DB)
Present: Sayyed Mazahar Ali Akbar Naqvi and Syed Muhammad Kazim Raza Shamsi, JJ.
MUHAMMAD TAQQI ABBAS--Appellant
versus
STATE—Respondent

Crl. Appeal No. 1437 and M.R. No. 337 of 2010, heard on 10.4.2014.

Pakistan Penal Code, 1860 (XLV of 1860)—

----S. 302(b)--Conviction and sentence--Challenge to--Benefit of doubt--Case was based upon circumstantial evidence as no direct evidence regarding murder of deceased is available on file so prosecution was required to make a chain of circumstances by linking one end of chain around neck of appellant while other one to the toe of deceased and if any link is missing in this chain, same will not stand intact--This is basic principle in cases like one in hand--Prosecution has miserably failed to complete chain of circumstances to hold appellant guilty of murder of deceased and story narrated by complainant was highly doubtful--It is another principle of law that even single doubt is sufficient to release a person from gallows, so keeping in view this salutary principle Court extend benefit of doubt to appellant and hold that prosecution has miserably failed to bring home his guilt by producing convincing, cogent and sufficient evidence--Appeal was hand is accepted and conviction and lenience awarded to appellant were set aside--He was acquitted from charge. [Pp. 895 & 896] A & B

Rana Ehsan, Advocate for Appellant.
Mirza Abid Majeed, D.P.G. for State.
M/s. Azam Nazeer Tarar and Muhammad Javed Awan, Advocates for Complainant.
Date of hearing: 10.4.2014.

JUDGMENT

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.--The appellant Muhammad Taqqi Abbas was tried in case FIR No. 489, dated 30.10.2007, registered with Police Station Darya Khan, District Bhakkar, under Section 302, PPC for the charge of Qatl-i-Amd of one Mureed Abbas. The learned Court, after conclusion of the trial, vide judgment dated 29.5.2010 convicted the appellant Muhammad Taqqi Abbas under Section 302(b), PPC and sentenced to Death as Ta'zir.

2. The appellant Muhammad Taqqi Abbas being aggrieved of his conviction and sentence preferred Crl. Appeal No. 1437/2010 while Murder Reference No. 337/2010 has been sent by the learned trial Court seeking, confirmation of death sentence awarded to Muhammad Taqqi Abbas. Since both matters are interconnected and interlinked therefore are being disposed of by this single judgment.

3. Ghulam Abbas complainant (PW.11) set the criminal machinery into motion through written complaint Ex.PA, on the basis of which aforesaid FIR (Ex.PA/1) was registered. According to the complainant on 19.10.2007 in the evening his brother Mureed Abbas went out of house on motorcycle but he did not return back till night and on the following day the complainant alongwith his cousin Ghulam Hur contacted Muhammad Taqqi friend of his brother, who informed that Mureed Hussain in the evening had gone from him but my brother Mukhtar Hussain and Qaiser Abbas son of Ghulam Abbas intimated that on the same day at about 9.30 p.m Mureed Abbas and Muhammad Taqqi were seen going from Lorri Adda Darya Khan towards Dullewala Road. Muhammad Taqqi was reluctant to inform them about Mureed Abbas because Muhammad Taqqi and Mureed Abbas had a rift between them on account of money dispute. The complainant had shown strong suspicion that Muhammad Taqqi with the help of others had murdered Mureed Abbas.

4. After registration of case the investigations were entrusted to PW.12 Muhammad Ramzan, Sub-Inspector, who recorded the statements of the witnesses under Section 161, Cr.P.C., arrested the accused Taqqi Abbas from his house, visited the place of occurrence, prepared unsealed site-plan Ex.PH, took into possession blood-stained brick (Ex.P3) vide recovery memo. Ex.PI, interrogated the accused, on receipt of presence of dead body of Mureed Abbas at RHC, Darya Khan he visited the hospital, prepared injury statement Ex.PD, inquest report Ex.PE and handed over the dead body to Abdul Ghaffar 309/C for post-mortem. On 1.11.2007 the Investigating Officer got prepared scaled site-plan (Ex.PB & Ex.PB/1) from Muhammad Shafique Khan Draftsman.

5. PW.13 Abdul Hameed, Sub-Inspector also conducted partial investigations, who obtained physical remand of the accused Muhammad Taqqi Abbas and interrogated him and on his disclosure recovered Toka (Ex.P.2) from sugarcane field of Ghulam Abbas Patwari after digging the land was taken into possession vide recovery memo. Ex.PG, He also took into possession motorcycle (Ex.P.1) of the deceased lying in canal from the southern side of the bridge Dullewala Darya Khan Road vide recovery memo. Ex.PF. He also recorded the statements of the witnesses under Section 161, Cr.P.C.

6. After completion of investigations, final report under Section 173, Cr.P.C. was submitted to the Court against Muhammad Taqqi Abbas. Learned trial Court on receipt of report charge sheeted the accused. The accused professed innocence and claimed trial.

7. The prosecution to bring home the gilt of the accused Muhammad Taqqi Abbas Ali had examined as many as 14 witnesses. PW.6 Manzoor Hussain, PW.7 Bashir Hussain, PW.8 Qaiser Abbas, PW.9 Mukhtiar Hussain and PW.11 Ghulam Abbas (complainant) had furnished last seen and evidence of `wajtakar' while PW.12 Muhammad Ramzan, Sub-Inspector and PW.13 Abdul Hameed, Inspector had stated about the investigations conducted by them in the case. The medical evidence was furnished by PW.5 Dr.

Muhammad Ishaque, Senior Medical Officer, RHC Hospital, Darya Khan, who conducted post-mortem of the deceased Mureed Abbas and found following injuries:--

"Injuries.

1. A chop wound in area of 12 cm x 03 cm, under lying bone was fractured with clear margin. The wound was situated on the top of head, 07 cm above right ear.

2. A depressed area in size of 12 x 06 cm was situated left upper chest just above left nipple."

In his opinion mode of death was comma due to Injury No. 1 and hemorrhage and shock due to Injury No. 2. Injury No. 1 was caused by heavy sharped edge weapon while Injury No. 2 by blunt weapon. Both injuries were ante-mortem and sufficient to cause death in ordinary course of nature. Probable time elapsed between, injuries and death was about 15 to 30 minutes while between death and post-mortem was about into 10 to 14 days.

8. The prosecution closed its evidence by giving up PWs Niaz Muhammad, Haq Nawaz, Ghulam Hur, Muhammad Ismail and Ghulam Akbar being unnecessary and by tendering the report of Chemcial Examiner Ex.PJ and report of Serologist Ex.PK.

9. The prosecution evidence so recorded was confronted to the appellant Muhammad Taqqi Abbas through his statement recorded under Section 342 CrP.C. Appellant Muhammad Taqqi Abbas while replying to question, "Why this case against you and why the PWs have deposed against you?" stated as under:

"The PWs are inter-se related and are friends with each other, so they are interested in my conviction. The case against me is false, I have produced so many persons in my defence but the Investigating Officer of this case was in league with the complainant, so he did not record the statements of my defence witnesses mala fidely. Prior to murder of Mureed Abbas deceased, one Abdul Sattar relative of Bashir Hussain and Manzoor Hussain P.Ws committed murder, during the investigation of which, all the P.Ws and the complainant were helping and appearing on behalf of Abdul Sattar accused while my father and my relatives had been supporting the complainant of that complainant party. Actually, it was a blind murder case and when no real culprits were traced out, the complainant party has booked me in this false case on the asking of above-said Manzoor Hussain and Bashir P.Ws."

The appellant neither opted to make statement under Section 340(2), Cr.P.C. to disprove the allegations levelled against him nor produced evidence in defence.

10. Learned counsel for the appellant has vehemently argued that the case in hand is of no evidence as the prosecution has miserably failed to fit the noose around the neck of the appellant by producing convincing and cogent evidence showing that the appellant was the person, who had committed the murder of Mureed Abbas. He further pointed out towards delay of 14 days in lodging the FIR and argued that after the recovery of the dead body the complainant approached the police for registration of the case whereas the deceased was missing from his house since 19.10.2007. He further maintained that there is no direct evidence showing that the appellant had inflicted injury at the head of the deceased and

then had thrown his dead body in the canal and in this connection while referring to the statement of PW.6 and PW.7 Manzoor Hussain and Bashir Hussain respectively, it is the argument of the learned counsel that the witnesses had only heard voice of falling of something in the canal but had not seen the appellant throwing the deceased in the canal. Added further that the statements of PW.6 and PW.7, who had allegedly seen the deceased in the company of the appellant, are not trustworthy nor they established that in fact the witnesses had seen both persons sitting at the bank of the canal. He further argued that the dead body was not recovered on the pointation of the appellant nor the document of pointation prepared by the Investigating Officer is admissible in evidence, therefore, the case against the appellant is wholly doubtful. He goes on to submit that the witnesses produced by the prosecution are closely related to the deceased and their testimonies cannot be relied upon without any independent corroboration, which is not available on the file. He lastly submitted that the motive as alleged in the crime report could not be established by the prosecution through any tangible evidence and it is highly improbable that when a person is having some ill-will with the other then he would accompany that person. In this background learned counsel for the appellant has prayed for acceptance of the appeal in hand and for the acquittal of the appellant from the charge.

11. Conversely, learned Law Officer, assisted by the learned counsel for the complainant, submitted that initially the appellant was the person, who had kidnapped the deceased and that the deceased and appellant was seen by the PWs 8 & 9 riding on motorcycle, which evidence was further supported by the statements of PW.6 and 7, who had seen the deceased in the company of the appellant while sitting at the bank of the canal and had heard voice of throwing of the deceased into the canal. He further submitted that the crime weapon `Tokka' was also recovered at the pointation of the appellant, which corroborates the medical evidence that the injury received by the appellant on his head was caused with same weapon.

12. Parties heard and record perused.

13. The case of the prosecution is that on 19.10.2007 deceased Mureed Abbas left his house at `Sham Vaila' on a motorcycle but did not return on the next day when the complainant started his search. Mukhtiar Hussain and Qaiser Abbas PWs 8 &, 9 when met the complainant told him that they had seen on the previous night at about 9.30 p.m the deceased in the company of the appellant riding on a motorcycle and proceeding towards Dullewala Road. On this information when Muhammad Taqqi appellant was inquired he put off the matter on one pretext or the other and then the complainant had shown his suspicion that the deceased was having some dispute with the appellant in respect of the money with said Taqqi and due to that fact the appellant might have murdered the deceased. This narration of the facts was made by the complainant Ghulam Abbas PW.11 through a written application Ex.PA made to Muhammad Zaman, ASI on 30.10.2007 at about 9.20 a.m in the morning. These facts narrated in the FIR sufficiently indicate that from 19.10.2007 to 30.7.2007 the complainant did not make any report to the police regarding missing of his brother Mureed Abbas. PW.6 and PW.7 had allegedly seen the deceased in the company of the appellant but as per their own statements they did not inform either the complainant or to the police. Same is the position with PW.8 and PW.9 who are close relative of the deceased and had seen him on the same night in the company of the appellant

but they also never bothered to lay any information to the police or to the complainant. These facts tend to show that on the recovery of the dead body from the canal the matter was reported to the police as was admitted by PW.12 Muhammad Zaman, Sub-Inspector that on 30.10.2007 at about 11.20 p.m. he received information that the dead body of Mureed Hussian was recovered from the area of District Layyah and then he proceeded to add an offence under Section 302, PPC. This delay of about 14 days in lodging the FIR has nowhere been explained in so many words by the complainant as to why he did not inform the police about the missing of his brother immediately so it is fatal blow to the prosecution case. Learned trial Court did not notice this piece of evidence when it proceeded to convict appellant so its findings suffer from misreading of evidence.

14. We have also examined the statements of PW.6 and PW.7, who deposed in the Court that one year and 10« month from the date of examination-in-chief i.e. on 05.9.2009, they had seen at 9.30/10 p.m a motorcycle standing on the bank of canal and two persons were talking with each other. They did not say that those two persons were appellant and the deceased. They further deposed that they had heard voice of huge and cry and noise of throwing something in the canal. Again they do not name the appellant that he had thrown the dead body of deceased Mureed Abbas in the canal. PWs then returned to their houses. They further deposed that they saw that a person then started a motorcycle and went towards the south thereon. Again the identification of the appellant is missing in this deposition. When the witnesses have not provided firstly the source of light in which they had seen two persons sitting at the bank of the canal talking with each other, secondly they had not identified both these persons and thirdly they did not watch throwing of the something in the canal then how can their statements can be treated as credible and confidence inspiring to believe that it was the appellant, who was sitting with the deceased, talking with him and then he had thrown the dead body of the deceased in the canal and thereafter he went on the motorcycle. At this juncture it is pertinent to mention here that as per crime report the deceased had gone on his own motorcycle but it is astonishing to note that as per statement of PW.6 and PW.7 the appellant had returned on a motorcycle and if it is so then whose motorcycle was recovered by the police from the canal regarding which recovery memo. Ex.PF was prepared by the Investigating Officer. This question could not be answered to the satisfaction of a prudent mind as if two persons were traveling on one motorcycle and one person had killed another and then returned on a motorcycle then wherefrom second motorcycle came which was recovered by the police from the canal. This is also a very doubtful fact smashing the case of the prosecution. Learned trial Court had incorrectly relied upon this piece of evidence in the impugned judgment.

15. Similarly as per prosecution case the injury was allegedly caused at the head of the deceased with `Tokka', which was recovered by the police allegedly on the pointation of the appellant vide recovery memo. Ex.PG but this piece of evidence again is not helpful to the prosecution for the reason that it is noted in the memo. that the said `Tokka' was not blood-stained and perhaps the appellant after washing the `Tokka' had concealed the same in the ground. Further this recovery is totally against the document Ex.PI, a recovery memo. of a brick, which was found blood-stained. If the injury was caused by the appellant with `Tokka' then why the prosecution had collected this evidence of brick, the explanation in this regard is not available on the file, rather it goes to cause serious dent in the prosecution case whether the deceased was killed with the `Tokka' or by hitting the brick at his head.

Similarly the dead body was not recovered on the pointation of the appellant rather it was recovered from the area not falling within the jurisdiction of Police Station Darya Khan as is evident from the statement of PW.12. Regarding the motive part of the occurrence it is questionable as to why the deceased had accompanied the appellant when he had some dispute with the appellant. There is no explanation in this regard on the file nor this fact was independently proved by the prosecution.

16. The upshot of whole discussion is that the case in hand is based upon the circumstantial evidence as no direct evidence regarding the murder of Mureed Abbas is available on the file so the prosecution was required to make a chain of circumstances by linking one end of chain around the neck of the appellant while the other one to the toe of the deceased and if any link is missing in this chain, the same will not stand intact. This is basic principle in the cases like the one in the hand. We have found in this connection that prosecution has miserably failed to complete the chain of the circumstances to hold the appellant guilty of the murder of Mureed Abbas and the story narrated by the complainant is highly doubtful. It is another principle of law that even single doubt is sufficient to release a person from the gallows, so keeping in view this salutary principle we extend benefit of doubt to the appellant and hold that the prosecution has miserably failed to bring home his guilt by producing convincing, cogent and sufficient evidence.

17. In view of the above observations, the appeal in hand is accepted and the conviction and sentence awarded to the appellant Muhammad Taqqi Abbas are set aside. He is acquitted from the charge and shall be released from the jail forthwith if not required involved in any other case. Consequently, Murder Reference No. 337/2010 sent by the learned trial Court seeking confirmation of death sentence awarded to appellant Muhammad Taqqi Abbas is answered in NEGATIVE and death is not confirmed.

(A.S.) Appeal accepted.

PLJ 2014 Lahore 1194

Present: Syed Muhammad Kazim Raza Shamsi, J.

MUHAMMAD MANSOOR & another--Petitioners

versus

ADDL. SESSIONS JUDGE, LAHORE and 6 other—Respondents

W.P. No. 25531 of 2014, decided on 24.9.2014.

Constitution of Pakistan, 1973—

----Art. 199--Illegal Dispossession Act, 2005--Ss. 3 & 4--Dispossession from property--Speedy and substantial justice--Order restoration of possession will dispossess from disputed property--Validity--Every wrong had its remedy and to meet ends of justice, trial Court is directed to implead petitioners as party in private complaint and after hearing their point of view shall take further proceedings--High Court did not feel any necessity for summoning respondents of case, who may make their submissions before Court when petitioners are impleaded as party in private complaint. [P. 1195] A & B

Mr. Moeen Ahmad, Advocate for Petitioners.
Mr. Raza-ul-Karim Butt, AAG on Court's Call.
Date of hearing: 24.9.2014.

Order

Zafar Iqbal and Farah Deeba lodged a private complaint under Section 3 & 4 of Illegal Dispossession Act, 2005 against Rana Muhammad Akram, Mian Jamshaid Aslam, Muhammad Rafique and Javed Akhtar, present Respondents No. 4 to 7, alleging their forcible dispossession from the property in dispute. In this matter the trial Court has commenced proceedings.

2. The present petitioners Muhammad Mansoor and his wife Nargis Mansoor moved an application in the said private complaint with the prayer of dismissal of the complaint on the ground that they are owners in possession of the property, subject matter of the complaint filed by Zafar Iqbal and another, with the apprehension that Zafar Iqbal and Rana Muhammad Akram with connivance of each other after securing an order restoration of possession will dispossess them from the property in dispute. Learned trial Court has turned down the request of the present petitioners vide order dated 19.9.2014 mainly on the ground that both petitioners were not party to the private complaint filed by Zafar Iqbal, so they have no locus-standi to make a prayer for dismissal of the complaint. This order has been assailed through the instant petition.

3. During the course of arguments, it is felt that the petitioners are aggrieved persons whose property and their proprietary rights therein are at stake and they are left with no remedy of any sort from any Court regarding misdeeds of the parties to the private complaint. There is every likelihood that the complainant and the respondents of the complaint with the connivance of each other may secure an order from the Court, which would be implemented upon the property of the petitioners, who may be dispossessed in the garb of that order, so in these circumstances while relying upon the principle of law that every wrong had its remedy and to meet the ends of justice, learned trial Court is directed to implead the petitioners as party in the private complaint and after hearing their point of view shall take further proceedings thereon.

4. Since the matter is of peculiar nature, so in order to provide speedy and substantial justice to the petitioners, I do not feel any necessity for summoning the respondents of the case, who may make their submissions before the Court when the petitioners are impleaded as party in the private complaint.

5. For the foregoing reasons, the petition in hand is accepted and order dated 19.9.2014 is set aside. Learned trial Court is directed to implead both petitioners as party to the private complaint filed by Zafar Iqbal and another and after providing hearing to the petitioners shall decide the fate of the case. Copy of this order be communicated to Mian Shahzad Raza, learned Addl. Sessions Judge, Lahore for compliance.

(R.A.) Petition accepted.

K.L.R. 2014 Criminal Cases 111

[Multan]

Present: **MAZHAR IQBAL SIDHU and SYED MUHAMMAD KAZIM RAZA SHAMSI, JJ.**

Allah Ditta

Versus

The State

Criminal Appeal No. 105 of 2009 and Murder Reference No. 20 of 2009, decided on 25th September, 2013.

MURDER --- (Quantum of punishment)

Criminal Procedure Code (V of 1898)---

---S. 410---Pakistan Penal Code, 1860, S. 302(b)---Murder appeal---Partial compromise---Mitigation of sentence---Factors---It appeared that occurrence had taken place at spur of moment and appellant in heat of passion took law into his own hands and killed his brother---PW/father sworn an affidavit stating that he had pardoned his son/appellant in name of Allah Almighty---PW/father was a person having age of 58 years and perhaps he might not sustain shock of death of another son---Impugned death sentence was converted into imprisonment for life.

(Para 16)

[Although appellant was not sole legal heir, yet he had forgive the murderer/appellant of his deceased son who was his other son. Impugned death sentence was converted into life imprisonment].

For the Appellant: **Prince Rehan Iftikhar Sheikh, Advocate.**

For the State: **Malik Muhammad Jaffar, D.P.G.**

For the Complainant: **Nemo.**

Date of hearing: **25th September, 2013.**

JUDGMENT

SYED MUHAMMAD KAZIM RAZA SHAMSI, J. --- The appellant Allah Ditta son of Sardar Khan was tried in case F.I.R. No. 464, dated 25.8.2007, registered under Section 302, P.P.C. with Police Station City Lodhran for the charge of Qatl-i-Amd of his brother Ghulam Murtaza. The learned Court, after conclusion of the trial, *vide* judgment dated 22.12.2008 convicted the appellant under Section 302(b), P.P.C. and sentenced to death as Ta'zir with a direction to pay Rs. 50,000/- to the legal heirs of deceased as required by Section 544-A, Cr.P.C. and in default whereof to undergo six months' simple imprisonment.

2. **Murder Reference No. 20/2009** has been sent by the learned Trial Court as required under Section 374, Cr.P.C. seeking confirmation of death sentence awarded to Allah Ditta.

3. The appellant Allah Ditta being aggrieved of his conviction and sentence has sent his appeal (Crl. Appeal No. 105/2009) through the Jail authorities, which is being disposed of alongwith Murder Reference No. 20/2009, by this single judgment.

4. The prosecution story as narrated by the complainant Sardar Khan son of Muhammad Ramzan (PW.8) in his written statement (Ex.PD/1), on the basis of which F.I.R. (Ex.PD) was that on 25.8.2007 at about 6.00 p.m., he on having information about quarrel between his sons Allah Ditta and Ghulam Murtaza reached the house of Ghulam Murtaza and saw that his both sons were abusing to each other. The complainant, his son Allah Dad and Sardar son of Ghulam Rasool, father-in-law of Ghulam Murtaza, who had come to see his daughter, made them to understand but Allah Ditta, who was very angry went to his house and came back with a hatchet. The complainant, Allah Dad and Sardar Khan tried to apprehend Allah Ditta but he threatened to kill them and within their view Allah Ditta inflicted consecutive blows with hatchet which landed on the back side head left side of head, left side of forehead and on the wrist of left hand of Ghulam Murtaza, whereafter Allah Ditta fled away from the scene. The complainant and others attended the injured but he succumbed to the injuries at the spot.

The motive behind the occurrence was that a short- while before the occurrence son of Ghulam Murtaza had slapped the child of Allah Ditta and for this grudge Allah Ditta wilfully killed Ghulam Murtaza.

5. After registration of the F.I.R., Nazir Ahmad, Sub-Inspector/Investigating Officer (PW.9) visited the place of occurrence, inspected the dead-body of Ghulam Murtaza, prepared inquest report Ex.PF, injury statement Ex.PF/1, dispatched the dead-body to the hospital for post-mortem examination in the escort of Abdul Shakoor 479/C, took into possession blood-stained earth *vide* recovery memo. Ex.PG, prepared rough site plan Ex.PH and recorded the statements of the PWs under Section 161, Cr.P.C. The Investigating Officer arrested the accused Allah Ditta on 28.8.2007, who got recovered blood-stained hatchet (Ex.P.2) from his house situated in Kundi, which was taken into possession *vide* recovery memo. Ex.PC. On 12.9.2007 the Investigating Officer got prepared scaled site plan (in triplicate) Ex.PA, PA/1 & PA/2 from Abdul Karim, Draftsman. During the investigations Allah Ditta was found guilty, consequently report under Section 173, Cr.P.C. was submitted in the Court for his trial, where he was charge-sheeted. The accused professed innocence and claimed trial.

6. The prosecution in order to bring home the charge against the accused Allah Ditta had examined nine witnesses in all. The ocular account mainly based upon the statements of PW.6 *Mst.* Amana Bibi, widow of Ghulam Murtaza, PW.7 Sardar Khan son of Ghulam Rasool, father-in-law of deceased Ghulam Murtaza, PW.8 Sardar Khan son of Muhammad Ramzan (complainant) and PW.9 Nazir Ahmad, Sub-Inspector/lnvestigating Officer. The medical evidence was furnished by Dr. Shaukat Ali Ijaz, Medical Officer,

DHQ Hospital, Lodhran (PW.5), who conducted post-mortem examination of the dead-body of deceased Ghulam Murtaza and found the following injuries:---

> **"(1) There was an incised wound 7 cm x 1.5 cm x bone deep (skull fracture of frontal bone), could be seen.**
>
> **(2) There was an incised wound 9 cm x 4 cm x bone deep (Sterno claviculer mussels cut could be seen, mastoid bone cut could be seen), below the left ear going towards neck.**
>
> **(3) There was an incised wound 11 cm x 3 cm x bone deep (Fracture of occipital bone could be seen) on back of skull on occipital region going towards back of neck.**
>
> **(4) There was an incised wound 3 cm x 1 cm x bone deep on lateral aspect of left wrist joint."**

In his opinion the death was resulted due to head injury (fracture of skull). Injuries No. 1, 2 & 3 were most likely sufficient to cause death in ordinary course of nature. The probable time between injuries and death was immediate and between death and post-mortem was about 14 hours.

7. The prosecution closed its evidence by giving up Shaukat Ali 228/C as well as Allah Dad PWs being unnecessary and by tendering reports of Chemical Examiner Ex.PJ and Ex.PK, reports of Serologist Ex.PJ/1 and Ex.PK/1.

8. The prosecution evidence so recorded was confronted to Allah Ditta accused/appellant, who made his statement under Section 342, Cr.P.C. and while replying question No. 9 "**Why this case against you and why the PWs have deposed against you?**" deposed as under:---

> **"I have been falsely implicated in this case due to previous enmity. All the PWs are *inter se* related to each other hence they have falsely deposed against me."**

9. The appellant neither opted to make statement under Section 340(2), Cr.P.C. to disprove the allegations levelled against him in the prosecution evidence nor produced any evidence in defence.

10. It is pertinent to mention here that on 28.11.2008 Sardar Khan complainant made statement on oath mentioning that due to compromise being one of the legal heirs of the deceased had forgiven Allah Ditta accused by waiving his right of Qisas and Diyat and had no objection on the acquittal of Allah Ditta.

11. Learned counsel for the appellant has, *inter alia*, contended that there was a glaring contradiction in the statements of complainant (PW.8) and Investigating Officer (PW.9) regarding recording of the statement of the complainant which indicates that at the time of occurrence the complainant as well as the witnesses were not present at the spot witnessing the occurrence; that the real culprit was substituted by the complainant with the appellant as the F.I.R. had been lodged with unexplained delay of two hours; that the appellant had been pardoned by the complainant while making his statement as PW.8, therefore, the appellant is liable to be acquitted on this statement; that the weapon of

offence allegedly recovered on the pointation of the appellant has been planted upon him with malice, that the occurrence which had taken place was not result of premeditation and it took place at the spur of the moment due to grave and sudden provocation; that PWs are highly interested and partisan, therefore, their testimonies cannot be relied upon without other independent corroboration; and that the prosecution has further failed to establish the motive for the occurrence as such on this account the appeal is liable to be accepted.

12. The submissions so made by the learned counsel for the appellant have been controverted by learned Deputy Prosecutor General by arguing that it is a case in which one brother had killed his other brother in the house and the occurrence had been witnessed by their real father, who is the complainant of the case, therefore, it is not probable that the complainant had mistakenly booked his other son for the murder of his deceased son Ghulam Murtaza. It is further submitted that the contradictions pointed out by the learned counsel for the appellant in the statements are minor in nature and do not have any bearing upon the genesis of the occurrence, which was duly supported by the statements of PW.6 and PW.7 in clear terms and their testimonies are quite consistent with each other on material points. Regarding statement of PW.8 that he had pardoned the appellant in the name of Allah Almighty is concerned, according to the learned counsel that cannot be considered as the deceased was a married person having his children also, who did not compound the offence nor made any statement in this regard. Lastly, it is argued that the prosecution by producing cogent and confidence inspiring evidence had established the identity of the appellant that he is the person who was present at the place of occurrence with weapon with which he had inflicted injuries at the vital parts of the body of the deceased resulting into his death which infliction of the injuries is further supported by the fact of recovery of crime weapon at the instance of the appellant thus the appeal is liable to be dismissed.

13. Arguments heard and record perused.

14. It is a case in which the complainant PW.8 being crest-fallen father of the deceased as well as appellant, has informed the Police about the incident with the assertion that within his view his one son Allah Ditta with hatchet inflicted injuries to his other son Ghulam Murtaza, which landed on his head due to which he succumbed to the injures. He mentioned that the motive of the occurrence is a quarrel between the children of two brothers in which infuriated appellant had killed his real brother. These facts have been established by the prosecution by producing PWs 6 to 8, who in their testimonies remained consistent with each other in respect of the identity of the appellant, his presence at the house, time and date at which the incident had taken place, the weapon with which the appellant was armed and infliction of the injuries. Although an attempt was made by the appellant side to dismental the credibility of the witnesses but he remained miserably failed to establish as to why PWs were interested in his prosecution. All the PWs are inmates of the house and closely related to both persons *i.e.* the deceased as well as appellant and in the absence of any animosity and ill-will with the appellant it cannot be observed that their testimonies suffer from some malice or afterthoughts. Even there appears no reason for falsely substituting the appellant with some other person by a person who is father of both.

The promptitude in lodging the F.I.R. also negates the fact of substitution or mistaken identity of the appellant. The depositions so made by the PWs are also found quite in line with the medical evidence furnished by PW.5 Dr. Shaukat Ali Ijaz, which indicates that the injuries were received by the deceased on his head with sharp-edged weapon, the nature of which weapon had already been mentioned by the PWs in their testimonies that the appellant was armed with hatchet at the time of occurrence thus a cogent corroboration has been furnished in this respect. Similarly the recovery of the hatchet at the instance of the appellant is another factor, which goes to establish that it was the same weapon, which was used by the appellant for killing his brother.

15. So far as the contention of the learned counsel that PW.8, father of the deceased as well as of the appellant, in his statement had forgiven the appellant in the name of Allah Almighty is concerned, that cannot be considered for the simple reason that PW.8 is not the sole legal heir of the deceased, who was also having his wife and children. Neither the widow of the deceased nor his children had come forward for effecting any compromise with the appellant, therefore, on the solitary statement of PW.8 offence cannot be compounded.

16. From the close examination of the record, it is found that the incident had taken place over a quarrel between the children of two brothers and appellant had killed his brother with hatchet over such a petty dispute. It is further evident that it was not a premeditated occurrence nor two brothers had any previous ill-will and animosity against each other. It appears that the occurrence had taken place at the spur of the moment and the appellant in the heat of passions took the law into his own hand and killed his brother. Further, although the other legal heirs of the deceased have not compounded the offence with the appellant but one of the legal heirs *i.e.* the father (PW.8) has sworn an affidavit in this respect stating that he had pardoned his son in the name of Allah Almighty. It would be very difficult situation for PW.8 to see the death of another son *i.e.* appellant particularly when he had already lost his one son in whatever circumstances. He is a person having the age of 58 years at present and perhaps he may not sustain the shock of death of his another son. Keeping in view all these peculiar circumstances, we are inclined to commute the death sentence into one imprisonment for life.

17. As already observed above, the prosecution has succeeded in bringing home the guilt of the appellant by producing credible evidence on the record, therefore, we are not inclined to accept this appeal.

18. For what has been discussed above, the appeal in hand is **dismissed** with the modification that the death sentence awarded to the appellant Allah Ditta is commuted to imprisonment for life with benefit of Section 382-B, Cr.P.C. The remaining sentences are maintained. Consequently, **Murder Reference No. 20/2009** sent by the learned Trial Court under Section 374, Cr.P.C. seeking confirmation of death sentence awarded to appellant Allah Ditta is **answered in NEGATIVE and death is not confirmed**.

Sentence reduced.

K.L.R. 2014 Criminal Cases 102

[Multan]

Present: **MAZHAR IQBAL SIDHU and SYED MUHAMMAD KAZIM RAZA SHAMSI, JJ.**

Muhammad Iqbal *alias* Fauji

Versus

The State

Criminal Appeal No. 192 of 2009 and Murder Reference No. 6 of 2009, decided on 24th September, 2013.

MURDER --- (Quantum of sentence)

Criminal Procedure Code (V of 1898)---

---S. 410---Pakistan Penal Code, 1860, S. 302---Murder appeal---Quantum of sentence---Case of prosecution on aspects of recovery of crime weapon and motive of occurrence was not clear---Impugned death sentence was converted into life imprisonment.

(Para 15)

[Recovery of weapon of offence and motive of murder was not clear. Impugned death sentence was converted into life imprisonment].

For the Appellant: **Prince Rehan Iftikhar Sheikh, Advocate.**

For the State: **Malik Muhammad Jaffar, D.P.G.**

For the Complainant: **Nemo.**

Date of hearing: **24th September, 2013.**

JUDGMENT

SYED MUHAMMAD KAZIM RAZA SHAMSI, J. --- The appellant Muhammad Iqbal *alias* Fauji son of Umar Din was tried in case F.I.R. No. 442, dated 06.02.2008 registered under Section 302, P.P.C. with Police Station Saddar Mianchannu, District Khanewal for the charge of Qatl-i-Amd of one *Mst.* Mobina Perveen. The learned Court, after conclusion of the trial, *vide* judgment dated 30.10.2008, convicted the appellant under Section 302(b), P.P.C. and sentenced to death.

2. **Murder Reference No. 06/2009** has been sent by the learned Trial Court as required under Section 374, Cr.P.C. seeking confirmation of death sentence awarded to Muhammad Iqbal *alias* Fauji.

3. The appellant Muhammad Iqbal *alias* Fauji being aggrieved of his conviction and sentence has sent his appeal (Crl. Appeal No. 192/2009) through the Jail authorities, which is being disposed of alongwith Murder Reference No. 06/2009, by this single judgment.

4. Fateh Muhammad complainant (PW.8) set the criminal machinery into motion through written complaint Ex.PA, on the basis of which F.I.R. (Ex.PA/A) was lodged. According to the complainant, on 06.02.2008 at about 1.30 p.m. he alongwith Muhammad Wakeel son of Mimmat Khan, Muhammad Pervez while standing outside his 'Baithak' were chatting, the wife of the complainant *Mst.* Mobina Perveen was coming towards her house after purchasing eggs from the shop and when she was passing in front of the 'Baithak' of his neighbour Iqbal Fauji, who was standing at the door of his 'Baithak', fired with his gun 12 bore at *Mst.* Mobina Parveen which hit on her left side of mouth due to which she fell down and succumbed to the injury within their view. After the occurrence accused Muhammad Iqbal fled away while brandishing his gun 12-bore.

The motive behind the occurrence was that due to previous grudge that the deceased *Mst.* Mobina Perveen used to restrain the accused from frequent habitual aerial firing near the house.

5. After registration of the F.I.R., Rana Muhammad Idrees, Sub--Inspector/Investigating Officer (PW.10) visited the place of occurrence, inspected the dead-body of *Mst.* Mobina Perveen, drafted application Ex.PE for post-mortem examination, prepared inquest report Ex.PD, took blood-stained earth *vide* recovery memo. Ex.PG, prepared rough site plan Ex.PH, escorted the dead-body of the deceased for post-mortem examination and recorded the statements of the PWs under Section 161, Cr.P.C. The Investigating Officer on 07.02.2008 got prepared scaled site plan (in triplicate) Ex.PJ, Ex.PJ/A and Ex.PJ/B from Raja Muhammad Iqbal, Draftsman and on 14.02.2008 he arrested the accused Muhammad Iqbal and on his pointation recovered 12-bore gun (Ex.PF/1) from his house on 21.02.2008, which was taken into possession *vide* recovery memo. Ex.PE. After completion of the investigations the report under Section 173, Cr.P.C. was submitted in the Court for trial of the accused where he was charge-sheeted. The accused professed innocence and claimed trial.

6. To bring home the guilt of the accused the prosecution has examined as many as ten witnesses. The ocular account mainly consists upon the statements of PW.8 Fateh Muhammad (complainant) and PW.9 Muhammad Pervez (eye-witness) as well as statements of PW.10 Rana Muhammad Idrees, Sub-Inspector/Investigating Officer. The medical evidence is based upon the statement of Lady Dr. Rizwana Tabassum, WMO, THQ Hospital, Mianchannu, (PW.5), who conducted post-mortem examination of the dead-body of deceased *Mst.* Mobina Perveen and found the following injuries:---

> **"(1) A fire-arm lacerated entry wound measuring 3.5 x 1 cm with inverted margin on the right cheek about 3 cm below the right eye.**
>
> **(2) A fire-arm lacerated exit wound measuring 7 to 9 cm involving half of the nose from the left side of upper and lower lips. Left eyebrow left eye, whole of left cheek, left ear is not involve, brain matter coming out through the wound. Margins are everted.**
>
> **Frontal and Parital wound in the brain matter damage on the left side of the head. Blood present in the cranial cavity."**

In her opinion the death was resulted due to damage to the vital organs *i.e.* brain by injury No. 1 caused with fire-arm weapon. All the injuries were ante-mortem and were sufficient to cause death in ordinary course of nature. The probable time between injuries and death was immediate and between death and post-mortem was about 08-10 hours.

7. The prosecution closed its evidence by giving up Muhammad Wakeel as well as Muhammad Abid PWs being unnecessary and by tendering report of Chemical Examiner Ex.PK and report of Serologist Ex.PL.

8. The prosecution evidence so recorded was confronted to Muhammad Iqbal *alias* Fauji accused/appellant, who made his statement under Section 342, Cr.P.C. and while replying question No. 14 "**Why the PWs deposed against you and why this case against you?**" has deposed as under:---

> **"This is a false case against me. The fire was made by some unknown person from the southern side with rifle. The same fact has been verified by the post-mortem report and other medical evidence. When the actual culprit was not traced, I was falsely involved in this case due to exchange of hot words a few days prior to this occurrence between me, the complainant and the victim. I am a retired army personnel. I am a responsible person of the society. I am not the perpetrator of this murder. PWs are interested witnesses. PWs Fateh Muhammad is the husband of the deceased whereas PW.9 is a friend of PW.8, therefore, they have deposed against me."**

9. The appellant neither opted to make statement under Section 340(2), Cr.P.C. to disprove the allegations levelled against him in the prosecution evidence nor produced any evidence in defence.

10. Learned counsel for the appellent while assailing the legality of the impugned judgment has submitted that the learned Trial Court has not properly read the material placed before it through the prosecution evidence as such the finding regarding conviction of the appellant suffers from illegality. In this connection, learned counsel has diverted the attention of the Court to the post-mortem examination report Ex.PC and submitted that the injuries mentioned in the same materially contradict the statement of the complainant (PW.8), which indicates that PW.8 and PW.9, claiming to be the eye-witnesses of the occurrence, were not present at the time of occurrence. He claimed the benefit of doubt on the basis of contradiction in the medical evidence *vis-a-vis* the ocular account. He has further argued that the witnesses, besides being related with the deceased and interested in the prosecution of the appellant, had reached at the spot after the occurrence and they had not seen the appellant firing at the deceased *Mst.* Mubina Perveen. Similarly while criticizing the factum of recovery of crime weapon at the instance of the appellant, it is the argument of the learned counsel that the appellant did not make any fire upon the deceased, which fact is established from the non-recovery of the crime empty from the place of occurrence, the alleged weapon when recovered was empty and no live cartridge was taken into possession by the Police and the weapon was a licenced one, therefore, the prosecution could not prove on record that the weapon allegedly recovered on the pointation of the appellant was ever used in the happening of the incident. The next argument of the learned

counsel is with regard to the motive part of the occurrence, which according to the learned counsel could not be established by the prosecution beyond any reasonable doubt, even no cogent and confidence inspiring evidence has been tendered in support of this fact. He pointed out that PW.9 had candidly stated that he did not know about the reason for the incident, so according to the submission of the learned counsel the case of the appellant in this circumstance was not one of awarding normal penalty of death, rather this could be treated as an extenuating circumstance for awarding lesser sentence.

11. The submissions made by the learned counsel for the appellant have been controverted by the learned Deputy Prosecutor General with the submission that the F.I.R. was lodged in respect of the occurrence within a span of less than two hours in which specific allegation of firing had been levelled against the appellant, which resulted into the death of the deceased. According to the arguments about the promptitude in lodging the F.I.R., there is no possibility for false implication of the appellant after deliberation and consultation. He has further pointed out that the occurrence had taken place in the daylight thus the identity of the appellant, who is neighbour of the complainant, is not mistaken one. He further added that PW.9 is not either related to the complainant or to the deceased, rather is an independent person, who had seen the occurrence and deposed the same in the Court as PW.9, which extremely shows the *bona fide* of the complainant and the prosecution that the statement of an independent person has been relied upon, who otherwise had no grudge or ill-will against the appellant. Regarding the dichotomy in the statement of PW.8 *vis-à-vis* PW.5, the Medical Officer, regarding seat of injury, it is argued that this alleged contradiction in the evidence appears to be quite natural as the complainant instead of falsely providing the seat of injuries received by the deceased had straightaway mentioned that the fire hit on the mouth of the deceased without specifying that on which side it was inflicted thus this contradiction is not material and helpful to the defence giving any benefit. Learned counsel lastly submitted that the judgment rendered by the learned Trial Court is neither based upon extraneous material nor suffers from any misreading and non-reading of material piece of evidence, thus prayed for the dismissal of the appeal.

12. We have given emphatic consideration to the submission made by the learned counsel for the parties and have also reappraised the evidence available on the record. As is evident from Ex.PA/A, the F.I.R., the wife of the complainant *Mst.* Mubina Perveen was returning to her house at about 1.30 p.m. on the fateful day after purchasing eggs from the shop and when she passed in front of the 'Baithak' of the appellant, he fired with his gun 12 bore hitting on the left side of her face, who succumbed to the injuries at the spot whereas the appellant fled away with weapon. The motive of the occurrence reportedly is that the appellant was in the habit of firing and the deceased had restrained her from doing so regarding which the appellant nourished grudge and ultimately killed the lady. These allegations have been proved by PW.8 Fateh Muhammad complainant and Muhammad Parvez (PW.9) by providing ocular account of the incident. It is note worthy that PW.9 Muhammad Parvez is not related to either of the parties, rather seems to be an independent person, who was present with the complainant and one another Wakeel (given up PW) at the door of the complainant, so in view of this position of PW.9 his testimony cannot be discarded on the ground that he was interested person, rather he is the natural and independent person against whom no ill-will has been alleged by the defence in his cross-

examination. PW.8 and PW.9 remained consistent with regard to the happening of the incident in their testimonies as well as the injuries received by the deceased. They have categorically denied the defence suggestion that it was blind murder and some other un-known person had killed the lady. They had also denied that at the time of occurrence they were not present at the spot. Learned Trial Court had duly appreciated the statements of both these PWs to conclude that the PWs were present at the spot and their testimonies are credible and confidence inspiring.

13. Regarding the objection of learned defence counsel in respect of contradiction in the medical evidence and ocular account as to the seat of injuries received by the deceased, it is sufficient to say that PW.8 in his statement had deposed that the deceased had received inquiry at her face, which fact is established by Ex.PC where the Medical Officer has pointed out the exact place at the face where the injury has been caused with the fire-arm. Even otherwise it cannot be expected from a complainant, who was also facing agony of the incident to detail out graphically the places where the fires were received by a deceased person. It would be suffice if the parts of the body are mentioned where the injuries were received by a person instead of minutely providing the details of the places wherefrom the bullet had entered and exited. If such details are provided in the first information report that they may make the story as un-natural as in the panic it is not possible for an ordinary person to watch in detail the infliction of the injuries. Another objection of the learned counsel that according to the statement of PW.5 the deceased had received bullet injury instead of injury from gun 12 bore has no legs to stand as the dimension of the injury provided by the Medical Officer is indicative of the fact that it was not caused with bullet. Further, it cannot be expected from a Medical Officer to describe the nature of weapon used in the commission of the offence because a Medical Officer, is not a ballistic expert and cannot give the nature of the weapon used by a culprit.

14. So far as the case of the prosecution in respect of recovery of the crime weapon at the instance of the appellant is concerned, it is evident from the record that the same was not sent to the Forensic Science Laboratory for matching the weapon with the crime empty, rather in the instant case as per evidence no crime empty was collected by the Investigating Officer while inspecting the place of occurrence. Even otherwise the weapon allegedly used was not an illegal fire-arm rather it was a licenced weapon of the appellant.

15. The record when examined is indicative of the fact that PW.8 and deceased used to restrain the appellant from making aerial firing and in this respect four days prior to the occurrence a scuffle had taken place between two parties, who are immediate neighbourers of each other. In this respect PW.8 had made statement. This piece of evidence does not appear to be sufficient to find out the exact reason for the murder of the lady. Admittedly the parties have no animosity previously except an uncorroborated incident, which had allegedly taken place four days prior to the occurrence, thus the genesis of the occurrence is not vivid through the prosecution evidence. So it can easily be concluded that the case of the prosecution on the aspects of recovery of crime weapon and motive of the occurrence is not clear, which factors could be considered as mitigating circumstances for converting sentence of death into imprisonment for life.

16. The perusal of the impugned judgment indicates that learned Trial Court while convicting the appellant had not awarded compensation to the legal heirs of the deceased *Mst.* Mubina Perveen as required by Section 544-A, Cr.P.C. The law has provided that whenever a person is convicted for an offence for in the commission whereof death of the person is caused then the Court is bound to order award of compensation to the legal heirs of the deceased person, which compensation is to be recovered as an arrears of land revenue in case of default and may suffer imprisonment for six months. If the Court while convicting the person does not order the award of the compensation then it is required to record reasons in writing for not doing so. In the instant case the Court neither has recorded any reason for not awarding the compensation nor has awarded the same thus the Court has ignored the provision of law in this respect. After considering all attending circumstances, we are inclined to award compensation of Rs. 100,000/- (Rupees One Lac only) to the legal heirs of the deceased and in case of default in the payment of the compensation to direct the appellant to suffer six months' imprisonment.

17. For what has been discussed above, the appeal in hand is **dismissed** with the modification of commuting death sentence awarded to the appellant Muhammad Iqbal *alias* Fauji into imprisonment for life with benefit of Section 382-B, Cr.P.C. The appellant is directed to pay compensation of Rs. 100,000/- to the legal heirs of the deceased *Mst.* Mubina Perveen and in default whereof to further undergo six months' imprisonment. Consequently, **Murder Reference No. 06/2009** sent by the learned Trial Court seeking confirmation of death sentence awarded to appellant Muhammad Iqbal *alias* Fauji is **answered in NEGATIVE and death is not confirmed.**

18. The Addl. Registrar of this Bench shall transmit the copy of this judgment to Mr. Muhammad Bukhsh Masood Hashmi, Addl. Sessions Judge, the author of the impugned judgment, for his information and perusal.

Sentence reduced.

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[Lahore]

Present: **SYED MAZAHAR ALI AKBAR NAQVI and SYED MUHAMMAD KAZIM RAZA SHAMSI, JJ.**

Shahzad *alias* Bille

Versus

The State

Criminal Appeal No. 357-J of 2010 and Murder Reference No. 497 of 2010, decided on 10th April, 2014.

MURDER --- (Quantum of sentence)

Criminal Procedure Code (V of 1898)---

---S. 410---Pakistan Penal Code, 1860, Ss. 302/34---Occurrence of murder---Appeal---Quantum of sentence---It was shrouded in mystery as to what happened immediately before occurrence between deceased and appellant nor complainant was able to narrate any such fact that before starting of firing, appellant had shown his vengeance on seeing deceased person---Such delay of dispatching material piece of evidence to relevant laboratory had not sufficiently been explained on record---Positive report of FSL was found to be of no legal consequence---Moreover, appellant at relevant time was having age of about 20 years---Impugned death sentence awarded to appellant was converted to life imprisonment---Sentence reduced.

(Paras 19, 20)

وقوعہ قتل سے فوری پیشتر کیا واقع ہوا۔ اس کا انکشاف نہ ہوسکا۔ لیبارٹری میں پسٹل کا پارسل ارسال کرنے میں تاخیر تھی۔ سزائے موت کو عمر قید میں تبدیل کردیا گیا۔

[It is shrouded in mystery as to what happened immediately before occurrence of murder. Dispatch of parcel of pistol to FSL was delayed. Impugned death sentence was converted to life imprisonment].

For the Appellant: **Maqbool Ahmad Qureshi, Advocate/Defence counsel.**

For the Complainant: **Rana Muhammad Ashraf, Advocate.**

For the State: **Mirza Abid Majeed, Deputy Prosecutor General.**

Date of hearing: **10th April, 2014.**

JUDGMENT

SYED MUHAMMAD KAZIM RAZA SHAMSI, J. --- The accused Shahzad *alias* Bille son of Sharif Masih alongwith his co-accused Sultan Ali son of Rehmat Ali, were tried by the learned Additional Sessions Judge, Gojra District Toba Tek Singh, in case F.I.R. No. 699, dated 07.12.2009, registered under Sections 302 & 34, PPC at Police Station Sadar Gojra, for committing Qatl-i-Amd of Muhammad Ramzan and Muhammad Sarwar. The learned Trial Court at conclusion of the trial, *vide* judgment handed down on 28.8.2010, acquitted Sultan Ahmad accused and convicted the appellant Shahzad *alias* Bille in the following manner:---

> **Death Sentence** under Section 302(b), PPC on two counts, with compensation of Rs. 5,00,000/- each to be paid to the legal heirs of each deceased, namely, Muhammad Sarwar and Muhammad Ramzan as required by Section 544-A, Cr.P.C. and in default of the payment of the amount, he was directed to further undergo six months' rigorous imprisonment on each count.

2. **Murder Reference No. 497/2010** has been sent by the learned Trial Court seeking confirmation of death sentence awarded to Shahzad *alias* Bille, appellant.

3. Shahzad *alias* Bille appellant has preferred Jail Appeal (Crl. Appeal No. 357-J of 2010). The complainant did not challenge the findings of acquittal of Sultan Ahmad, accused in any further proceedings. The instant appeal is being disposed of alongwith the afore-said Murder Reference by this single judgment.

4. As per prosecution story, Muhammad Iqbal son of Muhammad Saleh, complainant (PW-7) on 7.12.2009 at 12:00 (forenoon) made a statement before Sana Ullah, Sub-Inspector ((PW-11) that on the fateful day, he alongwith his son Muhammad Sarwar aged about 14/15 years and Muhammad Ramzan were going on donkey cart to fetch fodder for the animals when all of sudden Shahzad *alias* Bille, appellant armed with pistol 30-bore and Sultan Ahmad son of Rehmat Ali, co-accused, emerged there; that upon raising Lalkara by Sultan Ahmad, not to leave alive Muhammad Sarwar and Muhammad Ramzan, Shahzad *alias* Bille, appellant made a direct fire with his pistol 30-bore which hit on the front side of abdomen of Muhammad Sarwar; that second fire made by the appellant landed on the back side of right ear of Muhammad Ramzan; that upon listening the hue and cry and on seeing the occurrence, Shah Baig son of Khan and Gul Sher son of Muhammad Ramzan, PWs attracted at the spot; that in the meanwhile, both the accused persons escaped from the spot; that the injured were taken to Civil Hospital, Gojra but Muhammad Ramzan succumbed to the injuries in the way to the hospital whereas Muhammad Sarwar injured died on reaching the hospital.

5. The motive for the occurrence is that 15/16 days prior to the occurrence, a scuffle took place between the deceased Muhammad Sarwar and the appellant Shahzad *alias* Bille, upon which grudge, both of the accused murdered Muhammad Sarwar and Muhammad Ramzan.

6. On the application (Exh.PJ) of complainant, formal F.I.R. Exh.P.J/1 was drafted at police station Sadar Gojra, District Toba Tek Singh, against the appellant and his co-accused.

7. After registration of crime report, PW.11, Sana Ullah, S.I. inspected the dead-bodies of Muhammad Sarwar and Muhammad Ramzan, prepared injury statement Exh.PB, inquest report Exh.PC with regard to Muhammad Sarwar, deceased, injury-statement Exh.PE and inquest report Exh.PF with regard to Muhammad Ramzan, deceased and handed over the dead-bodies to Sher Masih, C/294 for post-mortem examination. He visited the of place of occurrence, prepared rough site-plan Exh.PO, collected. blood-stained earth from the place of murder of Muhammad Sarwar, deceased *vide* recovery memo. Exh.PL, also collected blood-stained earth from the place of murder of Muhammad Ramzan *vide* recovery memo. Exh.PM, collected two empties of bullet of 30-bore pistol *vide* recovery memo. Exh.PN and recorded the statements of the PWs under Section 161, Cr.P.C. On 09.12.2009, he got prepared the scaled site plan (Exh.PH and Ex.PH/1) from Haq Nawaz, Patwari Halqa. On 16.12.2009, he arrested Shahzad *alias* Bille and Sultan Ahmad, got their physical remand and recovered pistol (P-1) from the bank of canal situated at Chak No. 431/JB, Gojra at the instance of appellant *vide* recovery memo. Exh.PK. After completing usual investigations and formalities, finding accused persons guilty of crime, final report under Section 173, Cr.P.C. was submitted to the Court where Shahzad *alias* Bille and Sultan Ahmad, accused were charge-sheeted on 25.2.2010 under Sections 302 & 34, PPC. They professed innocence and claimed trial. The prosecution examined eleven witnesses to prove the charge.

8. Dr. Masood Ahmad (PW-2) conducted post-mortem examination on the dead-bodies of deceased Muhammad Sarwar and Muhammad Ramzan; Muhammad Iqbal

complainant (PW-7) and Shah Baig (PW-8) deposed about the ocular account; Israr Ahmad, ASI (PW-10) and Sana Ullah, Sub-Inspector (PW-11) provided evidence of the investigations conducted by them. The learned Trial Court at the conclusion of trial, acquitted Sultan Ahmad, from the charge whereas Shahzad *alias* Bille was convicted and sentenced in the manner noted in preceding para.

9. Dr. Masood Ahmad (PW-2) on 07.12.2009 at about 5:20 p.m. conducted post-mortem examination on the dead-body of Muhammad Sarwar, deceased and found the following injuries on his person:---

> "A fire-arm wound of entrance measuring 0.7 cm x 0.6 cm on front of abdomen, 4 cm below from umbilicus slightly towards left side. Margins were inverted. Collar abrasion was present."

In the opinion of Medical Officer, death was caused due to accumulative effect of injury No. 1 inflicted by fire-arm which was anti-mortem in nature and was sufficient to cause death in ordinary course of nature. The probable time elapsed between injury and death was 20 minutes and between death and post-mortem was about within 6 to 12 hours.

10. Dr. Masood Ahmad (PW-2) on the same day, at about 6:30 p.m., also conducted post-mortem examination on the dead-body of Muhammad Ramzan, deceased and found the following injuries on his body:---

> **"A fire-arm wound of entry measuring 0.7 cm x 0.10 cm on back and right side of head just behind the right ear. Margins were inverted, Collar of abrasion was present."**

In the opinion of Medical Officer, death was caused due to expensive brain damage due to injury No. 1 which was inflicted by fire-arm and was anti-mortem in nature and was sufficient to cause death in ordinary course of nature. Probable time elapsed between injury and death was 30 minutes and between death and post-mortem was about within 6 to 12 hours.

11. The prosecution closed its evidence by giving up Gull Sher, Muhammad Aslam and Shahbaz Ali, PWs being unnecessary and by tendering report of Chemical Examiner Ex.PQ and report of Serologist Ex.PR.

12. The prosecution evidence, so recorded was confronted to the accused Shahzad *alias* Bille by recording his statement under Section 342, Cr.P.C. and the appellant Shahzad *alias* Bille, in answers to questions No. 12 and 13, set up his defence following words:---

> "It was an unseen occurrence. Some unknown persons had committed murder of Muhammad Ramzan and Muhammad Sarwar but the complainant involved me in the instant case on the basis of a suspicion as he had been suspecting that I had been having a dispute with the deceased persons. The PWs are related *inter-se* with the deceased persons. They have falsely deposed against me due to the suspicion which they had been having."

13. The appellant neither opted to produce any evidence in his defence nor to make statement under Section 340(2), Cr.P.C. to disprove the allegation levelled in the prosecution evidence.

14. Learned counsel for the appellant Shahzad *alias* Bille has argued that the occurrence as reported through the F.I.R. is unseen and further the statements of PW.7 and PW.8, do not indicate their presence at the spot and witnessing the occurrence. He further submitted that the appellant has been involved in this case due to his media trial as two young boys were murdered and under the influence of that, the appellant has been made scapegoat. Touching the fact of the motive for occurrence, it is the argument of the learned counsel that the motive for the occurrence is not of such a high gravity, that a person could take such a drastic step of killing two boys. Added that the prosecution has miserably failed to establish that the deceased Muhammad Sarwar had any quarrel with the appellant constraining him to take his life. About the recovery of weapon of offence allegedly made at the instance of the appellant, it is submitted that the said recovery cannot be read against the appellant as the crime empties were sent to the Forensic Science Laboratory with a considerable delay and that the alleged pistol was also kept at the police station without explanation in this respect. He has also commented upon the delay in lodging of the F.I.R. and argued that the witnesses produced by the prosecution are related *inter-se* with the deceased persons and are interested in his prosecution. In view of these submissions, the learned counsel has prayed for acceptance of the appeal and acquittal of the appellant from the charge.

15. Conversely, the learned Law Officer assisted by learned counsel for the complainant argued that it is a case of double murder in which the appellant has specifically been nominated for causing death of Muhammad Sarwar and Muhammad Ramzan by making fires with his pistol which allegation is duly supported by the statements of the witnesses as well as by the medical evidence. He further argued that on the pointation of the appellant, the crime weapon was recovered regarding which place of recovery, the appellant was having special knowledge and the positive report sent by the Forensic Science Laboratory is another circumstance establishing that the pistol recovered at the instance of the petitioner was fired, thus, the learned Trial Court while considering all these relevant factors had correctly indicted the appellant.

16. Arguments heard. Record perused.

17. The case of the prosecution as set out in Ex.PJ is that on 07.12.2009 at about 11:00 a.m., the appellant while armed with pistol 30-bore, had launched an attack upon Muhammad Sarwar, aged about 14/15 years and Muhammad Ramzan, by giving fires at the abdomen of Muhammad Sarwar and at the back of right ear of Muhammad Ramzan due to which both the boys died at the spot. The occurrence had taken place due to the fact that a fortnight prior to the occurrence, Muhammad Sarwar, deceased had some dispute with the appellant who vindicated his revenge by killing two young boys. This statement of allegation has duly been supported by the statements of PW.7 and PW.8 who consistently deposed about the date, time, place and the weapon with which the appellant was armed at the relevant time. The witnesses were duly cross-examined by the defence but it failed to shake their credibility and to have any concession from their mouths. The defence has miserably failed to point out any ill-will or malice on the part of the witnesses for falsely

deposing against him or implicating him in the murder of two boys. The statements made by the witnesses of scene are confidence inspiring and natural in their narrations.

18. Further, the testimony of these two PWs *i.e.* PW.7 and PW.8 with regard to the seat of injuries has duly been synchronized with the post-mortem reports Exh.PA and Exh.PD wherein the Medical Officer, PW.2 had found seat of injuries exactly at the same location which the PWs had described in their deposition. The medical evidence, in view of these corroborations with the ocular account is a material piece of evidence which cannot be ignored in any manner. The prosecution, in these circumstances, has successfully established through ocular and medical evidence that the appellant while armed with pistol 30-bore had made two fires upon the two persons which resulted into their death.

19. So far the question as to what was the evidence to prove the scuffle between Muhammad Sarwar and the appellant which had allegedly taken place 15-days earlier to the occurrence, is concerned, the prosecution witnesses could not establish this scuffle between the two persons. That scuffle was never reported to the police nor any witness in whose presence that quarrel had taken place, had been produced in the Court, so the statements made by PW.7 and PW.8, in this respect, have no independent corroboration. It is shrouded in mystery as to what happened immediately before the occurrence between the deceased and the appellant nor the complainant was able to narrate any such fact that before starting of the firing, the appellant had shown his vengeance on seeing the deceased persons. Similarly, PW.3 was handed over the sealed parcel of crime empty for safe custody in the Malkhana on 07.12.2009 which he kept there till 15.12.2009 and then he had sent the same to the Forensic Science Laboratory. He has not mentioned in his deposition as to when the parcel of the pistol was handed over to him for onward transmission to the Forensic Science Laboratory, however, the sale parcel was received in the laboratory on 18.01.2010 as is evident from Exh.PS. This delay in dispatching the material pieces of evidence to the relevant laboratory, has not sufficiently been explained on the record, so in this manner, the positive report of the laboratory is found to be of no legal consequences. Moreover, the appellant at the relevant time was having the age of about 20-years and according to the ratio of cases decided by the apex Court, this factor can be counted for commuting the capital sentence. In view of the afore-noted facts and circumstances of the case, we intend to modify the death sentence awarded to the appellant to one imprisonment for life.

20. For the foregoing reasons, the appeal in hand, bereft of merits, is **dismissed** with the modification that the death sentence awarded to Shahzad *alias* Bille, appellant, is *commuted to imprisonment for life on two counts* while remaining sentence in respect of award of compensation to the legal heirs of the deceased persons, and sentence in default of payment of compensation, shall remain intact. However, the appellant shall be entitled to the benefit of his previous incarceration. The sentences shall run concurrently. The **Murder Reference** sent by the learned Trial Court is answered in negative and death sentence awarded to the appellant Shahzad *alias* Bille, is **not confirmed.**

Sentence reduced.

K.L.R. 2014 Criminal Cases 139

[Lahore]

Present: **SYED MUHAMMAD KAZIM RAZA SHAMSI, J.**

Asif Khan

Versus

The State, etc.

Criminal Misc. No. 2178-B of 2014, decided on 24th February, 2014.

BAIL --- (Subsequent introduction of accused)

Criminal Procedure Code (V of 1898)---

---S. 497(2)---Pakistan Penal Code, 1860, Ss. 302/395---Bail after arrest, grant of---Introduction of additional accused---Further inquiry---There was contradiction in medical evidence and ocular account---Alleged fire-arm injury raised by deceased was not cause of death rather his death had occurred due to fire-arm injury attributed to some other record---I.O. had recommended discharge of petitioner for case---A set of three other persons had been introduced in instant case---Case called for further inquiry---Bail after arrest granted.

(Para 4)

مقدمہ قتل ھذا میں بعد ازاں تین ملزمان کو متعارف کرایا گیا۔ ایف آئی آر اور میڈیکل رپورٹ میں تضاد تھا۔ ضمانت عطا ہوئی۔

[In murder case later on three accused persons were introduced. F.I.R. contradicted medical report. Bail was allowed].

For the Petitioner: **Syed Karamat Ali Naqvi, Advocate.**

For the State: **Abdul Rauf Wattoo, Deputy Prosecutor General with M. Anwar, S.I.**

Date of hearing: **24th February, 2014.**

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J. --- Asif Khan petitioner seeks his release on post arrest bail in case F.I.R. No. 220, dated 15.6.2013 registered at police station Saddar, District Narowal, under Sections 302 & 395, PPC.

2. Precisely the allegation against the petitioner is that he while armed with 'Danda' had inflicted an injury on the that right arm of Muhammad Amin who succumbed to the injuries caused by other co-accused with fire-arm.

3. Parties heard. Record perused.

4. As per crime report, an allegation of inflicting injury at the right arm of Muhammad Amin has been attributed to the petitioner which injury is non-existence on the right arm of the deceased rather injury No. 3 has been shown to have been inflicted on the left arm which was superficial injury. This contradiction in the medical evidence as well as ocular account brings the case of the petitioner within the ambit of Section 497(2), Cr.P.C.

furthermore, the fire-arm injury received by deceased Muhammad Amin is not the cause of death rather his death had occurred due to fire-arm injury attributed to some other accused. It is further noticed from the record that the police after investigating the matter had recommended the discharge of the petitioner from the case in hand and a set of three other persons has been introduced in the case in hand. Keeping in view these facts and circumstances of the case, the involvement and guilt of the petitioner calls for further inquiry entitling him for the concession of bail.

5. In view of above, this petition is allowed and petitioner Asif Khan is admitted to bail subject to his furnishing bail bonds in the sum of Rs. 50,000/- with one surety in the like amount to the satisfaction of the learned Trial Court.

Bail after arrest granted.

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2015 M L D 1188

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi, J

TARIQ HAMEED and 2 others---Petitioner

versus

ADDITIONAL SESSIONS JUDGE and 5 others---Respondents

W. P. No.789 of 2012, decided on 2nd July, 2013.

(a) Interpretation of statutes---

----Special law has overriding effect over general law.

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

----Ss.380 & 406---Criminal Procedure Code (V of 1898), S.22-A---Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001), S. 7(b)---Constitution of Pakistan, Art.199---Constitutional petition---Special law---Banking offence---Registration of case---Petitioner availed finance facility from respondent bank and also pledged bags of rice---Bank alleged that petitioner had misappropriated or stolen the rice bags and sought direction from Ex-officio Justice of Peace for registration of FIR---Validity---Financial Institutions (Recovery of Finances) Ordinance, 2001, was a special law and had overriding effect over the provisions of Penal Code, 1860---When Financial Institutions (Recovery of Finances) Ordinance, 2001, itself provided procedure for dealing with matters of civil as well as criminal nature, only Banking Court constituted under Financial Institutions (Recovery of Finances) Ordinance, 2001, had jurisdiction to take action upon criminal acts performed by parties---Provision of S. 7(b) of Financial Institutions (Recovery of Finances) Ordinance, 2001, created a prohibition in respect of lodging of criminal case under the provisions of Penal Code, 1860---Ex-Officio Justice of Peace was not within his jurisdiction when he ordered for registration of case against petitioners under the provisions of Penal Code, 1860---Bank had no authority to file application under S. 22-A, Cr.P.C., nor Ex-Officio Justice of Peace had any jurisdiction, in presence of Banking Court, to order for registration of case against petitioners---High Court set aside the order passed by Ex-Officio Justice of Peace---Petition was allowed in circumstances.

Murshid Ali and 4 others v. S.H.O, Police Station Saddar, Khanewal and another 2011 PCr.LJ 1763; Mian Asim Farid and another v. Industrial Development Bank of Pakistan and 4 others 2005 PCr.LJ 766 and and Malik Tariq Mehmood v. Messrs Askari Leasing Ltd. PLD 2009 Lah. 629 ref.

Shaukat Ali and others v. The State and others 2012 CLD 1 and Industrial Development Bank of Pakistan and others v. Mian Asim Fareed and others 2006 SCMR 483 distinguished.

Ch. Muhammad Abdul Qayyum for Petitioners.

Wali Muhammad Khan, A.A.-G. for Respondents.

Hassan Iqbal Warraich for Respondent No.5.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Tariq Hameed etc. being borrowers had secured a finance facility from Habib Bank Limited, a banking company, Trust Plaza, Gujranwala after providing all securities in respect of the facility they obtained. In this connection the bags of rice were also pledged with the banking company. Later on the company by filing an application under section 22-A, Cr.P.C. prayed for registration of the case against the petitioners, upon which application vide order dated 7-12-2011 the requisite direction was issued. The order passed by the learned Ex-Officio Justice of Peace, Wazirabad, District Gujranwala is the subject matter of instant petition, which has been filed under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973.

2. The moot point involved in this case is whether the ordinary police in presence of section 7(b) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 has jurisdiction to register the case under Pakistan Penal Code, 1860 against a borrower of a banking company for breaching the contract or any other offence committed during the period of availing finance facility. This situation has arisen when the pledged stock had been attached by the learned Banking Court and from its legal custody misappropriation of the bags of rice had taken place. Learned counsel for the petitioner, in support of the fact that the ordinary police has no jurisdiction to register the FIR, has relied upon the cases reported as Murshid Ali and 4 others v. S.H.O, Police Station Saddar, Khanewal and another (2011 PCr.LJ 1763), Mian Asim Farid and another v. Industrial Development Bank of Pakistan and 4 others (2005 PCr.LJ 766) and Malik Tariq Mehmood v. Messrs Askari Leasing Ltd. (PLD 2009 Lahore 629).

3. On the other hand, learned counsel for respondent No.5 has also relied upon the cases of Shaukat Ali and others v. The State and others (2012 CLD 1) and Industrial Development Bank of Pakistan and others v. Mian Asim Fareed and others (2006 SCMR 483).

4. After examining the cases cited at the bar it is found that the order passed by this Court in the case of Mian Asim Fareed (2005 PCr.LJ 766) was set aside by the apex Court in the judgment reported as 2006 SCMR 483. A close examination of the judgment cited by the learned counsel for respondent indicates that this Court as well as apex Court had drawn a distinction between the matter of registration of the case and taking of cognizance in the case. Both these cases cited by the learned counsel for the respondent relate to the quashing of the FIR where a criminal case had already been lodged against the person but in the instant case the matter is that the order of learned Ex-Officio Justice of Peace issuing direction for registration of the case has been assailed with the contention that the local police has no jurisdiction to take action under the provisions of Pakistan Penal Code, 1860, therefore, in my view the judgments cited by the learned counsel for the respondent are not applicable to the facts and circumstances of the case.

5. It is a rule of prudence as well as of interpretation of statute that special law shall have overriding effect over the general law, thus keeping in view this interpretation it can be said that the Financial Institutions (Recovery of Finances) Ordinance, 2001 being a special law shall have the overriding effect over the provisions of Pakistan Penal Code, 1860, particularly when the Ordinance (ibid) has itself provided the procedure for dealing with the matters of civil as well as criminal nature. In this connection when the provisions of section 7(b) of the Ordinance, 2001 are examined it comes to light that only Banking Court constituted under that Ordinance has jurisdiction to take actions upon the criminal acts performed by the parties. This specific provision, as provided by the Ordinance, has created a prohibition in respect of lodging of the criminal case under the provisions of Pakistan Penal Code thus the learned Ex-Officio Justice of Peace was not within his jurisdiction when he had ordered for registration of the case against the petitioners under the provisions of Pakistan Penal Code. Another matter regarding the competency of the order passed by the Court on the application of the respondent is that respondent No.5 could not file an application under section 22-A, Cr.P.C. before the learned Ex-Officio Justice of Peace for the reason that the Banking Court in accordance with its own order had attached the bags of rice and had taken the same stock into its legal custody thus if any theft or misappropriation of that stock has been committed then it is the Court itself to initiate proceedings against the culprits and this jurisdiction cannot be bestowed upon the Manager of the branch of banking company to pray for the relief before the Court of ordinary jurisdiction in super-session of the available forum. It is also noticeable that uptil now the suit for recovery filed by the banking company had been decreed in its favour and an execution petition against the petitioners is pending before the Court.

6. The resume of the above discussion is that respondent No.5 had no authority to file an application under section 22-A Cr.P.C. before learned Ex-Officio Justice of Peace nor the learned Ex-Officio Justice of Peace had any jurisdiction, in the presence of the Banking Court, to order for registration of the case against the petitioner.

7. In view of afore-noted circumstances, this petition is allowed and the impugned order is set aside resulting into dismissal of the application filed by respondent No.5 under section 22-A, Cr.P.C.

MH/T-14/L Petition allowed.

2015 P Cr. L J 361

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi, J

SHAHZAD ALI---Petitioner

Versus

The STATE and others---Respondents

Criminal Revision No. 587 of 2012, decided on 3rd April, 2013.

Penal Code (XLV of 1860)---

----S. 302---Criminal Procedure Code (V of 1898), Ss. 464 & 539---Qatl-i-amd---Lunatic---Determination---Report of Medical Board---Accused claimed to be suffering with schizophrenic illness and filed application for declaring him as lunatic---Validity---Mere determination by Jail Medical Officer about unsoundness of mind of accused had no meaning as he was residing in jail and there was a possibility that he had influenced Jail Medical Officer for declaring him unfit for trial---Report firstly submitted by Medical Board was not proper in its form and court had rightly directed the Board to resubmit the same and the Board on the basis of first examination conducted in respect of accused had submitted report later on, treating accused fit for facing trial---When first report was not signed by all members of Medical Board, then it could not be that opinion given by all members was correct and all agreed with the same---Medical Board was not facing pressure of institution of contempt petition and did not change its view---Accused alleged his sickness prior to occurrence and his admission in hospitals and receiving treatment from different Medical Officers but no proof of such treatment was appended with application for examination of court, as such the same showed malice on the part of accused to have wrongful gain by declaring him unfit to stand trial---Plea of unsoundness of mind was raised at belated stage which also did not inspire confidence and cast serious doubt upon bona fide of accused---Revision was dismissed in circumstances.

Ch. Ali Muhammad for Petitioner.
Muhammad Ishaq, Deputy Prosecutor-General for the State.
Rana Bakhtiar Ali for Respondent No.2.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---The petitioner has assailed the legality of proceedings dated 28-4-2012, recorded by the learned Additional Sessions Judge, Sheikhupura whereby the court after examining the record had formed an opinion that charge be framed against the accused/petitioner and proceeded to frame charge as such against Shahzad Ali, Jehangir Babar and Muhammad Rafique. Before considering merits of the case, a brief history of the case is required to be mentioned that is, Shahzad Ali and his two co-accused had killed Muhammad Ashiq as well as Mst. Majeedan Bibi, the brother and mother of the complainant Liaqat Ali In this respect, F.I.R. No.65 dated 22-2-2010 was registered with Police Station Narang Mandi District Sheikhupura.

2. On 2-8-2010, Shahzad Ali, petitioner made an application before the learned trial court with the statement that he is person of unsound mind and remained under treatment with different medical experts and admitted in the private and official hospitals, therefore, he be sent to some hospital for his treatment. The learned trial Court vide order dated 17-3-2011, referred the matter of determination of mental condition of the petitioner to the Medical Superintendent, DHQ, Sheikhupura for constitution of a Medical Board. The Medical Board consisting upon about eight members, on 20-10-2011 sent the report to the court declaring that Shahzad Ali, petitioner was suffering from "schizophrenic illness" and is not fit to stand trial. This report was signed by three members while signatures of two members

including the Chairperson were made on their behalf and not by the Chairperson and the members themselves whereas three members had not signed the report. The court on receipt of this incomplete report again directed the Executive Director, Mental Health Services, Punjab, Lahore to submit report signed by all the members. In the meanwhile, the complainant/respondent moved an application under section 476, Cr.P.C. for initiating action against the members of the Board for sending the fake medical report regarding the disease of the petitioner Shahzad Ali.

3. The Board again on 19-4-2012, sent the report signed by all the members signed by themselves mentioning that the petitioner is not suffering from active psychiatric illness at present and he is fit to stand trial. Thereafter, the learned trial court proceeded to frame charge against Shahzad Ali and others which order of the court has been impugned through the instant revision petition.

4. Learned counsel for the petitioner affirmed that the Jail Medical Officer has confirmed the unsoundness of mind of the petitioner and the Medical Board has also given an opinion about the disease suffered by the petitioner which report was subsequently changed by the Board with the pressure that contempt proceedings were pending in the court against them. He further submitted that second report was submitted by the Medical Board without examining the petitioner, thus said report is not acceptable.

5. Conversely, learned counsel for the complainant/respondent No.2 submitted that this plea of unsoundness of mind was never raised before the Investigating Officer nor before the learned Magistrate enabling them to conduct inquiry into the mental health of the petitioner, thus at the belated stage, the said application cannot be entertained. He further argued that in the application seeking determination of mental disease, the petitioner has not appended any prescription regarding his previous treatment before the occurrence, thus this plea has been raised by the petitioner just to save his skin from the liability of double murder. Contended further that the first report submitted by the Medical Board was not signed by all the members and other persons had signed the same on behalf of the original members, thus the report was not proper and the court had rightly desired the submission of proper report in the court. He lastly submitted that the petitioner has not provided any clue in his application that at the time of occurrence, he was suffering from fits of the mental disease and was not in sense thus at this stage, he cannot be heard to say that he was suffering from mental illness. The learned counsel has referred various documents in this regard showing that the petitioner is a hale and hearty person and is an ex-Ranger man who was relieved from his duty due to his overstaying. The learned counsel has also relied upon the "Social Case Work" performed by the medical officers before submission of report to the court which reveals that the petitioner was in habit of asking about the murder cases, result after the murder and arresting issue and it was reported that his intention was not good enough. The learned counsel further objected that proceedings dated 28-4-2012 taken by the learned trial Court cannot be assailed through instant revision petition.

6. Parties heard. Record perused.

7. Taking the objection of learned counsel for the respondent that proceedings dated 28-4-2012 cannot be assailed through instant revision petition, I am in full agreement with the learned counsel for the complainant for the reason that the proceedings did not give any cause of action to the petitioner for institution of this petition. These proceedings were taken by the court after the report of the Medical Board declaring that he is fit to stand trial. The submissions of learned counsel for the petitioner as noted above are neither impressive nor are supported by law. Mere determination by the Jail Medical Officer about the unsoundness of mind of the petitioner has no meaning as the petitioner is residing in the jail and there is a possibility that he had influenced the Jail Medical Officer for declaring him unfit for the trial. The report firstly submitted by the Board on 20-10-2011 was not proper in its form and the court had rightly directed the Board to resubmit the same and the Board on the basis of first examination conducted in respect of the petitioner had submitted second report on 19-4-2012, treating the petitioner fit for facing the trial. When the first report was not signed by all the members of the Board then it cannot be said that the opinion given by all the members was correct and all agreed with the same. It is very wrong to say that the Medical Board facing the pressure of institution of contempt petition, had changed its view. It is noticed from the application filed by the petitioner that he has alleged his sickness prior to the occurrence and his admission in the hospitals and receiving treatment from different Medical Officers but no proof of such treatment has been appended with the application for examination of the court. This shows the malice on the part of the petitioner to have a wrongful gain by declaring him unfit to stand trial. Similarly, the plea of unsoundness of mind was raised at a very belated stage which also does not inspire confidence and casts serious doubt upon the bona fide of the petitioner. The report made by the "Social Case Work" has commented upon the character and as indicated by the character and mental state of affair of the petitioner that he is interesting in murdering human being as well as in the result if any case is registered in this regard. The evaluation of the whole record as discussed above, leads to the conclusion that the petition in hand is not entertainable and is liable to be dismissed.

8. For the foregoing reasons, the petition bereft of merits, is dismissed.

MH/S-38/L Revision dismissed.

2015 P Cr. L J 727
[Lahore]
Before Syed Muhammad Kazim Raza Shamsi, J
SHOAIB alias SABA---Petitioner
versus
The STATE and another---Respondents

Criminal Miscellaneous No.7786-B of 2014, decided on 23rd October, 2014.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), Ss.302 & 34---Qatl-i-amd, common intention---Bail, grant of---Complainant in F.I.R. had alleged that accused had fired hitting over the left eye of the deceased, but that injury was not available in the pictorial attached with the postmortem report---Pictorial showed that the injury was received by the deceased at the back of his head; and had exit from right eye brow of the deceased---Complainant, though made a supplementary statement charging attribution to accused within one hour, but there was possibility that within that time, the complainant after consultation and deliberation had changed the attribution just to bring it in line with the postmortem report---Complainant had also filed private complaint regarding the same occurrence, in which the seat of injury was at the back of the head of the deceased--- Accused was lying behind the bars in the State case without any trial, which detention could be termed as illegal and unjustified---Accused was facing trial in the private complaint, and was in detention since 12-3-2013, and there was no possibility of conclusion of the trial in near future---Accused was entitled for his release on post arrest bail---Accused, was admitted to bail, in circumstances.

Azam Nazeer Tarar for Petitioner.
Muhammad Ishaque, D.P.-G. with Tariq, S.-I. for the State.
Syed Ijaz Qutab and M. Tanvir Ch. for the Complainant.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Shoaib alias Saba petitioner seeks his release on post arrest bail in case F.I.R. No.1309, dated 5-11-2012 registered under sections 302 and 34, P.P.C. with Police Station Sargodha Road, Faisalabad.

2. As per F.I.R. the petitioner while armed with pistol fired at the brother of the complainant hitting over the left eye due to which he fell on the ground and subsequently died. The complainant had witnessed the infliction of the injury at the person of his brother in the light available at the 'Kariana Store' situated nearby the place of occurrence.

3. Parties heard and record perused.

4. As per attribution made by the complainant in the F.I.R. the petitioner had fired hitting over the left eye of the deceased, which injury is not available in the pictorial attached with the postmortem report, which pictorial shows that the injury was received by the deceased at the back of his head and had exited from right eyebrow of the deceased. Obviously the attribution made to the petitioner is not supported by post-mortem examination report.

5. Learned counsel for the complainant argued that on the date of lodging of the F.I.R. within an hour the complainant had made a supplementary statement wherein he had mentioned that the petitioner had caused injury at the back side of the head, which exited from the front side of the head of the deceased, therefore, the petitioner is the principal accused and is not entitled for the relief of bail. The complainant of the case although within an hour made a supplementary statement changing attribution to the petitioner but there is a possibility that within that time the complainant after consultation and

deliberation had changed the attribution just to bring it in the line of the postmortem report. Similarly the complainant has also filed private criminal complaint regarding the same occurrence, in which the seat of injury was at the back of the head of the deceased. In that complaint the petitioner has been summoned to face the trial and as per view taken by this Court the petitioner is lying behind the bars in the State case without any trial, which detention can be termed as illegal and unjustified. The petitioner is facing trial in the private complaint and in detention since 12-3-2013 and there is no possibility of conclusion of the trial in near future, therefore, the petitioner is entitled for his release on post arrest bail.

6. For the foregoing reasons, the petition in hand is accepted and the petitioner Shoaib alias Saba is admitted to bail on furnishing of bail bonds in the sum of Rs.100,000 (Rupees One Lac only) with one surety in the like amount to the satisfaction of learned trial Court.

HBT/S-3/L Bail granted.

2015 P Cr. L J 766
[Lahore]
Before Syed Muhammad Kazim Raza Shamsi, J
NIAZ ALI SHAH---Petitioner
versus
The STATE and another---Respondents

Criminal Miscellaneous No.3546-B of 2014, decided on 15th May, 2014.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), Ss. 302, 324, 148 & 149---Qatl-i-amd, attempt to commit qatl-i-amd, rioting armed with deadly weapons, unlawful assembly---Bail, grant of---Mere presence at place of occurrence---Non-attribution of any injury---Accused was merely shown to be present at the spot while armed, but no injury to the deceased or injured persons was attributed to him---Accused was shown in the FIR to be a silent spectator who despite being armed with a weapon did not use the same---Complainant had thrown a wide net to involve all male members of the family of accused in the commission of the crime---Question as to what role was performed by the accused during the incident was yet to be ascertained during trial---Question of vicarious liability of accused and sharing of common intention in the incident could not be decided at bail stage as the same needed evidence---Prosecution witnesses had also narrated mere presence of accused at the spot in their statement sunder S. 161, Cr.P.C.---Accused was granted bail accordingly.

Muhammad Yousaf Butt v. P.C. Abdul Lateef Shar and others 2012 SCMR 1945; Dhani Bux and others v. The State and others 1989 SCMR 239; Arshad v. The State 2012 PCr.LJ 1749; Umar Hayat and others v. The State 2009 PCr.LJ 1058; Sher Ahmad and others v. Jan Faqir and others 2003 PCr.LJ 528 and Ghazi v. The State 2002 PCr.LJ 1532 distinguished.

Saeed Ullah Khan for Petitioner.
Ch. Muhammad Ishaque, DPG with Rai Talib Hussain, S.-I. for the State.
Manzar Abbas Khokhar for the Complainant.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---The petitioner Niaz Ali Shah son of Sangeen Shah prays for his release on post arrest bail in case FIR No.466, dated 19-7-2013, registered under sections 302, 324, 148 and 149, P.P.C. with police station Hanjarwal, Lahore.

2. In the occurrence, as reported through the instant FIR, the petitioner was shown to be armed with a pistol whereas his other family members booked in the instant case had fired at Azhar Khan and killed him whereas Ghani ur Rehman also received injuries.

3. Parties heard and record-perused.

4. As is evident from the perusal of the record mere presence of the petitioner Niaz Ali Shah has been recorded in the crime report without attributing any injury either to the deceased or to the injured person. In this connection learned counsel for the complainant while relying upon the cases of Muhammad Yousaf Butt v. P.C. Abdul Lateef Shar etc. (2012 SCMR 1945), Dhani Bux etc. v. The State etc. (1989 SCMR 239), Arshad v. The State (2012 PCr.LJ 1749), Umar Hayat etc. v. The State (2009 PCr.LJ 1058), Sher Ahmad etc. v. Jan Faqir etc. (2003 PCr.LJ 528) and Ghazi v. The State (2002 PCr.LJ 1532), has submitted that the petitioner had shared common intention with his co-accused and that motive is jointly attributed to the petitioner also, so he is not entitled for the concession of bail.

5. The case law cited at the bar by the learned counsel for the petitioner has been examined and it is found that the said case-law does not bear identical facts as have been mentioned in the instant FIR, In all these precedent cases some role has been attributed to the accused of that cases whereas in the instant case the petitioner has been shown as silent spectator, who although was armed with a weapon but has not used the same. This fact further goes to establish that the complainant of the case has thrown a wide net to involve all male members of the family of Sangeen Shah in the commission of the crime so as to what role has performed by the petitioner in the incident is yet to be ascertained in the trial of the case. The question of vicariously liability and sharing of common intention in the incident cannot be decided at bail stage as the same needs evidence. The P.Ws. while making their statements under section 161, Cr.P.C. have also narrated mere presence of the petitioner at the spot. Keeping in view the above noted circumstances, the petitioner is found entitled for the concession of bail.

6. For the foregoing reasons, the petition in hand is accepted and petitioner Niaz Ali Shah is admitted to bail on furnishing of bail bonds in the sum of Rs.100,000 (Rupees One Lac) with one surety in the like amount to the satisfaction of learned trial Court.

MWA/N-38/L Bail granted.

2015 P Cr. L J 1436

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi, J

MUHAMMAD NAZIR---Petitioner

versus

DEPUTY INSPECTOR-GENERAL OF POLICE and 6 others---Respondents

Writ Petition No.5708 of 2014, heard on 16th May, 2014.

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

----S. 173---Submission of Challan---Re-investigation of case---After investigating case and submission of final report, police is left with no authority to reinvestigate matter once again---All evidence collected by police is placed before Court for determination of innocence or guilt of accused person.

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

----Ss. 173 & 204---Penal Code (XLV of 1860), Ss.302 & 337-J---Qatl-i-amd, causing hurt by means of poison---Constitution of Pakistan, Art.199---Constitutional petition---Re-investigation of police case---Private complaint---FIR on the allegations of qatl-i-amd and causing hurt by means of poison was registered against accused persons, police completed investigation and submitted investigation report---Complainant dissatisfied with police report filed private complaint in which accused persons had been summoned---On the application of accused, a new Investigating Officer was appointed for re-investigation---Validity---Investigation of police had no bearing upon merits of private criminal complaint which was to be decided by Court of law independently without being influenced by investigations---High Court set aside the order passed by police authorities and investigation carried out by Investigating Officer was coram non judice and had no bearing upon the merits of the case---High Court directed Trial Court to decide private complaint independently without being influenced from subsequent investiga-tions conducted by police---Petition was allowed in circumstances.

Riaz Hussain and others v. The State 1986 SCMR 1934; Bahadur Khan v. Muhammad Azam and 2 others 2006 SCMR 373; Muhammad Nisar Cheema v. Mazhar Javed PLD 2007 SC 31; Liaquat Ali Virk v. Inspector General of Police, Lahore PLD 2010 Lah. 224; Muhammad Yousaf v. The State and others 2000 SCMR 453; Khalid Javed v. Board through Deputy Inspector General of Police (Investigation), Lahore and 5 others PLD 2009 Lah. 101; Muhammad Hafeez v. District Police Officer Narowal and 4 others 2010 YLR 3142 and Amir Masih's case 2013 SCMR 1059 ref.

Saeed Ullah Khan for Petitioner.

Ghulam Mustafa Chaudhary for Respondent.

Khawar Ikram Bhatti, Addl. A.-G. Punjab for the State.

Date of hearing: 16th May, 2014.

JUDGMENT

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Through this petition filed under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner has assailed the legality of an order dated 29-9-2012 passed by the Deputy Inspector General of Police (Investigations), Lahore, whereby Iqbal Shah DSP/SDPO, Sabzazar Circle, Lahore was deputed to reinvestigate the case FIR No.16 dated 12-1-2011 registered under sections 302 & 337-J, P.P.C. with police station Wahdat Colony, Lahore.

2. Succinctly, facts of the case are that a married son of the petitioner namely Arsalan Nazir was found dead in his bedroom and his dead body was lying in the bathroom where his wife Mst. Safia Bibi was also sitting pretending to be semi unconscious. On the happening of this occurrence, FIR No.16/2011 was registered at the police station. Mst. Safia Bibi is the daughter of respondent No.3 Safdar Ali who was challaned by the police but did not recommend the prosecution of Zunaira Safdar and Nafeel Akhtar. Charge was framed against the lady on 17-3-2012.

3. Feeling dissatisfied with the investigations of the police, the petitioner filed a private criminal complaint against Mst. Safia Bibi, Mst. Zunaira Bibi and Nafeel Akhtar who were summoned by the learned trial court and were charge sheeted holding them responsible for the death of Arsalan Nazir. Subsequently, the petitioner came to know that respondent No.1 vide impugned order had changed the investigation of the said FIR and had deputed one Iqbal Shah DSP/SDPO to reinvestigate the matter. As per version of the petitioner, he joined the investigations with the said Iqbal Shah DSP and informed that after submission of the challan in the court and taking of the cognizance by a court, the case cannot be reopened and re-investigated, upon which information, respondent No.2 the DSP/SDPO relieved the petitioner and promised to return the file to the concerned police station. In this connection, it is further pointed out that respondent No.3 had filed a petition before the learned Justice of Peace with the prayer that respondent No.2 be restrained from causing any harassment and in para 4 of that petition, it was admitted in clear words that after submission of the challan, a criminal case cannot be reinvestigated. In this background, the impugned order has been assailed.

4. Learned counsel for the petitioner while submitting that after submission of challan in the court in terms of section 190, Cr.P.C. and taking cognizance by a court of law, the police has no jurisdiction to reopen the case and reinvestigate the matter again so the impugned order suffers from inherent illegalities. In this connection, learned counsel has placed reliance upon the cases of Riaz Hussain and others v. The State (1986 SCMR 1934), Bahadur Khan v. Muhammad Azam and 2 others (2006 SCMR 373), Muhammad Nisar Cheema v. Mazhar Javed (PLD 2007 SC 31) and Liaquat Ali Virk v. Inspector General of Police, Lahore (PLD 2010 Lahore 224).

5. On the other hand, learned counsel for respondent No.3 submitted that the impugned order has already been implemented and Iqbal Shah DSP/SDPO has conducted investigations in the case which were duly joined by the petitioner and in his presence as well as in the presence of the respondents, the said police official had visited the place of occurrence. So now that order cannot be set at naught. In this respect, learned counsel for the respondent has referred to the police diary dated 4-5-2013 in which the presence of the petitioner and his witnesses have been marked and it is also noted in the presence of both the parties that the place of occurrence was visited. Learned counsel has also relied upon the cases of Muhammad Yousaf v. The State and others (2000 SCMR 453), Khalid Javed v. Board through Deputy Inspector General of Police (Investigation), Lahore and 5 others (PLD 2009 Lahore 101) and Muhammad Hafeez v. District Police Officer Narowal and 4 others (2010 YLR 3142), to say that even after submission, of the challan, the police has the authority to reinvestigate the case and to submit final report in the court through the proper channel.

6. I have considered the submissions made by the learned counsel for the parties and while examining the record have also minutely gone through the judgments cited at the bar.

7. The moot point involved in the case in hand is whether after submission of final report under section 173, Cr.P.C. in the court, upon which the court has taken cognizance, investigations in the state case can be changed. In this connection, it is observed that after investigating the case and submission of final report, the police is left with no authority to reinvestigate the matter once again. All the evidence collected by it is placed before the court for determination of innocence or guilt of an accused person. Here another question arises, if an aggrieved person i.e. the complainant does not feel satisfied with the police investigations and he files a private criminal complaint in respect of the same occurrence, what effect would be on the merits of that complaint, if the police after reinvestigating the case reaches at a different conclusion than the one it had already given while submitting the final report in the court, answer to this question simply is that the investigation of the police would have no bearing upon the merits of private criminal complaint which is to be decided by the court of law independently without being influenced by the investigations. The Hon'ble Supreme Court in the case of Riaz Hussain (Supra), cited by learned counsel for the petitioner, has observed in clear terms in the following words:--

"that System of re-investigation in criminal cases, a recent innovation always taken up at instance of influential people and favourable reports obtained in no way assists Courts in coming to correct conclusion, it rather creates more complications to the court administering the justice. We, therefore, disapproved this system altogether."

8. Similarly, in the case of Muhammad Nisar Cheema (supra) it has been observed:

"that an investigation report (challan) has already reached in the trial court where trial had already commenced, change of investigation or ordering further investigation in the matter thereafter was an exercise unsustainable in law".

9. In the case of Bahadur Khan (supra) again while approving the case of Riaz Hussain (supra), the Apex Court has disapproved the system of reinvestigation and successive investigations. This court in the case of Liaquat Ali Virk (supra), while following the rule laid down in the case of Muhammad Nisar Cheema (supra) had also set aside the order for change of investigations, which were conducted after submission of challan and commencement of trial.

10. Although in the case of Muhammad Yousaf (supra) the Apex Court had observed:

"that no legal bar existed on re-investigation of case even after submission of final report under section 173, Cr.P.C. and police could carry out fresh investigation and submit its report to the court"

but in the later view taken by the Apex Court in the case of Muhammad Nisar Cheema (supra), this observation was not authenticated so the view of the Supreme Court later in time would prevail as observed in the case of Amir Masih (2013 SCMR 1059). Same is the position with the cases of Khalid Javed and Muhammad Hafeez (supra) which judgments after categoric view of the Supreme Court cannot be relied upon for holding that second investigation could be conducted even after submission of the challan and commencement of trial.

11. Adverting back to the merits of the instant case, it is on the record that even in the State case after submission of final report, the court had taken cognizance and trial was commenced in which case the accused Mst. Safia Bibi had filed an application under section 265-K Cr.P.C. seeking her acquittal from the charge which was dismissed by learned trial court on 22-2-2012 and the revision petition filed against the said order was withdrawn. Till that time, the order for change of investigation was not passed, thereafter a private criminal complaint was filed by the petitioner in which on 11-3-2013, formal charge was framed against the respondents of the case. This progress in the trial brings me to the conclusion that the court had already progressed in the trial in the state case when the application for change of investigation was not even in its inception.

12. It is also very astonishing to note how the respondents can wriggle out of his version which he had given in para 4 of a petition filed under section 22-A and 22-B Cr.P.C. seeking a direction to respondent No.2 Iqbal Shah restraining him for causing any harassment to the petitioner and his family members. The petitioner in that application was Safdar Ali now respondent No.3. An extract of para 4 is reproduced hereunder for ready reference:--

"That on 20-12-2012, respondent No.2 called petitioner and her afore-mentioned daughters and nephew in the police station for investigation of the said case FIR No.16/11 by stating that the investigation has been entrusted to him by the higher authorities. The petitioner asked the said respondent that the case is sub-judice before the competent court of law and fixed for evidence and in the given situation no further investigation is required but he did not accept the genuine request of the petitioner. (emphasis provided)."

13. This statement has not been negated by respondent No.3 nor he could negate the same as the application was filed at his instance which also bears his signatures. When respondent No.3 is also of the view that during the commencement of a trial, investigation cannot be changed and the petitioner is also of the same view then maintaining the order dated 29-9-2012 would not be in the fitness of things. The impugned order thus is ineffective and has no bearing upon the merits of the private criminal complaint being tried by the learned trial court nor the investigations which were initiated upon this order, although disputed by the petitioner, could change the fate of the case so for administering the safe criminal justice to the parties, the order impugned is liable to be set aside.

14. For the foregoing reasons, this petition is allowed and the order dated 29-9-2012 passed by respondent No.1 is set aside with further observation that the investigations carried out by Iqbal Shah DSP/SDPO on the basis of this order were coram non judice and would have no bearing upon the merits of the case. The learned trial court shall decide the private complaint lodged by the petitioner independently without being influenced from the subsequent investigations conducted by respondent No.2 Iqbal Shah OSP/SDPO.

MH/M-246/L Petition allowed.

2015 Y L R 1954
[Lahore]
Before Syed Muhammad Kazim Raza Shamsi, J
ANSAR IJAZ---Petitioner
versus
The STATE---Respondent

Criminal Miscellaneous No.13775-B of 2012, decided on 4th January, 2013.

Criminal Procedure Code (V of 1898)---

----S.497(2)---Penal Code (XLV of 1860), Ss. 302, 324, 148 & 149---Qatl-i-Amd, attempt to commit Qatl-i-Amd and rioting armed with deadly weapons---Bail, grant of---Medical ground---Case of further inquiry---Plea raised by accused was that he was physically disable and could not use firearm---Validity---Disability of accused was confirmed by Medical Board by reporting that his right hand was totally amputated while left hand was deformed and functioning poorly---Accused also had mal-united / deformed left leg/left ankle---Accused was disable and infirm person who was unable to fire with any weapon---General allegation of firing was levelled against all nominated persons without describing injuries caused by them---Allegation of firing with pistol .30 bore had been levelled against accused but neither any crime empty was collected from the spot nor any such like weapon could be recovered at the instance of accused---Complainant had also given clean chit to accused by filing affidavit which document was still being owned by him---Case of accused

was covered within the ambit of S. 497(2), Cr.P.C. entitling him for grant of bail---Bail was allowed in circumstances.

Faisal Iqbal Awan for Petitioner.
Muhammad Ishaque, D.P.G. and Akbar S.I. for the State.
Khanzada Muqarram Khan for the Complainant.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Ansar Ijaz petitioner seeks his release on bail in case FIR No.308, dated 12-7-2011 registered against him under sections 302, 324, 148, 149, 109, 311, P.P.C. with Police Station Narang, District Sheikhupura.

2. As per contents of the FIR, the brother of son-in-law of the petitioner namely Aftab son of Aslam was murdered and case FIR No.417/2009 was registered at the same police station. In that case, through supplementary statement, the petitioner Ansar Ijaz etc. were nominated for the murder. On the fateful day, the complainant party was going to the office of Superintendent Police (Investigation), Sheikhupura while riding on two different cars who had summoned them for investigations. The car of the complainant was following another car in which Muhammad Shafqat son in law of the complainant, Muhammad Aslam his father and Muhammad Rizwan were sitting. The above said cars were intercepted by the assailants while armed with Kalashnikov and pistol, and on seeing the car of Shafqat deceased started indiscriminate firing killing all three inmates. Later on, the assailants while following the complainant party entered into the house of the deceased Shafqat where they killed Mst. Manzoor Bibi mother of late Shafqat. The petitioner was shown to be armed with pistol .30 bore.

3. It is contended by learned counsel for the petitioner that allegation of indiscriminate firing has been levelled against all the assailants therefore, it is not possible to determine at this stage as to whose fire proved fatal for the life of the deceased persons. He maintained that the petitioner has lost his right hand whereas his left hand is deformed unable to hold anything thus, attribution of firing to petitioner with pistol .30 bore is unacceptable. Added more that neither any empty of pistol .30 bore was recovered from the spot nor any pistol was recovered at the instance of the petitioner. Argued that the complainant of the case Muhammad Yousaf had also executed an affidavit exonerating the petitioner and his co-accused Amjad and Asghar. Iftikhar Ahmad co-accused was also given clean chit who was admitted to bail by this court on 29-3-2012 on the basis of affidavit sworn by the complainant of the case.

4. Learned counsel appearing on behalf of the son of the deceased Shafqat submitted that the complainant Muhammad Yousaf has connived with the accused party, who firstly himself had lodged the FIR and thereafter exonerated the assailants by executing affidavits and that on the complaint of his client he (Yousaf) has also been nominated as accused of murder of Shafqat Mehmood etc. Commenting upon the disability of the petitioner and firing at the deceased persons, he has referred to certain photographs in which the petitioner

is having a Kalashnikov at his shoulder and further submitted that on the record there is a C.D. showing that the petitioner was firing with Kalashnikov in a marriage function. According to the learned counsel the petitioner is not a disabled person and is sufficiently able to hold firearm.

5. Learned counsel for the complainant in contradiction with the submissions made by the learned counsel for the son of the deceased has submitted that the complainant of the case has sworn an affidavit wherein he has exonerated petitioner being not an accused of the case.

6. Parties heard. Record perused.

7. So far as the disability of the petitioner is concerned, it is confirmed by the Medical Board of DHQ Hospital, District Sheikhupura by reporting on 22-11-2012 that the right hand of the petitioner is totally amputated while the left hand is deformed and functioning poorly. It is further submitted that there was mal-united/deformed/left leg/left ankle. This medical report negates the assertion of the counsel appearing on behalf of the son of the deceased. Even the photographs shown by the learned counsel are also not of any help to him for the reason that in none of those photographs the petitioner was shown to be firing. Merely having a firearm at the shoulder does not indicate that the armed person has also capacity of firing. About the C.D., collected by the police through a recovery memo, when this Court asked to the Investigating Officer, whether he had viewed this C.D., he answered in negative. In this view of the matter, the petitioner appears to be a disabled and infirm person, who probably is unable to fire with any weapon. On merits, general allegation of firing has levelled against all the nominated persons without describing the injuries caused by them. The allegation of firing with pistol .30 bore has been levelled against the petitioner but neither any crime empty of .30 bore pistol was collected from the spot nor any such like weapon could be recovered at the instance of the petitioner. Moreover, the complainant of the case has also given a clean chit to the petitioner by filing an affidavit which document is still being owned by him. The afore-noted facts thus clearly bring the case of the petitioner within the ambit of section 497(2), Cr.P.C. entitling him for grant of bail.

8. In view of above, this petition is allowed and Ansar Ijaz petitioner is admitted to bail subject to his furnishing 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.

MH/A-11/L Bail allowed.

PLJ 2015 Cr.C. (Lahore) 180

Present: **SYED MUHAMMAD KAZIM RAZA SHAMSI, J.**

Mst. **SARWARI BIBI--Petitioner**

versus

STATE and another—Respondents

Crl. Misc. No. 8978-B of 2014, decided on 25.9.2014.

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

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 302, 364-A & 363--Bail, grant of--Allegation of--Murder and abduction of minor girl--Petitioner had scuffle with sister of complainant and she threatened that her children would be kidnapped and except this allegation contained in FIR, there was nothing on file to show that petitioner had any hand in murder of deceased or in abduction of minor girl--Minor girl while making statement u/S. 161, Cr.P.C did not implicate petitioner for her abduction and for murder of her brother--Liability of petitioner regarding her participation in occurrence would be determined by Court seized of trial of case and charges levelled against her were yet to be established--Petitioner was facing incarceration for last seven months whose person was not required for further investigations--Bail accepted. [P. 181] A

Mian Shahid Ali Shakir, Advocate for Petitioner.
Mr. Muhammad Ishaque, DPG for State.
Mr. Saif Ullah Warraich, Advocate for Complainant.
Date of hearing: 25.9.2014.

ORDER

Mst. Sarwari Bibi petitioner seeks her release on post arrest bail in case FIR No. 60 dated 28.1.2014, registered under Sections 302, 364-A & 363, PPC at Police Station Saddar Jaranwala, District Faisalabad.

2. In brief, the allegation against the petitioner is that her son Shakoor on her instigation had abducted two children Sameer aged about 5/6 years and Alisha aged about 7/8 years and dead body of Sameer was found subsequently at some unknown place while the minor girl was recovered from the custody of co-accused Shakoor.

3. Parties heard. Record perused.

4. As per contents of the FIR the petitioner had some scuffle with the sister of the complainant Rana Akash and she threatened that her children would be kidnapped and except this allegation contained in the FIR, there is nothing on the file to show that the petitioner had any hand in the murder of Sameer or in the abduction of the minor girl. The minor girl while making statement under Section 161, Cr.P.C did not implicate the petitioner for her abduction and for the murder of her brother. The liability of the petitioner regarding her participation in

the occurrence would be determined by the Court seized of the trial of the case and the charges levelled against her are yet to be established. The petitioner is facing incarceration for the last seven months whose person is not required for further investigations.

5. Keeping in view the afore-noted facts and circumstances of the case, the petition in hand is accepted and *Mst.* Sarwari Bibi is admitted to bail subject to her furnishing of bail bonds in the sum of Rs.2,00,000/- with one surety in the like amount to the satisfaction of the learned trial Court.

(A.S.) Bail granted

PLJ 2015 Lahore 332

Present: **SYED MUHAMMAD KAZIM RAZA SHAMSI, J.**

NAEEM ADIL--Petitioner

versus

A.S.J., etc.—Respondents

W.P. No. 7943 of 2010, decided on 23.9.2014.

Constitution of Pakistan, 1973--

----Art. 199--Criminal Procedure Code, (V of 1898), S. 22-A--Constitutional petition--Order of justice of peace--Challenge to--Petitioner had performed his duties in accordance with law being a police official--Even official acts are not liable for prosecution, which fact has not noticed by *Ex-officio* justice of peace while making direction for registration of case against petitioner, so order passed by *Ex-officio* justice of peace is liable to be set aside. [P. 332] A

Mr. Shahid Ali Shakir, Advocate for Petitioner.

Mr. Raza-ul-Karim Butt, AAG for Respondents.

Date of hearing: 23.9.2014.

ORDER

Through this constitutional petition, an order dated 15.4.2010 has been assailed which was passed by learned *Ex-Officio* Justice of Peace, Jaranwala, District Faisalabad directing initiation of criminal case against the petitioner.

2. The petitioner is a police official and being an Investigating Officer of case FIR No. 882 dated 13.12.2009 he had recommended the said case for cancellation, which report was agreed upon by the concerned authorities giving rise to filing of an application under Section 22-A, Cr.P.C. against the petitioner.

3. After having heard the learned counsel for the parties and perusing the record it is found that the petitioner had performed his duties in accordance with law being a police official. Even otherwise, his official acts are not liable for prosecution, which fact has not noticed by the learned *Ex-Officio* Justice of Peace while making direction for registration of

the case against the petitioner, so the order passed by the learned *Ex-Officio* Justice of Peace is liable to be set aside.

4. For the foregoing reasons, the petition in hand is accepted and the order impugned is set aside resulting into dismissal of the application filed under Section 22-A, Cr.P.C. by Respondent No. 4.

(R.A.) Petition accepted

PLJ 2015 Lahore 383

Present: **SYED MUHAMMAD KAZIM RAZA SHAMSI, J.**

Mirza **MUHAMMAD ANSAR QAYYUM--Petitioner**

versus

M. MUNIR AHMED and another—Respondents

W.P. No. 26526 of 2013, decided on 12.12.2014.

Constitution of Pakistan, 1973—

----Art. 199--Illegal Dispossession Act, (XI of 2005), Ss. 3 & 5--Criminal Procedure Code, (V of 1898), S. 22-A--Possession as tenant--Ejected without due process of law--Validity--Petitioner had failed to provide antecedents that they belonged to land mafia or were land grabbers which was a condition precedent constituting offence falling under Illegal Dispossession Act--Police report secured by Court u/S. 5 of Act, was not supporting regarding dispossession from property--Petition was dismissed. [P. 384] A & B

2012 SCMR 1533, PLD 2010 SC 661 & PLD 2007 Lah. 231, *ref.*

Mr. Muhammad Nawaz, Advocate for Petitioner.

Mr. Raza-ul-Karim Butt, Asstt.A.G.

Mr. Pervaiz Inayat Malik, Advocate for Respondents.

Date of hearing: 12.12.2014.

ORDER

Vide order dated 6.9.2013, passed by the learned Additional Sessions Judge, Shakargarh, District Narrowal, the application filed by Respondent No. 1 under Section 22-A, Cr.P.C. was accepted and the. private complaint filed by the petitioner under Section 3 of the Illegal Dispossession Act, 2005 was dismissed.

2. In the complaint, it was alleged by the petitioner that he is in possession of the property in dispute as a tenant wherefrom he has been ejected by the respondent without due process of law.

3. After having heard the learned counsel for the parties and perusing the record, it is found that the petitioner had failed to provide the antecedents of the respondents that they belong to land mafia or are land grabbers which is a condition precedent constituting the

offence falling under the Illegal Dispossession Act, 2005 as has been held in the cases reported as *Zahoor Ahmad and others vs. The State and others* (PLD 2007 Lahore 231), *Bashir Ahmad vs. Addl. Sessions Judge. Faisalabad and 4 others* (PLD 2010 SC 661) and *Habibullah and others vs. Abdul Manan and others* (2012 SCM'R 1533). Further on the merits of the case, it is found that the petitioner with the connivance of his previous owner Mumtaz Ahmad had instituted the instant petition against the respondent who is the subsequent vendee of the property in dispute. The police report secured by the Court under Section 5 of the Act, is also not supporting the contention of the petitioner regarding his dispossession from the property in dispute. The learned Court while allowing the application of the respondent and dismissing the complaint of the petitioner has not committed any illegality as such the order is liable to be maintained.

4. For the foregoing reasons, the petition in hand having no merits is dismissed.

(R.A.) Petition dismissed

PLJ 2015 Cr.C. (Lahore) 339
[Multan Bench Multan]
Present: **SYED MUHAMMAD KAZIM RAZA SHAMSI, J.**
ALTAF HUSSAIN *alias* ATTI--Petitioner
versus
STATE and another—Respondents

Crl. Misc. No. 6501-B of 2013, decided on 16.1.2014.

Criminal Procedure Code, 1898 (V of 1898)--
----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 376 & 511--Bail, grant of--Allegedly petitioner has attempted to molest the modesty of daughter of complainant so has been booked in case which was registered at Police Station under Sections 376 & 511, PPC, in which case petitioner prays for his release on post arrest bail which request has been accepted on ground that victim was not produced for her medical examination to determine attempt allegedly made by petitioner to rape her; that according to FIR, clothes of victim were torn and string of shalwar was found broken but these clothes were not produced before Investigating Officer and that delay for four days in lodging FIR has not been explained by complainant which casts serious doubt about implication of petitioner in commission of offence--Bail was granted. [P. 340] A

Kh. Qaiser Butt, Advocate for Petitioner.
Ch. Muhammad Akbar, D.P.G. for State.
Malik Muhammad Akram Khand, Advocate for Complainant.
Date of hearing: 16.1.2014.

ORDER

Allegedly the petitioner Altaf Hussain *alias* Atti has attempted to molest the modesty of *Mst.* Rasham Bibi, the daughter of the complainant so has been booked in case FIR No. 495 dated 8.9.2013 which was registered at Police Station Jalalpur Pir Wala, District Multan under Sections 376 & 511, PPC, in which case the petitioner prays for his

release on post arrest bail which request has been accepted on the ground that the victim was not produced for her medical examination to determine the attempt allegedly made by the petitioner to rape her; that according to the FIR, the clothes of the victim were torn and the string of the shalwar was found broken but these clothes were not produced before the Investigating Officer and that delay for four days in lodging the FIR has not been explained by the complainant which casts serious doubt about the implication of the petitioner in the commission of offence. The petitioner is directed to furnish bail bonds in the sum of Rs.50,000/- with one surety in the like amount to the satisfaction of the learned trial Court.
(A.S.) Bail granted.

PLJ 2015 Lahore 974

***Present*: SYED MUHAMMAD KAZIM RAZA SHAMSI, J.**

KHURRAM SHEHZAD--Petitioner

versus

EX-OFFICIO JUSTICE OF PEACE/ADDITIONAL DISTRICT & SESSION JUDGE, LAHORE and 2 others—Respondents

W.P. No. 4440 of 2015, decided on 19.5.2015.

Constitution of Pakistan, 1973—

----Art. 199--Pakistan Penal Code, (XLV of 1860), S. 489-F--Criminal Procedure Code, (V of 1898), S. 22-A--Constitutional petition--Issuance of cheque--Cheque was dishonoured on instruction of petitioner not to encash--Validity--Petitioner had also filed a suit for declaration against respondent regarding disputed cheque--It seems that respondent wants to convert civil liability into criminal one--Ex-Officio Justice of Peace while issuing direction had not considered facts and in a mechanical manner had passed impugned order, which is not sustainable in eyes of law and requires interference of High Court. [P. 975] A

Mr. Altaf Ahmad Hanjra, Advocate for Petitioner.

Mr. Wali Muhammad Khan, AAG for Respondents.

Date of hearing: 19.5.2015.

ORDER

Through the petition in hand the legality of an order dated 23.01.2015 passed by learned *Ex-Officio* Justice of Peace, Lahore has been assailed, whereby the application filed by Respondent No. 3 under Section 22-A Cr.P.Cwas disposed of and SHO police station concerned was directed to record his statement and proceed with it in accordance with law.

2. In his application, Respondent No. 3 had leveled allegation of issuance of Cheque valuing Rs.825,000/- in his favour dishonestly, which was subsequently dishonoured when presented for encashment.

3. After hearing the learned counsel for the parties and perusing the record, it is noticed that the brother of the petitioner Mehboob Tariq and Respondent No. 3 had business terms inter-se but subsequently on account of differences Respondent No. 3 had

lodged FIR No. 86/2014 and No. 195/2014 under Section 489-F PPC against the brother of the petitioner in which case he was arrested and during bail proceedings the parties entered into a compromise and accused settled the matter with respondent and given Rs.200,000/- to the respondent, and the petitioner issued cheque No. 45283026 of Rs.825,000/- in favour of Respondent No. 3 as guarantee. It is noticed that the said cheque was dishonured as the petitioner had instructed his bank not to en-cash the same, as according to him the respondent had not fulfilled his commitment. It is found that the petitioner had also filed a suit for declaration against Respondent No. 3 regarding the disputed cheque. It seems that the respondent wants to convert the civil liability into criminal one. Learned *Ex-Officio* Justice of Peace while issuing the direction had not considered the afore-noted facts and in a mechanical manner had passed the impugned order, which is not sustainable in the eyes of law and requires interference of this Court.

4. For the foregoing reasons, instant petition is allowed and the impugned order is set aside, resulting into dismissal of the application of Respondent No. 3 filed under Section 22.A Cr.P.C.

(R.A.) Petition allowed.

2015 P.Cr.R. 1

[Lahore]

Present: **SYED MUHAMMAD KAZIM RAZA SHAMSI, J.**

Muhammad Iqbal

Versus

The State, etc.

Criminal Miscellaneous No. 7636-B of 2013, decided on 4th July, 2013.

BAIL/MURDER --- (Lalkara)

Criminal Procedure Code (V of 1898)---

---S. 497(2)---Pakistan Penal Code, 1860, Ss. 302/34---Commission of murder---F.I.R.---Role of Lalkara---Grant of bail---**Held:** Petitioner was simply accused of raising 'Lalkara'---Petitioner had not been ascribed with any role of fire upon deceased---Even it had not been mentioned in F.I.R. that petitioner was armed with any weapon at relevant time---Case fell within ambit of further inquiry---Bail after arrest granted.

(Paras 4, 5)

سائل سے محض للکارا منسوب تھا۔ مقتول پر فائرنگ کا کوئی کردار منسوب نہ تھا۔ ضمانت عطا ہوئی۔

[Only Lalkara was attributed to petitioner. No role of firing upon deceased was assigned to him. Bail was allowed].

For the Petitioner: **Ch. Abdul Ghaffar, Advocate.**

For the State: **Muhammad Ishaq, Deputy Prosecutor General.**

For the Complainant: **Muhammad Tanveer Chaudhry, Advocate.**

Date of hearing: **4th July, 2013.**

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J. --- Muhammad Iqbal, petitioner seeks his release on post-arrest bail in case F.I.R. No. 1309, dated 05.11.2012 registered under Sections 302, 34, P.P.C. with Police Station Sargodha Road, District Faisalabad.

2. The allegation against the petitioner is that the complainant and his brother Waheed Ahmad *alias* Kukoo were standing in the Main Bazar Noorpur when the petitioner alongwith unknown accomplices attracted there and on the *"Lalkara"* raised by Muhammad Iqbal, petitioner, Shoaib *alias* Sabir, co-accused fired at Waheed Ahmad hitting on his left eye who succumbed to the injuries at the spot.

3. Parties heard. Record perused.

4. The submission of learned counsel for the complainant that the *"Lalkara"* was commanding in nature and co-accused of the petitioner while acting upon the same had killed Waheed Ahmad *alias* Kukoo, is the question which cannot be determined at this stage as it needs detailed evidence whether the *"Lalkara"* of the petitioner was commanding in nature and the co-accused had acted upon the same for killing an innocent person. The learned counsel has also relied upon the call-data which calls were allegedly made by the petitioner prior to the occurrence and also thereafter but again this evidence can be thrashed and scrutinized by the Court of competent jurisdiction in appropriate proceedings. On the face of the record, the petitioner is simply accused of raising *"Lalkara"* for killing Waheed Ahmad and in this connection, he had not been ascribed with any role of fire upon the deceased. Even, it has also not been mentioned in the F.I.R. that he was armed with any weapon at that time. The case of the petitioner in this manner squarely falls within the purview of Section 497(2), Cr.P.C., therefore, he is entitled for the concession of bail.

5. In view of the above, this petition is ***allowed*** and Muhammad Iqbal, petitioner is admitted 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 learned Trial Court.

Bail after arrest granted.

2015 P.Cr.R. 19

[Lahore]

Present: **SYED MUHAMMAD KAZIM RAZA SHAMSI, J.**

Muhammad Usman

Versus

The State, etc.

Criminal Miscellaneous No. 9631-B of 2014, decided on 17th September, 2014.

BAIL/INJURY CASE --- (Opinion of I.O.)

Criminal Procedure Code (V of 1898)---

---S. 497(2)---Pakistan Penal Code, 1860, Ss. 324/34---Opinion of I.O.---Grant of bail---Rule of consistency---In course of two successive investigations story of complainant was not believed by I.O. and petitioner was exonerated from allegation---Said declaration was further supported by non-recovery of crime weapon---Co-accused who had allegedly fired two shots on legs of the injured PW and motive had also been attributed to him had already been granted bail by High Court---**Held:** Petitioner was also entitled to same concession---Bail after arrest granted.

(Paras 4, 5)

سائل کو دوران تفتیش الزامات ضربات سے نکال دیا گیا تھا۔ ہمراہی ملزم پہلے ہی ضمانت پر تھا۔ بجرم مذکور میں سائل کو ضمانت عطا ہوئی۔

[Petitioner was exonerated from allegations during course of investigation Co-accused was already released on bail. Post-arrest bail was granted to petitioner]

For the Petitioner: **Mian Altaf-ur-Rehman, Advocate.**

For the State: **Muhammad Ishaque, Deputy Prosecutor General.**

For the Complainant: **Sarfraz Ali Khan, Advocate.**

Date of hearing: **17th September, 2014.**

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J. --- Muhammad Usman petitioner seeks his release on post-arrest bail in case F.I.R. No. 262, dated 6.4.2013 registered with Police Station Baghbanpura, District Gujranwala under Sections 324 & 34, P.P.C. but subsequently offence under Section 302, P.P.C. was added.

2. Precise allegation against the petitioner is that he made a fire with his pistol hitting on the right thigh of Babar injured, the son of the complainant.

3. Parties heard and record perused.

4. A specific role of firing has been attributed to the petitioner but in two successive investigations the story narrated by the complainant was not believed by the Investigating Officer and exonerated the petitioner from the allegation. This declaration was further supported by non-recovery of crime weapon. Moreover, co-accused Shahid who had fired two shots at the legs of Babar and motive has also been attributed to him has already been granted bail by this Court *vide* order dated 24.6.2014. The case of the petitioner found on better footing than his co-accused Shahid, so he is also entitled for the concession of bail.

5. For the foregoing reasons, the petition in hand is accepted and Muhammad Usman petitioner is admitted to bail subject to his 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.

2016 M L D 1747
[Lahore]
Before Syed Muhammad Kazim Raza Shamsi, J

SAJID ALI---Petitioner
Versus
The STATE and 7 others---Respondents

Criminal Revision No.822 of 2015, decided on 30th September, 2015.

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

----Arts.132 & 133---Refusal to grant permission to cross-examine the Investigating Officer---Trial Court while trying the complaint case, had declined the request of the complainant to cross-examine prosecution witness/Sub-Inspector of Police---Stance taken by the Trial Court was that the witness was produced by the complainant as prosecution witness, who could not be termed as hostile witness; as such he could not cross-examine said witness---Stance taken by the Trial Court was not based upon the correct application of law---If the complaint was also filed along with the State case, then the procedure for the court was to take up first the complaint case; and to examine prosecution witnesses listed in the Police challan as "court witnesses"---When the witness was treated as court witness, then a right was accrued in both parties to cross-examine him---Trial Court, in the present case, should have followed that procedure by treating the witness as court witness; and to allow the complainant to cross-examine him also---Said witness was to be treated as court witness, and permission should have been granted to the petitioner/complainant to cross-examine him---Impugned order passed by the Trial Court was not sustainable in the eyes of law---Impugned order was set aside, with direction to treat the statement of said witness (Sub-Inspector) as statement made by a court witness and allow the complainant to cross-examine him.

Nur Elahi v. The State PLD 1966 SC 708 rel.
Rana Habib-ur-Rehman Khan for Petitioner.
Muhammad Ishaque, D.P.G. for the State.
Rana Muhamamd Saeed Akhtar for Respondents Nos. 2 to 5 and 7.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---This criminal revision petition has arisen out of an order dated 25.7.2015 passed by learned Addl. Sessions Judge, Chunian, District Kasur, whereby he while conducting trial in the complaint case refused to grant permission to the petitioner to cross-examine the Investigating Officer.

2. During the examination of PW.8, learned Addl. Sessions, Judge while trying the complaint case has declined the request of the petitioner/complainant to cross-examine PW.8 Liaqat Ali, Sub-Inspector. The stance taken by the court below in this respect that the

witness was produced by the complainant as prosecution witness, who cannot be termed as hostile as such he cannot cross-examine the witness. This stance taken by the court below is not based upon correct application of law as laid down by the apex Court in the case of Nur Elahi v. The State (PLD 1966 SC 708). In the reported judgment the majority view was that in case the complaint is also filed along with the State case then the procedure for the court is to take up first the complaint case and to examine prosecution witnesses listed, in the police challan as 'court witnesses'. Needless to say that when the witness is treated as court witness then a right is accrued in both parties to cross-examine him. In the case in hand trial court should have followed this procedure by treating the witness as court witness and to allow the complainant to cross-examine him also. Liaqat Ali, Sub-Inspector in view of this case law is to be treated as court witness and permission should have been granted to the petitioner to cross-examine him. Learned trial court has passed the impugned order in violation of above said case law, therefore; the same is not sustainable in the eyes of law.

3. For the foregoing reasons, the petition in hand is accepted and order dated 25.7.2015 passed by learned Addl. Sessions Judge Chunian, District Kasur is set aside. Learned Court is directed to treat the statement of Liaqat Sub-Inspector as statement made by a court witness and allow the complainant to cross-examine him.

HBT/S-118/L Petition accepted.

2016 P Cr. L J 44

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi, J

TAHIRA PARVEEN---Petitioner

Versus

STATION HOUSE OFFICER, POLICE STATION MANSOOR ABAD, DISTRICT FAISALABAD and another---Respondents

Crl. Misc. No. 2207-H of 2015, decided on 22nd October, 2015.

Criminal Procedure Code (V of 1898)---

----S. 491----Petition for direction in nature of habeas corpus---Custody of minor---Principles---Locus standi of adoptive parents---Mother claimed custody of minor alleging that father of minor had snatched minor from her lawful custody---Father took plea that petitioner had no locus standi to file present petition as she had adopted minor from her real sister---Validity---In the present case, it was only to be seen whether custody of minor with father was proper or illegal---Although, custody of minor with father could not be termed as illegal as father was also adoptive parent, but his custody was improper as mother enjoyed right of 'Hazanat' of minor and she was living apart from father of minor---As father was living with his first wife, thus it would not be appropriate to send minor in laps of step mother---Mother, on the other hand, had not remarried, thus she was able to look after minor properly---Real mother of minor stated before court, that minor, since her birth, had

been happily living with her sister, petitioner---Statement of real mother was sufficient to brush aside contentions of father---Father was bound to provide all those facilities to child in the house of mother, which minor had enjoyed while living with him---High Court ordered custody of minor to be handed over to mother---Petition was allowed accordingly.

Naveed Munir v. Additional District and Sessions Judge, Lahore and another 2014 SCMR 1446 and Mst. Nadia Parveen v. Mst. Almas Noreen and others PLD 2012 SC 758 ref.

Naveed Munir v. Additional District and Sessions Judge, Lahore and another 2014 SCMR 1446 distinguished.

Muhammad Ajmal Adil for Petitioner.
Muhammad Ishaque, DPG with Saeed, SI.
Ghulam Fareed Sanotra for Respondent No.2.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Through the petition in hand, filed under section 491, Cr.P.C., the petitioner Mst. Tahira Parveen submitted that she and her family embraced Islam nine years back and she contracted marriage in accordance with the Muslim rites with respondent No.2 Pervaiz Jat and adopted baby Kashaf (daughter of her real sister) as no issue had born out of that wedlock. It was further submitted that respondent No.2 recently has snatched the minor detenue from her custody, who may be recovered and her custody be handed over to her.

2. On this application, the detenue aged 5-1/2 years was ordered to be recovered and produced in this court. Today the detenue has been produced by the police. Respondent No.2 is also present with his learned counsel.

3. Learned counsel for respondent No.2 while highlighting the character of the petitioner submitted that she and her family has not embraced Islam thus sending the child with the petitioner in the family, professing faith of Christianity, is not in her welfare; that the petitioner is residing in a very small house, so it would not be feasible for the child to live there as basic necessities of life are not available there; that respondent No.2 is maintaining the child in well manner as the baby has been got admitted in Beacon House School, Faisalabad, and a car is deputed for her pick and drop which facility is not available in the house of the petitioner; that in Islamic law there is no concept to adopt the child, therefore, the petitioner has no locus standi to file the petition and lastly while relying upon the case of Naveed Munir v. Addl. District and Sessions Judge, Lahore and another (2014 SCMR 1446), it is the submission of the learned counsel for respondent No.2 that a commission may be appointed for getting a report about the residential place where the minor is to reside and then to decide the application of the petitioner.

4. All the contentions raised by learned counsel for respondent No.2 have been controverted by learned counsel for the petitioner and submitted that the arguments raised by learned counsel for respondent No.2 relate to the proceedings to be imitated under section 25 of the

Guardians and Wards Act, 1890 and in the present proceedings, it is to be seen whether the minor is in improper and illegal custody of respondent or not. He has submitted that in the recent past the minor has been removed from the custody of the petitioner with force therefore, the judgment reported as Mst. Nadia Parveen v. Mst Almas Noreen etc. (PLD 2012 SC 758) is not applicable to the facts of the instant case. He also termed the judgment of Apex Court delivered in the case of Naveed Munir, distinguishable on the factual side.

5. I have considered the submissions made by learned counsel for the parties and perused the record.

6. After considering the contentions made by learned counsel for the parties, this court is of the opinion that all the arguments raised by learned counsel for respondent No.2 are not related to the instant proceedings rather the same could be raised validly before the learned Guardian Court in a petition which can be filed under section 25 of the Guardians and Wards Act, 1890. In the instant proceedings, it is only to be seen whether the custody of the father of the minor is in proper or illegal. The minor is having the age of 5-1/2 years and she was interviewed by the court. During the interview it is observed that the minor has mature understanding and has answered all the questions of the court. When it was asked from the minor about the petitioner she pointed finger towards her and went to her (adopted mother) and embraced with her. This shows that the minor is still having love and affection with the petitioner, who has adopted her. No doubt the custody of respondent No.2 cannot be termed as illegal as he is also an adopted father of the minor but that custody is still improper as mother is enjoying the rights of 'Hazanat' of the minor and that she is living apart from the respondent. It is also informed that respondent No.2, during subsistence of his first marriage, has contracted second marriage with the petitioner and his first marriage is still intact and his first wife is living with him. In this situation, it would not be appropriate to send the detenue in the lap of step mother. The petitioner, as yet, has not remarried, so she is able to look after the minor properly. The question raised by learned counsel for respondent No.2 that petitioner has no locus standi to file the instant petition as she is the mother, who has adopted the baby is untenable as the real mother of the baby, is also present in the court and standing with the petitioner and stated that the baby from her birth was handed over to petitioner Tahira Parveen and till date she is residing with her and she is happily living there. This statement of the lady is sufficient to brush aside the contention raised by learned counsel for respondent No.2. It is the ground of respondent that petitioner is able to maintain the child, suffice it to say that it is the duty of the father to provide all those facilities to the child in the house of the petitioner, which she enjoyed while living with respondent No.2.

7. The judgment cited by learned counsel in the case of Naveed Munir (supra), has been examined and it is found that the judgment was delivered in the proceedings initiated on the application filed under sections 6 and 7 of the Guardians and Wards Act, 1890 and was not passed in the petition filed under section 491, Cr.P.C. The scope of both the proceedings is on different footing as under the former proceedings the court has to determine the welfare of the minor before deciding guardian petition and in the latter proceedings, the court had to see the custody of the minor is legal or proper. In these circumstances, judgment delivered by Apex Court, in the case of Naveed Munir (supra) is not applicable to the fact of present

case. As has been observed by this court that the child is inclined to join her mother and a scene has been created in the court room in this respect, so it can easily be said that child has been removed from the custody of the petitioner in the recent past, thus this petition can be entertained. It has been brought to the notice of the court that respondent No.2 belongs from very influential family so there is every likelihood that due to that influence the cases have been registered against the family of the petitioner, as has been pointed out by counsel of the petitioner.

8. In view of the afore-noted observation, this petition is allowed and the custody of the minor baby Kashaf is ordered to be handed over to the petitioner.

9. City Police Officer, Faisalabad, keeping in view the influence of respondent No.2, is directed to provide protection to the family of the petitioner and to drop baby and her mother at their residence safely.

10. The City Police Officer, Faisalabad, be informed telephonically as well as through Fax about this order of the court.

SL/T-18/L Petition allowed.

2016 P Cr. L J 300

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi and Ali Baqar Najafi, JJ

SARDAR MUHAMMAD NASEEM---Appellant

Versus

The STATE---Respondent

Criminal A. No. 370 of 2004, decided on 11th May, 2015.

National Accountability Ordinance (XVIII of 1999)---

----Ss. 5(da) & 9(a)(v)---Assets beyond known sources of income---Appreciation of evidence---Benami properties---Sources of income---Proof---Accused was holder of public office and was convicted and sentenced by Trial Court for seven years imprisonment along with fine---Validity---No notice was issued to alleged Benamidar prior to confiscation of property, the same was fatal to prosecution case---In a case of assets beyond means, prior to discussing assets, the known source of income both legal and illegal had to be brought on record---Trial Court fixed value of properties but nowhere salary of accused for last 41 years, his savings and his other emoluments were even discussed---Court had no formula to apply in order to ascertain as to what were the assets beyond means---High Court disagreed with the findings of Trial Court and set aside conviction and sentence awarded to accused, resultantly he was acquitted of the charge---Appeal was allowed in circumstances.

Syed Zahir Shah and others v. National Accountability Bureau and others 2010 SCMR 713 rel.

Muhammad Saleem Shehnazi and Muhammad Aslam Khan Buttar for Appellant with Appellant as bail.

Arif Mehmood Rana, Additional Deputy Prosecutor General for NAB.

ORDER

This single judgment shall dispose of the instant appeal and W.P. No.9763 of 2004 as both involve identical question of law and facts.

2. Through the present appeal the appellant challenges judgment dated 03.03.2004 whereby he was convicted under sections 9 and 10 of the National Accountability Bureau Ordinance, 1999 for the offence of corruption and corrupt practices and sentenced to 7 years punishment of rigorous imprisonment extending the benefit of section 382-B, Cr.P.C. besides imposing a fine of Rs.25,00,000/- as equal to the price/gain of the aforesaid lands acquired or purchased. Six different properties are also forfeited in favour of the Government out of which five properties were confiscated, whereas sixth was excluded. He was also disqualified from being in service. The properties mentioned at serial No.I to VI of para 43 supra, shall be forfeited to the Government of the Punjab. Property at serial No.VI has been excluded from forfeiting as it has been further sold out to some persons other than the dependents of accused. Its price has been considered for the purpose of fine. As a consequent of above conviction, the accused shall cease to hold public office and further he shall stand disqualified for seeking or from being chosen, appointed or nominated as a member or representative of any public body or any statutory authority or in service of Pakistan for period of 10 years to be reckoned from the date he is released after serving the sentence. He shall not be allowed to apply for or be granted or allowed any financial facility in the form of any loan, or advances, or other financial accommodation by any Bank or financial institution owned or controlled by Government for a period of 10 years from the date of conviction. The amount of fine imposed today shall be recoverable as arrears of land revenue.

3. Briefly the allegations as contained in Reference No.14/2001 against the appellant are that while posted as Junior Clerk, D.C. Office, Lahore, from 1966-2000, he indulged in the acts of corruption and corrupt practices and acquired properties in his own name and in the name of his different dependents which were disproportionate to his own known source of income. The details of the properties are as follows:-

(i) 250 Kanals 18 Marlas agricultural land in village Barka Khurd, Tehsil Cantt, District Lahore, purchased in 1990, in his own name.

(ii) 154 Kanals 6 Marlas agricultural land in village Hadyara, Tehsil Cantt., District Lahore, purchased in 1990, in his own name.

(iii) 102 Kanals 14 Marlas agricultural land in village Barka Khurd, Tehsil Cantt, District Lahore, purchased in 1988 in the name of his wife Mst. Naseem Akhtar.

(iv) 204 Kanals 11 Marlas agricultural land in village Barka Kallan, Tehsil Cantt, District Lahore, purchased in 1988 in the name of his wife Mst. Naseem Akhtar.

(v) 2 Kanals 2 Marlas residential plot in Harbanspura, Tehsil Cantt, District Lahore, purchased in 1989 in the name of his wife Mst. Naseem Akhtar.

(vi) 88 Kanals 13 Marlas agricultural land in village Barka Kallan, Tehsil Cantt, District Lahore, purchased in 1988 in the name of his two sons Khalid Mahmood land Asif Mahmood.

(vii) 241 Kanals 11 Marlas agricultural land in village Hadyara, Tehsil Cantt, District Lahore, purchased in 1988 in the name of his sons Arif Ali, Imran Mahmood, Tariq Mahmood and daughter Shabana Naseem.

(viii) 88 Kanals 13 Marlas agricultural land in village Barka Kallan, Tehsil Cantt, District Lahore, purchased in 1989 in the name of his daughter Shabana Naseem.

After the submission of reference the trial court framed charge, whereafter 12 prosecution witnesses were examined. The statement of the accused/appellant under section 342, Cr.P.C. was recorded and the appellant produced 6 DWs in respect of his defence. The trial court confiscated the above said five properties and sentenced the appellant as stated above. Hence this appeal.

4. Learned counsel for the appellant submits that the allegations against the appellant could not be proved before the learned trial court as the appellant himself and his family members already owned enough properties either through inheritance or through purchase, therefore, source of income was adequately explained. Further submits that NAB has no jurisdiction to probe any property prior to 1999, therefore, any transaction of 1974 in the name of the appellant or his family members is outside the domain of the NAB authorities. Adds that the income from the Jhar Padawar of the land owned or calculated by the appellant, his father and sons were not taken into account which is Exh.DW23/C to Exh.DW23/L. Further adds that the other sources of earning like dairy farming, tractor trolley hiring, water selling and business run by Khalid Mehmood were not considered.

5. Conversely, learned Additional Prosecutor General for NAB submits that the prosecution has amply proved that the appellant had properties much beyond his known source of income.

6. Arguments heard. Record perused.

7. Out of eight properties alleged to have been purchased/acquired by the appellant and his family members, the prosecution could prove only four properties before the Accountability Court No.I, Lahore.

8. Firstly, the land measuring 44 Kanals 5 Marlas in Barka Khurd is alleged to have been purchased by the appellant for Rs.2,50,000/- but the appellant claims that the same was purchased by Khalid Mehmood his son in the name of the appellant which plea was believed by the trial court by holding that he may have sufficient sources. Secondly, the land measuring 85 Kanals 5 Marlas in Barka Khurd was purchased on 04.04.1990 in the name of the appellant for a consideration of Rs.3,50,000/-. The same plea taken by the appellant in defence was not relied upon by the learned court. Thirdly, property is land measuring 144 Kanals 8 Marlas in Hadyar was allegedly to have been in the name of the appellant on 28.01.1990 for an amount of Rs.6,00,000/- which the appellant claims to have purchased from the money in the bank account of his son, namely, Khalid Mehmood. The bank statement of Account No.380 Exh.DW2/A, Account No.426 Exh.DW7/A and Account No.312 Exh.DW7/A which are in the name of Khalid Mehmood but the learned court held that the transaction from the said account was not possible as balance in Account No.380 was Rs.59934/-, Account No.426 Rs.145010/- and Account No.312 was not operative after December 1987. Fourthly, the land measuring 112 Kanals 18 Marals was purchased in Barka Khurd on 14.05.1990 for a consideration of Rs.3,50,000/- and the same plea was raised by the appellant that the said property was purchased by his son. The land measuring 204 Kanals 11 Marlas in Barka Kalan was purchased in the year 1988 from one Masood Abbas in the name of wife of the appellant, namely, Naseem Akhtar for Rs.2,00,000/-, which according to the appellant was paid by Khalid Mehmood after selling of the trolley. However, neither Naseem Akhtar nor Khalid Mehmood appeared either as a witness.

9. The appellant produced Khushi Muhammad/DW20, Mohsin/DW21 and Muhammad Ilyas/DW22, who categorically stated that the land was purchased by Khalid Mehmood but the learned trial court did not believe their statements on the ground that the said Khalid Mehmood did not appear and that it was not stated by them that the money was paid by Khalid Mehmood. A close perusal of the statements of the DWs reveals that the money was paid to the seller and the appellant was not required to establish that he paid the money from his own personal resources. The prosecution could have brought the seller of the said land as a witness to show that the amount of Rs.2,50,000/- was received actually from the appellant.

10. To prove the said transaction as Benamidar, the question arises as to what was the prime responsibility of the prosecution and after that what was the duty of the appellant to show that the said property was a Benami transaction. But before we look into this aspect, it is worth mentioning that the appellant had already retired in the year 2001 and for the last 20 years since the allegation of purchasing properties from unknown sources of income, no agency or authority had ever probed about such allegation. The learned trial court basically construed the nonappearance of the wife of the appellant and his son as a proof of the fact that the property was purchased by the appellant.

11. Admittedly, no notice was issued to the alleged Benamidars prior to confiscation of the property, which is fatal to prosecution case. Reliance is placed upon Syed Zahir Shah

and others v. National Accountability Bureau and others (2010 SCMR 713). The relevant extract from para 18 is reproduced as under:-

> "18. It is an admitted feature of the case that the stated Benamidars and the dependents of the appellant, in view of the accusation and the allegations, as well as; contained in the Reference and the report filed in the trial Court under section 173, Cr.P.C. supported by the incriminating material; notice was not directed to be issued to the alleged Benamidars by the trial Court nor they were heard obviously before passing of the final judgment in the case although, it was evident that they were fully aware and in the knowledge of the proceedings before the trial Court, which related to the assets and properties in which right and interests have been claimed by the petitioners before us in these two civil petitions for leave to appeal, as well as; interesting to note that out of the alleged Benamidars Mst. Tasneem Begum and Yasir Shah wife and son respectively of the appellant had appeared as D.Ws. before the trial Court yet, their appearance as D.Ws. for the accused would not by itself be a valid substitute of notice to Benamidars, affording them opportunity of hearing and leading evidence if so deemed proper by them in support of their claims to be the legitimate owners as having rightful interest in such properties….."

12. Shockingly, in the entire judgment we have not been able to read a single line in which the income of the appellant since 1960 to 2001, his regular and normal expenses and his additional source of income were ever discussed. In a case of assets beyond means, of course, prior to discussing the assets, the known source of income both legal and illegal has to be brought on the record. As observed by the learned trial court Rs.2,50,000/- for 44 Kanals 5 Marlas, Rs.3,50,000/- for 85 Kanals 5 Marlas, Rs.6,00,000/-, 144 Kanals 14 Marlas, Rs.3,50,000/- for 112 Kanals 18 Marals and Rs.2,00,000/- for 204 Kanals 11 Marlas make it Rs.17,50,000/- but nowhere the salary of the appellant for the last 41 years, his savings and his other emoluments were even discussed. The court had no formula to apply in order to ascertain as to what are the assets beyond means. We have left with no option but to disagree in the most definite terms with the findings of the learned trial court.

13. As a result of which, we allow this appeal, set aside the judgment of the trial court and acquit the appellant of the charges. His sureties shall be discharged at once and the properties so confiscated shall also stand released.

MH/S-62/L Appeal allowed.

2016 P Cr. L J 732

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi, J

Mst. NUSRAT BIBI---Petitioner

Versus

The STATE and another---Respondents

Criminal Revision No.233 of 2015, decided on 29th May, 2015.

(a) Juvenile Justice System Ordinance (XXII of 2000)--

----S. 7---Determination of age of accused---Inquiry, purpose of---Petitioner's plea was that inquiry was essentially to be held by court while determining age of accused---Validity---Inquiry to be held by court for determining age of accused was not a mandatory requirement for the reasons that documents, Form-B and Birth Certificate of accused had come on record from official custody and were prepared under National Database and Registration Authority Ordinance, 2000---Such documents enjoyed presumption of truth unless rebutted through very strong and cogent evidence.

Ghulam Abbas v. The State and others 2014 PCr.LJ 858 ref.

(b) Juvenile Justice System Ordinance (XXII of 2000)--

----S. 7--- Determination of age of accused--- Genuineness of documents---Contention of petitioner was that Form-B contained cutting which had made the same doubtful---Validity---Particulars mentioned in the Form did not contain and cutting or tampering---Document showed that birth entry was recorded in the official record and old registration number had also been mentioned in Birth Certificate meaning thereby that entry of birth of accused was made in the official record in 1999---Documents, in circumstances were genuine.

(c) Juvenile Justice System Ordinance (XXII of 2000)--

----S. 7---Determination of age of accused---Inquiry by court---Inquiry could be held in respect of age of accused during trial, if and whenever it appeared to be necessary to the court---Court had the discretion to see whether there was need to hold an inquiry for determination of age of accused person; if the court was not satisfied, it had jurisdiction to hold such inquiry by summoning original record.

Sultan Ahmed v. Additional Sessions Judge, Mianwali and 2 others PLD 2004 SC 758 and Ahmad Sher v. The State and another 2006 PCr.LJ 1450 rel.

(d) Juvenile Justice System Ordinance (XXII of 2000)--

----S. 7---Determination of age of accused---Medical test, purpose of---Whenever a question of age of an accused person was raised, he must be subjected to medical test unless strong reason existed or could be offered for not doing so.

Rana Ashfaq Ahmad Shafi for Petitioner.
Muhammad Ishaque, DPG for the State.
Mian Waheed Ahmad Majeed for Respondent No.2.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Through the instant criminal revision petition vires of an order dated 09.02.2015 passed by learned Addl. Sessions Judge, Gujranwala have been assailed whereby the application filed by respondent No.2 for declaring him as juvenile offender was accepted.

2. Respondent No.2 is facing trial in case FIR No.270, dated 03.8.2013, which was registered at police station, Ferozewala, District Gujranwala under sections 364-A and 302, P.P.C., in which it was alleged that respondent No.2 had abducted the daughter of the complainant, raped her and then murdered her.

3. During the trial proceedings on 12.6.2014 respondent No.2 filed an application with the prayer that at the time of occurrence he was having the age of less than 15 years thus under section 2-B of Juvenile Justice System Ordinance, 2000 he comes within the ambit of 'Child' and be declared as an juvenile offender. This petition was contested by the complainant and the learned trial court after hearing both parties while relying upon Form-B and birth certificate issued by NADRA in respect of respondent No.2 declared him as juvenile offender.

4. The reason which prevailed upon the mind of the learned Court for declaring the respondent as juvenile offender, as noted above, was that the birth certificate issued by NADRA was an official document, which was prepared much before the date of occurrence.

5. Learned counsel for the petitioner has challenged the impugned order on twofold grounds, firstly that under section 7 of the Ordinance (ibid) the Court is required to hold an inquiry by summoning the relevant record and the persons related with that record; and secondly, that for having the correct view about the age of the assailant a medical report is also needed in the form of securing ossification test. Learned counsel for the petitioner in this connection has relied upon the cases of 'Sultan Ahmed v. Addl: Sessions Judge, Mianwali and 2 others' (PLD 2004 SC 758) and 'Ahmad Sher v. The State and another' (2006 PCr.LJ 1450).

6. Learned counsel for respondent No.2 while citing the case of 'Ghulam Abbas v. The State and others' (2014 PCr.LJ 858) has submitted that it was not necessary in each case to hold an inquiry, particularly when the documents relied upon by the Court had come from official custody and were prepared much prior in time than registration of the criminal case; and that ossification test of an accused would only be necessary and relevant when no authentic documentary evidence was available.

7. Parties have been heard and record perused.

8. The submission of the learned counsel for the petitioner that inquiry was essentially to be held by the court while determining the age of the respondent in the given circumstances of this case, does not seem to be a mandatory requirement for the reason that the documents, Form-B and the birth certificate of the respondent, have come from the official custody and were prepared under NADRA Ordinance, 2000 thus enjoy a

presumption of truth, unless this presumption is rebutted through very strong and cogent evidence. The petitioner has not placed on file any document countering that the age of the respondent mentioned in the Birth Certificate was incorrectly recorded nor it could be rebutted that the documents relied upon by the Court below were fabricated and fake. Simple statement of the petitioner that the respondent was not a child within the meaning of the Ordinance, 2000 is not enough to negate out-rightly the official documents, the authenticity and genuineness of which is undoubted. Learned counsel for the petitioner submitted that Form-B contains cutting, which has made that form as doubtful, is a wishful argument as the particulars mentioned in that form do not contain any cutting or tampering. According to that document, the birth entry was recorded in the official record and old registration number has also been mentioned in the birth certificate meaning thereby that the entry of the birth of the respondent was made in the official record in 1999 when respondent No.2 had born on 10.8.1999, definitely at that time neither the respondent nor his parents were having the knowledge that the respondent in future would commit a crime and to forestall they had created evidence. In the case of Sultan Ahmed (supra) it was observed by the Hon'ble Supreme Court that during the trial of a person an inquiry can be held in respect of the age of the accused if and whenever it appears to be necessary to the Court. These words used in the judgment clearly bestow a discretion in the court to see whether there was any need to hold an inquiry for the determination of the age of the accused person and if the court is not satisfied then it has jurisdiction to hold such inquiry by summoning the original record and the authors of that record.

9. So far as the second contention of the learned counsel for the petitioner regarding conduct of ossification test for determining the age of the respondent in the case is concerned, the Apex Court in the same judgment has also dealt with this question by observing that whenever a question of age of an accused person is raised or arose, he must be subjected to medical test unless strong reason existed or could be offered for not doing so. When this principle laid down by the Apex Court is applied to the instant case, it is found that there are sufficient strong reasons for not subjecting the respondent to the medical test as the documents produced by the respondent before the court are genuine and authentic and have maintained under a statutory provision and in rebuttal of the same no evidence was produced by the petitioner. No doubt onus to prove his minority is rested upon respondent No.2 but he has discharged that onus by producing birth certificate and Form-B, whereafter it was the complainant to disprove that documentary evidence by producing convincing and cogent documentary evidence. The judgment cited by the learned counsel for the petitioner in these terms does not advance his case rather it helps respondent No.2 in the above terms. The order of learned trial Court in these circumstances to proceed with the case of the respondent under Juvenile Justice System Ordinance, 2000 did not suffer from any legal infirmity as such the same is upheld.

10. For the reasons stated above, the petition in hand having no merits is dismissed.

RR/N-25/L Petition dismissed.

2016 P Cr. L J 986

[Lahore]

Before Syed Muhammad Kazim Roza Shamsi, J

MUHAMMAD NAWAZ alias ASIF alias PHALLO---Petitioner

Versus

The SUPERINTENDENT CENTRAL JAIL GUJRANWALA and others---Respondents

W. P. No. 31279 of 2014, decided on 4th February, 2015.

Anti-Terrorism Act (XXVII of 1997)---

----S. 21-F---Constitution of Pakistan, Art. 199---Constitutional petition---Remissions---Retrospective effect---Scope---Plea raised by petitioner was that occurrence took place prior to insertion of S. 21-F in Anti-Terrorism Act, 1997, therefore, he was entitled to benefit of remissions---Validity---Law prevalent at the time of commission of crime would hold the field and provisions of S. 21-F of Anti-Terrorism Act, 1997, did not contain anything showing intention of the Legislature that the provisions would be applicable to cases retrospectively---Although petitioner was convicted and sentenced after promulgation of S. 21-F, of Anti-Terrorism Act, 1997, yet he would be entitled for benefits which were made available to him at the time when crime was committed by petitioner---Jail authorities wrongly denied right and benefits to petitioner, so the same needed to be corrected---High Court directed jail authorities to grant petitioner remissions which were admissible to him and release him from the custody, if he had completely served out his sentence awarded by Trial Court---Petition was allowed in circumstances.

Shah Hussain v. The State PLD 2009 SC 460; M. Aslam Mouvia v. Home Secretary and others PLD 2011 Lah. 323; Abdul Qadir Tawakkal v. The State PLD 2013 Sindh 481 and Colonial Sugar Mills's case 1906 (A.C.) 307 rel.

Malik Abdul Wahid for Petitioner.

Raza-ul-Karim Butt, Assistant Advocate-General with Kamran Anjum, Superintendent, Central Jail, Gujranwala and Mudassar, Deputy Superintendent Jail.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Through this constitutional petition, it is prayed that respondent No.1/ Superintendent, Central Jail, Gujranwala be directed to release the petitioner from the jail forthwith.

2. The grievance of the petitioner is that the remissions in the sentence awarded to the petitioner are not being granted to him by the jail authorities on the ground that the petitioner was convicted and sentenced under the Anti-Terrorism Act, 1997 and section 21-F of the Act bars the grant of remissions.

3. Learned counsel for the petitioner while relying upon the cases of "Shah Hussain v. The State" (PLD 2009 Supreme Court 460), "M. Aslam Mouvia v. Home Secretary and others" (PLD 2011 Lahore 323) and 'Abdul Qadir Tawakkal v. The State" (PLD 2013 Sindh 481) submitted that, the alleged occurrence had taken place on 09.05.2000 at which time the provisions of section 21-F of the Act were not promulgated, so the said provisions of law cannot be applied retrospectively rather the law prevailing at the time of commission of offence would be applied to the case of the petitioner and the petitioner would be entitled for the remissions.

4. The learned Law Officer has opposed this proposition of law and submitted that after promulgation of law, the remissions were rightly refused to the petitioner by the jail authorities.

5. I have considered the submissions made by learned counsel for the parties and have also gone through the case law minutely.

6. The petitioner was arrested in case FIR No.144 dated 09.05.2000 registered under sections 365-A, 324, 109, P.P.C. read with section 7 of the Anti-Terrorism Act, 1997 and after facing trial therein, vide judgment dated 15.08.2002, he was convicted under sections 344/34, P.P.C. with rigorous imprisonment of three years with fine of Rs.20,000/- and in default of the same, to suffer two years' R.I; under section 7 of the Anti-Terrorism Act, 1997, he was sentenced to imprisonment for life with fine of Rs.20,000/-, in default whereof to suffer two years' R.I. Benefit of section 382-B, Cr.P.C. was also extended in favour of the petitioner. As per petitioner, he is languishing in the jail since 2000. After the promulgation of section 21-F of the Act, admissible remissions were rot granted to the petitioner. In this connection, the provisions of section 21-F of the Anti-Terrorism Act, 1997 have been examined and it is found that the same were inserted in the statute book on 15.08.2001 i.e. the time when the trial of the petitioner was in progress. The tenor of the cases of Muhammad Aslam Mouvia and Abdul Qadir Tawakkal is that the law enforced at the time of commission of crime shall be taken into consideration while awarding benefits to a person who has been convicted and sentenced. Same is the position in the civil jurisdiction and it was held by the Privy Council in the case of "Colonial Sugar Mills 1906 (A.C.) 307" that the law prevalent at the time of accrual of the right to a person shall govern his subsequent proceedings launched on the basis of that right. In the case of Muhammad Aslam Mouvia and Abdul Qadir Tawakkal, it has been observed by the learned Division Benches the same proposition of law as was discussed in the Colonial Sugar Mills's case. It has validly been observed by this Court as well as by the learned Court from Sindh jurisdiction that the law prevalent at the time of commission of crime would hold the field and that the provisions of section 21-F of the Act do not contain anything showing the intention of the legislature that the provisions would be applicable to the cases retrospectively. Although, the petitioner was convicted and sentenced after the promulgation of above said provisions of law but he would be entitled for the benefits which were made available to him at the time when the crime was committed by the petitioner. The jail authorities have wrongly denied the right and benefits to the petitioner, so the same needs to be corrected.

7. For the reasons stated above, the petition in hand is accepted and the jail authorities are directed to grant the petitioner the remissions which are admissible to him and release the petitioner from the custody, if he has completely served out his sentence awarded by the learned trial Court. The petition in these terms has succeeded.

MH/M-63/L Petition allowed.

2016 P Cr. L J 1407

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi and Ali Baqar Najafi, JJ

HABIB ULLAH---Petitioner

Versus

NATIONAL ACCOUNTABILITY BUREAU through Chairman and 5 others---Respondents

Writ Petition No. 10877 of 2015, decided on 18th May, 2015.

Criminal Procedure Code (V of 1898)---

----S. 497---Penal Code (XLV of 1860), Ss. 384 & 420---Extortion, cheating and dishonestly inducing delivery of property---Role ascribed to accused was that he was shown as a Army Official and behind his back, a huge amount was grabbed by co-accused for securing lease in their favour---After two years of the alleged occurrence a supplementary list of witnesses was introduced by the Investigating Officer in the reference, wherein only 5 to 6 persons, out of 102 had identified accused as a person, who was introduced as Army official, for grabbing the money from them by principal accused---Initially, accused was summoned as a witness by the Investigating Officer, but subsequently he was booked in the case by attributing role of abetment---Role of accused, was yet to be examined by the Trial Court, till that time accused could not be detained in the jail---Co-accused having already been admitted to bail, following the rule of consistency, accused was also entitled for the same relief.

Hamad Akbar Wallana for Petitioner.

Arif Mehmood Rana, ADPGA for NAB.

ORDER

Through the petition in hand, grant of post arrest bail in Accountability Reference No.17/2014, has been prayed asserting that the petitioner is an accused of abetting the offence and his person is not required for further investigations.

2. In the Reference, filed against the petitioner, it is alleged that the co-accused of the petitioner by posing the petitioner as Colonel of Pakistan Army had grabbed the money of 102 affectees for securing lease of military land for them thus the public at large was cheated in this manner.

3. We have heard the learned counsel for the parties and perused the record which discloses that the other accused of the petitioner have already been admitted to bail who have been held responsible for extorting money from the claimants. The role ascribed to the petitioner is that he was shown as a Colonel of Pakistan Army and behind his back, a huge amount was grabbed by the co accused of the petitioner for securing the lease in their favour. According to the learned counsel for the petitioner, after two years of the alleged occurrence, a supplementary list of witnesses was introduced by the Investigating Officer in the reference wherein only 5 to 6 persons out of 102 had identified the petitioner as a person who was introduced as an Army Colonel for grabbing the money from them by the principal accused Hadayat Ali. It is also noticed from the file that initially the petitioner was summoned as a witness by the Investigating Officer but subsequently he was booked in the case by attributing role of abetment to him. In these circumstances, the role of the petitioner in the commission of crime is yet to be examined by the trial court seized with the matter so, till that time, he cannot be detained in the jail. Moreover, the co-accused of the petitioner have already been admitted to bail so following the rule of consistency, the petitioner is also entitled for the same relief.

4. For the reasons stated above, the petition in hand is accepted and petitioner Habib Ullah is admitted to post arrest bail subject to his furnishing of bail bonds in the sum of Rs.2,00,000/- with two sureties each in the like amount to the satisfaction of the learned trial court.

HBT/H-5/L Bail granted.

2016 P Cr. L J 1735

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi and Ali Baqar Najafi, JJ

QAMAR-UD-DIN BUTT---Petitioner

Versus

HOME SECRETARY GOVERNMENT OF PUNJAB and others---Respondents

W. P. No.2886 of 2016, decided on 28th July, 2016.

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

----Ss. 9(c) & 15---Possession of narcotic---Sentence---Fine imposed on accused---Non-payment of fine---Reduction in quantum of fine and release from jail---Accused who had served out his sentence of imprisonment was confined in jail just because he could not pay the fine of Rs. 500,000 imposed on him by Trial Court---Imposition of fine to the accused was the sole discretion of the court, regulated by the facts and circumstances of a case---Fine of Rs. 500,000 imposed on the accused had been maintained up to the Supreme Court, however such fact may not debar the High Court to reduce the fine---Liberty of an individual was of prime importance for the High Court and just because of non-payment of fine, which the accused could not arrange while in jail, his liberty could not be curtailed---

High Court reduced fine imposed on accused from Rs. 500,000 to Rs. 50,000 and in the alternate to spend two months imprisonment---As accused had already spent two months in prison due to default of fine, High court directed to release him immediately from jail---Constitutional petition was disposed of accordingly.

Nadeem Shibli for Petitioner.
Muhammad Akram Tahir, DDPP on Courts' Call.

ORDER

Through this constitutional petition the petitioner has sought his release on parole on the ground that he was convicted, in case FIR No.28 dated 04.09.2003 under sections 9(c)/15, Control of Narcotic Substances Act, 1997 registered at Police Station ANF, Lahore by Judge, Special Court, C.N.S., Lahore vide judgment dated 29.08.2005 and sentenced to 25 years' R.I. with fine of Rs.5,00,000/- and in default whereof to further undergo 1 year's S.I. besides extending the benefit of section 382-B, Cr.P.C.

2. As per the report submitted by Superintendent, Central Jail, Faislabad the petitioner was to be released on 09.11.2016, but still he is behind the bars as the fine of Rs.5,00,000/- has not been paid.

3. Release of the petitioner sought through this petition is opposed by the learned law officer appearing on behalf of the State.

4. Arguments heard. File perused.

5. It is not denied that petitioner has served out his entire sentence but could not be released on account of non-payment of fine of Rs.5,00,000/-. In the report and parawise comments submitted by respondent No.1/Home Secretary, release of the petitioner on parole had already been denied. However, while going through the file we have noticed that petitioner is confined in the jail just because he could not pay the fine of Rs.5,00,000/-. As per said report dated 15.10.2015, probable date of release of the petitioner is 09.11.2016 if fine is paid and according to the learned counsel for the petitioner based on the said calculation the petitioner was required to be released before two months from now.

6. The imposition of the fine to the convict is a sole discretion of the court, regulated by the facts and circumstances of the case. The fine has been maintained up to the level of Supreme Court when Jail Petitions Nos.202 of 2008 and 309-L of 2008 filed by the petitioner was dismissed but said fact may not debar this court to reduce the fine. The liberty of an individual is of prime importance for this Court and just because of non-payment of fine, which he could not arrange while living in the jail, his liberty cannot be curtailed.

7. For what has been discussed above, we dispose of this petition while reducing the fine of Rs.5,00,000/ to Rs.50,000/- and in alternate to spend two months' S.I. As we have been informed that petitioner has already spent two months in default of the fine, therefore, he shall be immediately released from the jail, if not required in any other criminal case.

MWA/Q-8/L Petition allowed.

2016 Y L R 272

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi, J

ALLA-UD-DIN---Petitioner

Versus

STATION HOUSE OFFICER and others---Respondents

W.P. No.5415 of 2014, decided on 9th July, 2015.

Criminal Procedure Code (V of 1898)---

----Ss. 22-A & 154----Penal Code (XLV of 1860), Ss. 418 & 423---Constitution of Pakistan, Art. 199---Constitutional petition---Cheating with knowledge that wrongful loss may ensue to person whose interest offender is bound to protect, dishonest or fraudulent execution of deed of transfer containing false statement of consideration---Powers of Justice of Peace---Scope---Information in cognizable offences---Registration of FIR---Principles---Civil dispute, determination of---Petition for registration of FIR against respondent-accused alleging that accused, showing himself absolute owner of subject property, had received earnest money as part payment of sale consideration, but the property later on turned out to have been pledged with Bank, and that accused had deprived petitioner from huge amount by fraud---Justice of Peace directed police to register case against respondent---Validity---Respondent-accused filed civil suit for cancellation of sale agreement, which was later withdrawn on basis of agreement between the parties---During execution proceedings of Bank recovery decree, application was filed for deposit of decretal amount on behalf of respondent-accused---Banking Court, allowing said application, directed to deposit decretal amount, but he failed to do so---No criminal liability against-petitioner was established---Ex-officio Justice of Peace, while passing impugned order, had not properly appreciated facts of the present case; order had been passed in mechanical manner, and same was, therefore, not sustainable in eyes of law---Order in question was set aside---Constitutional petition was accepted in circumstances.

Muhammad Ajmal Adil for Petitioner.
Wali Muhammad Khan, A.A.-G. and Sarfraz, A.S.-I. for Respondents.
Salman Arif for Respondent No.2.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---This petition filed in terms of Article 199 of Constitution of Islamic Republic of Pakistan, 1973 is directed against an order dated 24.02.2014 passed by learned Ex-Officio Justice of Peace, Faisalabad, whereby the application filed by respondent No. 2 under section 22-A, Cr.P.C. was accepted and SHO was directed to record his statement and proceed under section 154, Cr.P.C.

2. In his application respondent No.2 alleged that the petitioner while posing himself as owner of property bearing khasra No.19/4, Square No.48, situated in Chak No.279/RB, Tehsil and District Faisalabad sold said property to him for a total consideration of Rs.53

lacs and received Rs.50 lacs on different occasions. Qamar-ud-Din and Basit, other proposed accused, verified the ownership of the petitioner and assured that the property was free from encumbrances. However, after some time when it transpired that the property was pledged with Habib Bank Limited the petitioner with the intervention of respectables demanded return of the sale consideration but the petitioner put off the payment on one pretext or other. Subsequently when the suit of the Bank for recovery was decreed the petitioner promised to transfer the property in favour of respondent No.2 after clearance of bank liability. In the backdrop of above facts, the respondent had complained that the petitioner and other proposed accused had deprived him from huge amount by fraud.

3. After hearing the learned counsel for the parties and perusing the record, it is noticed that allegedly the parties entered into an agreement for sale of disputed property on 04.02.2012 for a total consideration of Rs.53 lacs and out of which Rs.15 lacs was received by the petitioner as earnest money. However, the petitioner filed a suit for cancellation of said agreement on the ground that the same was forged and fabricated one. During the pendency of said suit the parties entered into another agreement and resultantly the suit was withdrawn by the petitioner on 13.6.2013. In the meanwhile the Habib Bank Limited, with whom the disputed property was pledged, after securing decree against the petitioner filed execution petition and in execution proceedings respondent No.2 filed an application for deposit of decretal amount on behalf of the petitioner/judgment debtor, which application was allowed by the learned Banking Court and respondent No.2 was directed to deposit the decretal amount within seven days but he failed to do so. Respondent No.2 after his failure to deposit the decretal amount has tried to give colour of civil dispute into criminal one. From the resume of afore-noted facts it is clear that the no criminal liability is established against the petitioner. Learned Ex-Officio Justice of Peace while passing the impugned order had not properly appreciated the afore- noted facts and in a mechanical manner had issued direction for registration of the case against the petitioner, which order is not sustainable in the eyes of law thus warrants interference of this court.

4. For the foregoing reasons, instant petition is allowed and the impugned order is set aside, resulting into dismissal of the application of respondent No.2 filed under section 22-A, Cr.P.C.

SL/A-143/L Petition allowed.

PLJ 2016 Lahore 500 (DB)

[Multan Bench Multan]

Present: **SYED MUHAMMAD KAZIM RAZA SHAMSI AND FARRUK GULZAR AWAN, JJ.**

MUHAMMAD DANISH--Petitioner

versus

CITY POLICE OFFICER, MULTAN and 4 others—Respondents

W.P. No. 17691 of 2015, decided on 14.1.2016.

Constitution of Pakistan, 1973--

----Art. 199--Punjab Police Order (Amendment) Ordinance, 2013, Art. 18-A--Constitutional petition--Change of investigation--Challan was submitted--Validity--Challan had been submitted in trial Court where charge was framed and trial was in progress and as such transfer of investigation at such a belated stage was not sustainable--Petition was dismissed. [P. 502] A

2014 SCMR 1499 *rel.*

Mr. Muhammad Bilal Butt, Advocate for Petitioner.

Mehar Nazar Abbas Chawan, AAG alongwith Atif, SSP (Operation) for Respondents.

Date of hearing: 14.1.2016.

ORDER

Through the instant petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, arising out F.I.R No. 510/2015 and F.I.R.No. 512/2015 dated 15.09.2015 under Section 9(c) of the Control of Narcotic Substances Act, 1997 registered at Police Station, Shujaabad, District Multan, the petitioner has sought direction against Respondent No. 1 that the application for change of investigation moved by petitioner before him be decided.

2. It is argued by learned counsel for the petitioner that cousin Muhammad Saleem Shahzad *alias* Akku and father of petitioner Khiyzar Hayat were booked into above mentioned false cases due to political rivalry; that police official demanded gratification from them and on refusal they were involved in these cases just to teach them a lesson and as a result, huge quantity of contraband charas was planted on them and now both of them are in judicial lockup.

3. On the other hand, learned law officer has opposed this petition and submitted that challan of both the cases have been submitted in which charge has been framed and trial is in progress.

4. We have heard the arguments of learned counsel for the petitioner and learned A.A.G for the State and have perused the record.

5. The above mentioned cases F.I.R. No. 510/2015 and F.I.R. No. 512/2015 were registered on 15.09.2015 under Section 9(c) of the Control of Narcotic Substances Act, 1997. During investigation, both Muhammad Saleem *alias* Akku and Khiyzar Hayat were found involved and challan was submitted in learned trial Court. Thereafter, petitioner being dissatisfied from the aforesaid investigation, moved application for change of investigation before City Police Officer, Multan.

6. Article 18-A of the Punjab Police Order (Amendment) Ordinance, 2013 (Ordinance II of 2013) deals with the subject which is re-produced for ready reference:

> "**18-A. Transfer of investigation.--**(1) Within seven working days of the filing of an application, the Head of District Police may, after obtaining opinion of the District Standing Board and for reasons to be recorded in writing, transfer

investigation of a case from the investigation officer to any other investigation officer or a team of investigation officers of a rank equal to or higher than the rank of the previous investigation officer.

(2) If the Head of District Police has decided an application for transfer of investigation, the Regional Police Officer may, within seven working days of the filing of an application, after obtaining opinion of the Regional Standing Board and for reasons to be recorded in writing, transfer investigation of a case from the investigation officer or a team of investigation officers to any other investigation officer or a team of investigation officers of a rank equal to or higher than the rank of the previous investigation officer or officers.

3 ----------"

7. Today SSP (Operations) has submitted report and stated that both the case files were referred to District Standing Board considering for first change of Investigation. He further stated that both the case files, investigating officer was examined minutely and application of the petitioner for change of first investigation was disposed of. Record reveals that challan of the above mentioned cases have been submitted in learned trial Court where the charge is framed and the trial is in progress and as such transfer of investigation at such a belated stage is not sustainable. Reliance in this respect is placed upon *"Qari Muhammad Rafique vs. Additional Inspector General of Police (Inv.) Punjab and others"* (2014 SCMR 1499).

8. In view of above, the petition in hand is without any merit, the same stands dismissed.

(R.A.) Petition dismissed

PLJ 2016 Cr.C. (Lahore) 511 (DB)

Present: **SYED MUHAMMAD KAZIM RAZA SHAMSI AND ALI BAQAR NAJAFI, JJ.**

JAHAN KHAN and others--Appellants

versus

STATE etc.—Respondents

Crl. A. No. 1598 of 2003 and W.P. No. 17173 of 2003, heard on 20.5.2015.

National Accountability Ordinance, 1999 (XVIII of 1999)--

----Ss. 9(v), 10(9) & 32--Sentence--Benamidars--Acquired properties disproportionate to known sources of income--Allegation of misusing authority--Legal income--Acquisition of land was based upon documentary evidence--Value of assets, obtained his own name and names of family member--No notice to benamidar--Validity--Prosecution could not establish source of ill-gotten money by producing any tangible and convincing evidence and has merely relied upon different documentary proof of transactions of agricultural land made in favour of appellant in different villages, which documents themselves did not speak about source of income of appellant, so on that score prosecution is not having any

case against appellant--Prosecution has miserably failed to establish guilt of appellant in so many words, thus appellant has earned his acquittal from charge. [Pp. 518 & 519] A

Mr. Anwaar-ul-Haq, Advocate with Appellant.
Syed Farhad Ali Tirmazi, Senior Special Prosecutor for State.
Date of hearing: 20.5.2015.

JUDGMENT

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.--This judgment-shall dispose of Crl. Appeal No. 1598/2003 *(Jahan Khan vs. The State etc.)* and Writ Petition No. 17173/2003 *(Muhammad Khan and others vs. The State etc.),* as both matters have arisen out of a common judgment.

2. Instant appeal filed under Section 32 of National Accountability Bureau Ordinance, 1999 is directed against judgment dated 10.9.2003, passed by learned Judge Accountability Court No. 3, Lahore, whereby the appellant Jahan Khan was convicted under Section 10(a) read with Section 9(v) of the National Accountability Ordinance, 1999 and sentenced to ten years rigorous imprisonment with a fine of Rs. 5 million and in default of payment of fine to suffer further rigorous imprisonment of two and half years. The agricultural land situated in Mouza Khairpur Para, District Muzaffargarh and in Chak No. 85-D, District Pakpattan, in his own name and in the names of any of his 'Benamidars' other than his ancestral agricultural, land in Chak No. 85-D, District Pakpatan stood forfeited to the State/Government of Pakistan. The benefit of Section 382-B, Cr.P.C. was also extended to the convict. Accompanied writ petition filed by Muhammad Khan assails legality of forfeiture order.

3. The appellant was tried in Accountability Court Reference No. 07/2002, in which it was alleged that he being Divisional Superintendent of Police (DSP) in the Police department had acquired the properties disproportionate to his known sources of his income, in his own name and in the names of his family members including his brothers as 'Benamidars'. Another allegation of misusing his authority by illegally occupying official accommodation meant for Administrator, Municipal Committee, Burewala, without payment of rent was also levelled against the appellant alongwith the allegation of acquisition of gold ornaments; from income beyond his known sources.

4. Learned Court, seized with the trial of the case, framed two charges against the appellant and Charge No. 1 was further sub-divided into 36 items. This charge included acquisition of land by the appellant and purchase of gold ornaments while in the second charge an allegation of depriving the Government from rent of official accommodation, which was in the occupation of the appellant as D.S.P, has been levelled against him. First charge was sub-divided into different portions mentioning that Properties No. 1 to 10 were acquired by the appellant in his own name, Properties No. 11 to 23 in the names of his wife and sons and Properties No. 24 to 30 in the names of his brother Muhammad Khan and Naseer Khan. Sub-charge 31 to 36 was regarding purchase of gold ornaments. Learned trial Court had exonerated the appellant from the Charges No. 31 to 36 regarding purchase of

gold ornaments as well as from Charge No. 2, thus only one charge regarding purchase of the properties was left to be established by the prosecution.

5. The prosecution had produced 29,witnesses to establish this charge, end to elaborate this prosecution evidence it can be bifurcated in the following manners:--

i) PWs-1 to 12 were examined in respect of possession of the house by the appellant over the house of Administrator, Municipal Committee, Burewala.

ii) PWs-13 to 15 had narrated about the purchase of gold ornaments.

iii) PW-16 had given evidence regarding ground levelling assessment of land of the appellant.

iv) PW-17 had stated about the recovery of gold ornaments receipts.

v) PWs-18 to 27 had deposed about acquisition of agricultural lands by the appellant in different villages. PW-27 is Investigation Officer of the case.

vi) PWs-28 & 29 made statements in respect of disbursement of Zakat to the daughter of Naseer Khan, late brother of the appellant.

Various documents were also produced by the prosecution witnessing the transactions to show transfer of agricultural land in the name of the appellant and siblings.

6. Similarly the Defence also produced evidence in disprove of the charges, which was consisted upon following categories:-

i) DWs-1 to 4 deposed about the memory register regarding the receipt of TA/DA and Transfer Grants by the appellant.

ii) DW-5 stated about the withdrawal of G.P Fund advance.

iii) DWs-6 & 7 produced documents regarding average yielding of the crops.

iv) DW-8 deposed about purchase of a house by him (DW) from Lal Din, father-in-law of the appellant.

v) DW-9, Ex-Chairman of the Municipal Committee, deposed about possession of Administrator House, Municipal Committee Burewala by DSPs; and ASPs, Burewala.

vi) DW-10 narrated about the purchase of buffaloes from Muhammad Khan, brother of the appellant.

vii) DW-11 had prepared the schedule of net produce and statements of income of agricultural land of the appellant.

viii) DW-12, the appellant, himself deposed on oath under Section 340(2), Cr.P.C.

Documentary evidence was also produced on the file showing that the properties were validly purchased from the known sources of the appellant.

7. Learned trial Court after considering the oral as well as documentary evidence led by the parties held that first charge to the extent of acquisition of property by the appellant in his own name and his sibling was proved while exonerated him from sub-charges No. 11 to 36 and the second charge of illegal occupation of the official residence of Administrator, Municipal Committee, Burewala without payment of rent.

8. The appellant has assailed his conviction and sentence by filing instant appeal while the State has not challenged the exoneration of the appellant from the afore-noted charges, thus the judgment handed down by the learned trial Court to that extent has attained finality. Muhammad Khan etc. writ petitioners have also questioned legality of forfeiture of properties, as directed by trial Court in the impugned judgment.

9. Learned counsel for the appellant has opened the argument with the submission that according to prosecution's own evidence the legal income of the appellant was about Rs. 80 lacs out to which he had acquired the properties and assets including gold ornament to the tune of Rs. 46 lacs thus the appellant has not committed any offence chargeable under NAB Ordinance. 1999. He explained that learned trial Court had duly noted afore-noted figures borne out of evidence but misread the evidence while convicting and sentencing the appellant. Further maintained that the acquisition of the land by the appellant was based upon the documentary evidence consisting, upon attestation of inheritance mutation, exchange mutations and gift mutations, which documents have amply proved the transactions entered into between the parties under a legal cover but learned Court, while ignoring this documentary evidence had drawn an adverse presumption that the appellant had purchased these properties from ill-gotten money. Learned counsel further submitted that the prosecution has miserably failed to establish that all assets were made by the appellant from ill-gotten money and none of prosecution witness could prove earning of ill-gotten money against appellant. He argued that the Court is required to take the face value of the documents and unless it shows some fraudulent intention or fabrication, till that time those documents has to be accepted as correct under law, which was not done by the Court below while indicting the appellant. Learned counsel argued that the documents did not prove nor it could be smelled therefrom that the properties mentioned in those documents were purchased from ill-gotten money and the witnesses produced by the prosecution in respect of those documents did not utter single word that the transactions made by the appellant were from his illegal money secured by him by misusing his authority. He has made reference to certain transactions in this respect by stating that the properties were purchased in a legal manner from the known legal sources of the appellant thus the Court below has incorrectly assumed that the appellant being the police officer was enjoying the authority, which he had misused and gathered all properties through illegal means. In this backdrop, learned counsel has prayed for accepting the appeal and acquittal of the appellant from the charges.

10. Learned Law Officer while controverting the submissions has not denied the legal income of the appellant to the tune of Rs. 70 lacs as put by the prosecution to the appellant in his statement under Section 342, Cr.P.C. but asserted that in that statement in Question No. 7 the word `legal' has been mentioned instead of using the word 'illegal'.

According the State representative, the appellant had earned that money from illegal means and thereafter he had purchased huge number of properties through that ill-gotten money. He has referred to the statements of the witnesses, who had produced documents regarding the transaction of mutations and exchanges with the submission that they had amply proved that the properties were obtained by the appellant through illegal means. He has frankly conceded that total value of the assets made by the appellant is more than Rs. 46 lacs. He has also supported the judgment delivered by the learned trial Court with the prayer of dismissal of the appeal.

11. We have given our conscious consideration to the submissions made by the learned counsel for the parties and have also gone through the record with their able assistance. In the first charge acquisition of various properties by the appellant has been mentioned, which according to the prosecution the appellant had obtained through ill-gotten money. In this respect, we have examined the documentary evidence produced on the file, which shows that certain mutations were entered into the record and those mutations only show existence of the transfer of the properties in the name of the appellant and does not show that the transactions were entered through ill-gotten money earned by the appellant. In-fact PWs 18 to 23 are. Patwaris, who had produced copies of mutations and schedule of the net produce, which in any cast, does not indicate the earning of the appellant through illegal means. On the other hand, statement of net produce, produced by the witnesses and the schedule of net produce submitted by PWs 21 to 25 shows the income, which the appellant had earned from agricultural land inherited from his father, exchange made with brother and through a gift mutation from his sister. It was not denied by the prosecution that on the death of father of the appellant a big piece of lend came into the hand of the appellant and it is also not denied on the record that prior to the death of the father of the appellant, the appellant was managing the affairs of agricultural land and was receiving sufficient money from there. As put by the prosecution to the appellant as Question No. 7, that he had earned about Rs. 10 lacs as salary and other allowances, which is an admitted fact, and has contributed towards the income of the appellant visa-e-vis the income, which he has earned from his agricultural land. In next question i.e Question No. 8, it was put to the appellant that he had earned total legal income from the agricultural land and lands standing in the name of the 'Benamidars' was Rs. 70,84,531/-. If both these amounts are calculated together, it comes to Rs. 80,81,042/-. According to the prosecution itself this was the legal income of the appellant. As per the prosecution, the total value of the assets made by the appellant was Rs. 46,31,745/-, thus value of the assets clearly indicates that the appellant had obtained his assets in his own name and in the names of his femily members including the 'Benamidars' from his legal income of Rs. 80 lacs, so what charge has left to be proved against the appellant, is a big question, which was not answered by the learned trial Court in the judgment although both these figures are reflected it in the impugned judgment. The prosecution could not come out of this shock, which apparently establishes innocence of the appellant. At this stage it will not be out of place to point out another fatal lacuna in the prosecution case that no notice to 'Benamidars' was issued as held by Hon'ble Supreme Court of Pakistan in the case of *Syed Zahid Shah and another vs. National Accountability Bureau and others* (2010 SCMR 713), Para 18 is reproduced as under:

> "18. It is an admitted feature of the case that the stated Benamidars and the dependents of the appellant, in view of the acquisition and the allegations, as well as

contained in the Reference and the report filed in the trial Court under Section 173, Cr.P.C., supported by the incriminating material; notice was not directed to be issued to the alleged Benamidars by the trial Court nor they were heard obviously before passing of the final judgment in the case although, it was evident that they were fully aware and in the knowledge of the proceedings before the trial Court, which related to the assets and properties in which right and interests have been claimed by the petitioners before us in these two civil petitions for leave to appeal, as well as; interesting to note that, out of the alleged Benamidars *Mst.* Tasneem Begum and Yasir Shah wife and son respectively of the appellant had appeared as D.Ws before the trial Court yet, their appearance as D.Ws for the accused would not by itself be a valid substitute of notice to Benamidars, affording them opportunity of hearing and leading evidence if so deemed proper by them in support of their claims to be the legitimate owners as having rightful interests in such properties. Besides these petitioners, the other petitioner, Mansoor Ahmed in C.P.No. 751-P/2003 has claimed rights and interests in the properties forfeited to the Government was admittedly not issued any notice by the trial Court nor opportunity of hearing was afforded to them by the learned trial Court, as well as; by the learned Special Bench of the Peshawar High Court before pessing the final judgments. In the case of *Mst. Zahida Sattar and others v. Federation of Pakistan and others* (PLD 2002 SC 408), in which somewhat identical questions of law and facts were involved, this Court in Paragraph No. 16 of the judgment, reproduced here in below as held:

> "The law by now is firmly settled that no person can be condemned unheard as regards any matter in which he has any interest. It has also been laid down as principle of law by the superior Courts that in every statute, principle of natural justice or hearing a person before condemning him as to his rights shall be deemed to have been embodied unless application thereof has been expressly or impliedly done away with. In the absence of any express provision to exclude the applicability of the principles of natural justice of hearing of a person adversely affected by on order or judgment of the Court under NAB Ordinance, we would hold that he (Benamidar) has a right to approach the said Court during the trial and before final judgment is passed that he should be heard. We may also observe that in all such cases where the properties are alleged to have been purchased by an accused person in the names of his spouse, relative and others as Benamidars, the Court should itself summon those persons and give them opportunity to produce evidence in support of their claim as to ownership in their own right to substantiate that they had sufficient sources of their own to acquire the properties and thereafter decide the case. As regards remedy of appeal, it being a substantive right cannot be availed by a person unless conferred by the statute. Under the relevant provisions of NAB Ordinance as regards appeal against final judgment of the Accountability Court, it can only be maintained by the State or the accused person. This being so, the ostensible owners or Benamidars if heard by the Accountability Court and findings recorded against them, may invoke any other remedy in such situation including remedy under Article 199 of the Constitution."

12. As observed above, the prosecution could not establish the source of ill-gotten money by producing any tangible and convincing evidence and has merely relied upon different documentary proof of the transactions of the agricultural land made in favour of the appellant in different villages, which documents themselves did not speak about the source of income of the appellant, so on that score the prosecution is not having any case against the appellant.

13. The upshot of above discussion is that in view of shaky and incredible evidence, the prosecution has miserably failed to establish the guilt of the appellant in so many words, thus the appellant has earned his acquittal from the charge.

14. For the foregoing reasons, Crl. Appeal No. 1598/2003 filed by the appellant Jahan Khan is accepted and impugned judgment of learned Accountability Court No III Lahore dated 10.9.2003 is set aside, resulting into acquittal of the appellant from the charges. The appellant is on bail, his bail bonds are cancelled and the sureties are relieved of their liability.

15. In view of the acceptance of Crl. Anpeal No. 1598/2003 filed by Jahan Khan and his ccquittal from the charges, W.P. No. 17173/2003 file by Muhammad Khan etc has rendered infructuous, which is disposed of accordingly.

(R.A.) Order accordingly

PLJ 2016 Lahore 587

Present: **SYED MUHAMMAD KAZIM RAZA SHAMSI, J.**

MUHAMMAD TAHIR--Petitioner

versus

ADDITIONAL SESSIONS JUDGE, (JUSTICE OF PEACE), FAISALABAD and 3 others—Respondents

W.P. No. 6123 of 2014, decided on 22.5.2014.

Constitution of Pakistan, 1973—

----Art. 199--Criminal Procedure Code, (V of 1898), S. 22-A--Constitutional petitions--Common allegation of demolition of houses and removing debris--Assailants were fugitive from law--Validity--If assailants were behind bars but due to their abscondence, no one can dare to cause any damage to their residences and taking away of their household articles--In order to pressurize petitioner's side who are complainant of FIR an attempt has been made by respondents for A.S.J. of criminal case against him. [P. 588] A

Mr. Munir Hussain Bhatti, Advocate for Petitioners.
Mr. Khawar Ikram Bhatti, Addl. Advocate General for Respondents.
Rana Ghulam Dastgir, Advocate for Respondents.
Date of hearing: 22.5.2014.

ORDER

By this single order, I propose to decide W.P. No. 6080/2014, W.P. No. 6081/2014 and W.P. No. 6123/2014, for the reasons that a person against whom an FIR is to be lodged is common in all the three petitions, but the applications under Section 22-A, Cr.P.C. were filed by different persons namely *Mst.* Ghulshan Bibi, Muhammad Anwar and *Mst.* Mumtaz Yaqoob.

2. The learned *Ex-Officio* Justice of Peace has also decided the three applications of the above-said persons through an order dated 26.2.2014.

3. Through all these three constitutional petitions Muhammad Tahir has assailed the legality of the above-said orders passed by the learned *Ex-Officio* Justice of Peace, Faisalabad whereby the concerned SHO of the police station was directed to record the versions of the three persons and to proceed with it in accordance with law. In all the three petitions, the applicants made a common allegation of demolition of their houses and removing the debris alongwith threats extended for murdering the applicants and their close relatives. In view of these allegations, the learned *Ex-Officio* Justice of Peace requisitioned the report from the SHO of the police station concerned who reported that Sikandar, Muhammad Qamar, Muhammad Qayyum and Muhammad Usman, the sons of the applicant *Mst.* Mumtaz Yaqoob, are accused of case FIR No. 17/2013 registered for the murder of three persons from the family of Muhammad Tahir's party (now petitioner) in these cases and that Yaqoob's family abandoned the village whereas Tahir's party has been confined to their houses due to the fact that all the assailants are fugitive from law and Tahir's party apprehended danger to their lives at their hands. It is further reported by the SHO that the household articles of Yaqoob's family have been kept in the house of his brother-in-law Sultan Yaqoob by the Yaqoob's party and in the garb of this, the applicants want to lodge an FIR against the complainant of case FIR No. 17/2013. The learned trial Court without looking into the report of the police has issued direction for recording the version of Yaqoob's party.

4. Parties heard. Record perused.

5. As per report of the concerned SHO of the police station, the sons of the respondents in these petitions are at large and could not be arrested by the police. In this state of affair, the allegation of demolishing the houses of those assailants and taking away household articles and debris of the houses by the complainant of that case, does not appeal to a prudent mind. This could happen if the assailants were behind the bars but due to their abscondence, no one can dare to cause any damage to their residences and taking away of their household articles. It is further evident that in order to pressurize the petitioner's side who are the complainant of FIR No. 17/2013, an attempt has been made by the respondents for registration of criminal case against him. It is further very astonishing that all the three respondents have made similar allegation against the present petitioner and the Court has also issued direction on all the three applications without applying its mind that regarding the same occurrence three FIRs cannot be registered at a police station. In this manner, the order passed by the learned *Ex-Officio* Justice of Peace is not sustainable in the eyes of law and is liable to be set aside.

6. For the foregoing reasons, all the three petitions are allowed and the order dated 26.2.2014 passed in each petition is set aside resulting into the dismissal of the applications filed by Respondent No. 3 in each petitions under Section 22-A, Cr.P.C.

(R.A.) Petition allowed

PLJ 2016 Cr.C. (Lahore) 531
[Multan Bench Multan]
Present: **SYED MUHAMMAD KAZIM RAZA SHAMSI, J.**
NIAZ and 2 others--Petitioners
versus
STATE and another—Respondents

Crl. Rev. No. 347 of 2013, decided on 18.1.2016.

Pakistan Penal Code, 1860 (XLV of 1860)—

----S. 337-A(i)--Criminal Procedure Code, (V of 1898), Ss. 435 & 439--Conviction and sentence--Daman--Inflicted soti blow on head--Locale of injury was not specific--Cross-version--Injury attribution given by complainant was not supported by medico-legal certificate which showed that all injuries were received by complainant on top of his head--All accused caused injuries at his head without disclosing the side on which head received injuries, without pointing out of locale of injuries--Although FIR lodged by petitioner was cancelled but it had given another picture of story--Complainant and other launched an assault upon them causing injuries was produced before police that was why FIR was cancelled--Crl. revision was accepted. [P. 532] A & B

Mr. Nadeem Ahmad Tarar, Advocate for Petitioners.
Mr. Muhammad Ramzan Khalid Joiya, Advocate for Complainant.
Mr. Hassan Mehmood Khan Tareen, Deputy Prosecutor General for State.
Date of hearing: 18.1.2016.

JUDGMENT

Since, the revision petition in hand as well as **Crl. Misc. No. 210-M of 2013** *(Noor Ahmad vs. Niaz etc.)* are inter-connected with each other, therefore, the same are taken up together.

2. The revision petition filed by Niaz Ahmad & 2 others is directed against judgment dated 15.04.2011, passed by learned Judicial Magistrate, Sahiwal and the judgment dated 12.01.2013, passed by learned Additional Sessions Judge, Sahiwal, whereby the petitioners were convicted under Section 337A(i), PPC and were sentenced to pay *'Daman'* to the tune of Rs. 10,000/- each to Noor Ahmad, injured with simple imprisonment for one year. Benefit of Section 382-B, Cr.P.C. was also extended in their favour. The learned appellate Court had varied the order to the extent of imposing simple

imprisonment for one year while rest of the conviction and sentence was maintained through the impugned judgment.

3. Brief facts of the case are that the petitioners alongwith Riaz, Imtiaz, Faiz Ahmad and Farooq, were tried in case FIR No. 433 dated 27.06.1998, lodged under Sections 452, 354, 337F(ii), 337F(v), 337F(i), 337L2, 148. 149, PPC with Police Station Yousafwala District Sahiwal. As per report, three Petitioners Niaz etc., had inflicted *'soti'* blow on the head of Noor Ahmad. Another accused, namely, Maqbool Ahmad, was also charged with the offence falling under Section 337F(v), PPC but during the trial, he kissed the dust. After the conclusion of trial, the petitioners were indicted in the above terms and the appeal filed by them, was also dismissed with above said modification. Regarding rest of the offences, the petitioners were acquitted against which no appeal or revision was filed by the complainant Noor Ahmad.

4. Arguments heard. Record perused.

5. It is noticed from the record that the petitioner-side had lodged FIR against complainant and others which was cancelled and the petitioners were convicted and sentenced in the cross-version lodged by Noor Ahmad, complainant.

6. Precisely, the allegation against the petitioners in the cross-version of Noor Ahmad, is that they were armed with *'Dangs'* and Niaz, petitioner caused an injury on the top of his head; similar blow was given by ZawarHussain, petitioner at the head of the complainant with his *'Dang'* and then Mumtaz, petitioner had given the same treatment to the head of the complainant. In this manner, the complainant had received one injury at the top of his head while two injuries on the other side of head, which locale of injury was not specified. This attribution given by the complainant is not supported by his medico-legal certificate which shows that all the three injuries were received by Noor Ahmad, on the top of his head. Noor Ahmad, appeared in the Court as PW.1 and stated that all the three persons, caused injuries at his head without disclosing the side on which, he had received the injuries. PW.2, although, has supported PW. 1, but without pointing out the locale of the injuries. Although, the FIR lodged by the petitioner side, was cancelled but it had given another picture of the story mentioning that NoorAhmad and others had launched an assault upon them causing injuries to them. Since, no medical certificate regarding those injuries was produced before the police that is why the FIR was cancelled. In view of the contents of FIR lodged by the petitioner side, there is every likelihood that the parties had free fight with each other and curing that scuffle, Noor Ahmad, had received some injuries on his head. Similarly, regarding the other offences charged against the petitioners, they were acquitted but no appeal or revision was filed in this respect. The fatal injury was attributed to one Maqbool Hussain, who, during the trial had died. The learned Courts below, have misread the evidence and have not properly appreciated the record while convicting and sentencing the petitioners, as such, the judgments concurrently rendered by the Courts below are the result of misreading of evidence and non-reading of the record, thus are not sustainable in the eyes of law.

7. For the reasons stated above, **Crl. Revision No. 347 of 2013 is accepted** and the impugned judgments are *set aside* resulting into acquittal of the petitioners.

8. In **Crl. Misc. No. 210-M of 2013,** Noor Ahmad, petitioner, has prayed for enhancing the sentence awarded to Niaz and others but since, the revision petition of Niaz etc. has been accepted and they have been acquitted from the charge, therefore, this petition rendered infructuous which is disposed of accordingly.

(R.A.) Order accordingly

PLJ 2016 Cr.C. (Lahore) 540
[Multan Bench Multan]
Present: **SYED MUHAMMAD KAZIM RAZA SHAMSI, J.**
SHER MUHAMMAD--Petitioner
versus
STATE etc.—Respondents

Crl. Rev. No. 347 of 2009, heard on 9.3.2016.

Pakistan Penal Code, 1860 (XLV of 1860)—

----Ss. 344, 337-F(i), 337-A(i)--Police Order, 2002, Art. 155--Sentence--Detenue was kept in police lock-up--Physically tortured--Guilt of charge--Presumption of truth--Illegal confinement in police station--Report of bailiff--Medical evidence--Validity--Prosecution was not able to point out any malice on part of petitioner for keeping alleged detenue in illegal custody and torturing him--Prosecution had failed to prove charge against petitioner beyond any shadow of doubt--thus, instant petition warranted acceptance. [P. 542] A

Mr. Nadeem Ahmad Tarar, Advocate for Petitioner on bail.
Mr. Shaukat Ali Ghauri, Addl. Prosecutor General for State.
Ms. Fouzia Kausar Bhatti, Advocate for Complainant.
Date of hearing: 9.3.2016.

JUDGMENT

The petitioner faced trial in case FIR No. 406/2004, registered under Sections 344,337F(i),337A(i), PPC read with Article 155 of Police Order, 2002 with Police Station Gaggo, Tehsil Burewala, District Vehari and at the conclusion of trial, the learned trial Court *vide* judgment dated 19.02.2009 convicted and sentenced the petitioner in the following manner:

1. Under Section 344, PPC, ten months simple imprisonment with fine of Rs. 2000/- and in defeult whereof to further undergo for ten days S.I.

2. Under Section 337A(i), PPC, to pay Rs. 2000/- as 'daman' and simple imprisonment for two months.

3. Under Section 337F(i), PPC, to pay Rs. 2000/- as 'daman' and simple imprisonment for two months.

4. Under Article 155 Police Order, 2002, to ten months simple imprisonment with fine of Rs. 2000/- and in default whereof to further undergo for 10 days S.I.

Benefit of Section 382-B, Cr.P.C. was also extended to the petitioner.

2. Against this conviction and sentence, an appeal was preferred and the learned Addl. Sessions Judge, Burewala *vide* judgment dated 19.09.2009 dismissed the same by upholding conviction and sentence of the petitioner.

3. Brief history of the case is that the petitioner was posted as ASI at the Police Station where he illegally confined one Allah Ditta and physically tortured him. The said Allah Ditta was recovered on the orders of the High Court and medically examined whereafter the petitioner has been implicated in the case in hand. Report under Section 173, Cr.P.C. was forwarded to the Court where statements of six prosecution witnesses were recorded as the petitioner did not plead guilty to the charge. All the incriminating material led by the prosecution was confronted to the petitioner by recording his statement under Section 342, Cr.P.C. in which he negated all the allegations and produced Muhammad Ashraf retired S.I. as DW-1 in his defence. The petitioner did not make statement on oath under Section 340(2), Cr.P.C.

4. Parties heard. Record perused.

5. The documents relied upon by the learned Courts below reveal that while convicting the petitioner, the learned Courts have relied upon the orders of the High Court Ex.PB whereby this Court *vide* order dated 25.11.2004 on the report of bailiff, found that Allah Ditta the detenue kept in police lock up by Sher Muhammad ASI (petitioner) without making any entry in his official record. The learned Courts below while relying upon these documents have concluded that the petitioner is guilty of the charge but have ignored the documents produced by the petitioner in his defence authenticity of which documents remained unchallenged on record. One of those documents is Ex.DG i.e. the certified copy of rapat dated 24.11.2004 issued by the Moharrir of the Police Station showing that on the said date, Sher Muhammad ASI had arrested Allah Ditta son of Yaqub in ease FIR No. 122/2004, registered under Section 302, PPC at the same police station. This document has not been negated by the prosecution through any evidence which is admittedly official record of the police station. Same is the case with Ex.DH i.e. another rapat recorded by Farman Ali SI. These two documents are from the official record and enjoy presumption of truth. According to these rapats, it is apparent that on 24.11.2004, Sher Muhammad ASI had arrested Allah Ditta and brought him to the Police Station at about 09:00 a.m. as he was a nominated accused of the FIR involving capital sentence. These documents are sufficient to say that the prosecution has not proved through other cogent and convincing evidence than Ex.PB that Allah Ditta was kept in illegal confinement in the police station. Similarly, the statement of Medical Officer (PW-6) shows that duration of the injuries was one to two weeks and two to four weeks. As per document Ex.DG, the detenue was arrested and brought to the Police Station at 09:00 a.m. on 24.11.2004 so this fact does not corroborate

and support the medical report. There is every likelihood that some weeks ago, the detenu might had suffered some injuries which had attributed to the petitioner. This medical evidence does not lend any support to the prosecution so the learned Courts below have erroneously relied upon the same. The complainant is not able to point out any malice on the part of the petitioner for keeping the alleged detenue in illegal custody and torturing him. In this manner, the prosecution has failed to prove the charge against the petitioner beyond any shadow of doubt, thus, the instant petition warrants acceptance. Even otherwise since 2004 to 2016, the petitioner had suffered the agony of trial and suffered incarceration which is sufficient to meet the ends of justice.

6. For the foregoing reasons, this revision petition is accepted and the conviction and sentence recorded, by the learned Courts below against the petitioner is set-aside. The petitioner is acquitted from the charge. He is present on bail whose bail bonds are cancelled and the surety is relieved from his liability.

(R.A.) Petition accepted

PLJ 2016 Cr.C. (Lahore) 555

Present: **SYED MUHAMMAD KAZIM RAZA SHAMSI, J.**

DEWAN SADDA--Appellant

versus

STATE etc.—Respondents

Crl. A. No. 13-J of 2013, heard on 14.1.2016.

Pakistan Penal Code, 1860 (XLV of 1860)—

----S. 376--Sentence--Zina with minor girl--Identification--Appreciation of evidence--Ocular account remained unshattered thus inspires confidence--Opinion of lady doctor--Quantum of sentence--Validity--In order to constitute an offence under Section 376, P.P.C., penetration was sufficient--Medical evidence sufficiently proves penetration--Charge of rape framed against convict in such manner, had been established by prosecution beyond any shadow of doubt--Trial Court after appreciating all evidence-available on record had drawn a right conclusion about conviction of appellant to which no exception can be taken--So far as quantum of sentence awarded to appellant, it was found that appellant at time of making statement under Section 342, Cr.P.C. was having age of 16 years thus was a minor boy--Although trial Court had considered that fact while sentencing him but sentence given appears to be too harsh--Keeping in view his age and expectancy of life, sentence awarded to appellant was reduced to 10 years. [P. 557] A & B

Mr. Muhammad Basir Khan Sikhani, Advocate for Appellant.
Mr. Hassan Mehmood Khan Tareen, DPG for State.
Date of hearing: 14.1.2016.

JUDGMENT

This jail appeal filed by Dewan Sadda is directed against the judgment dated 14.2.2013 passed by the learned Additional Sessions Judge, Layyah, whereby after convicting the appellant under Section 376, P.P.C., he was sentenced to twenty years rigorous imprisonment with the fine of Rs. 2,00,000/-, failing which to further undergo six months simple imprisonment.

2. As per story narrated in the complaint Ex.PA made by PW-3 Zahoor Hussain at about 9/10:00 p.m. when his minor daughter Sumera Bibi aged about 6/7 years went outside the house to answer the call of nature, the appellant grasped her and raped the minor girl who was identified in the light of electric bulb. The appellant was arrested at the spot.

3. The police completed the investigations of the case and submitted final report under Section 173, Cr.P.C. to the Court for trial.

4. During the trial, prosecution evidence was recorded as the accused did not plead guilty to the charge. PW-1 Muzammil Hussain TASI, PW-2 Nimra Andleeb, Women Medical Officer, PW-3 Zahoor Hussain, PW-4 Muhammad Asif, PW-5 Aftab Ahmad ASI, PW-6 Muhammad Sadiq Constable, PW-7 Hayat Bhatti SI and PW-8 Sumera Bibi, the victim of the case were examined as a prosecution evidence.

5. After closure of the prosecution evidence, the incriminating evidence was confronted to the accused by recording his statement under Section 342, Cr.P.C. in which he termed all the witnesses as related inter-se, Investigating Officer belonging to the complainant party and that on 16.1.2011 he went to the mobile shop to fetch mobile wherefrom he was abducted by Zahid Bhatti, Sajjad Bhatti and Allah Dewaya and kept him confined in the room and they committed sodomy with him and also snatched his mobile. They in order to save themselves, registered this false case. He did not opt to appear as witness under Section 340(2), Cr.P.C. however, he opted to produce defence evidence consisting upon an attested copy of petition for registration of case Ex.DB, copy of order dated 16.12.2011 passed by learned Additional Sessions Judge, Layyah Ex.DC.

6. After the conclusion of the evidene, the Court appreciated the facts of the case and convicted the appellant under Section 376, P.P.C. Sentence of rigorous imprisonment of twenty years was imposed upon appellant by taking a lenient view that the appellant was a juvenile and first offender.

7. Parties heard. Record perused.

8. Learned counsel for the appellant has raised sole argument that as per statement of PW-2, Women Medical Officer, she could not give her final opinion regarding commission of rape with the girl due to the fact that no DNA test report was received. This submission of the learned counsel is not much impressive for the reason that in the statement made by said PW it is clearly mentioned that the hymen of the minor girl was torn and there was fresh bleeding from the margin of torn hymen. This medical evidence sufficiently shows that victim was freshly raped. This medical report was further supported by PW-8 the victim who herself appeared in the Court and stated that the appellant is the person who had committed Zina with her. In the cross-examination made on her statement, she remained affirm to her stand that she was subjected to unlawful act by the appellant.

The PW-3 and PW-4 eye-witnesses have also made statements in line with the prosecution version regarding identification of the appellant in the light of the bulb and that he was arrested at the spot when he attempted to flee away. The ocular account remained un-shattered thus inspires confidence. In order to constitute an offence under Section 376, P.P.C., penetration is sufficient. The medical evidence sufficiently proves penetration. The charge of rape framed against the convict in this manner, has been established by the prosecution beyond any shadow of doubt. The learned trial Court after appreciating all the evidence-available on the record had drawn a right conclusion about the conviction of the appellant to which no exception can be taken.

9. So far as the quantum of sentence awarded to the appellant is concerned, it is found that the appellant at the time of making statement under Section 342, Cr.P.C. was having the age of 16 years thus is a minor boy. Although the learned trial Court has considered this fact while sentencing him but the sentence given appears to be too harsh. Keeping in view his age and the expectancy of life, sentence awarded to appellant is reduced to 10 years. The sentence of fine is also reduced to the sum of Rs. 25,000/- as the fine imposed by the Court is much exorbitant and in default in the payment of fine, the appellant shall serve one month simple imprisonment.

10. For the foregoing reasons, the appeal in hand having no merits is dismissed. However, the quantum of sentence is reduced in the, manner mentioned above.

(R.A.) Appeal dismissed

PLJ 2016 Cr.C. (Lahore) 708

***Present*: SYED MUHAMMAD KAZIM RAZA SHAMSI, J.**

MUHAMMAD SAEED--Petitioner

versus

STATE and another—Respondents

Crl. Misc. No. 2955-M of 2015, decided on 3.6.2016.

Criminal Procedure Code, 1898 (V of 1898)—

----S. 561-A--Qanun-e-Shahadat Order, (10 of 1984), Art. 129(g)--De-exhibited document--Iqrar Nama--Document cannot be tendered in evidence--Document was not part of investigations nor was taken into possession by police through any recovery memo--Validity--Only those documents could be tendered in evidence, which had been proved in accordance with Q.S.O. or against whom law has provided presumptions of truth--Documents prepared by private party are required to be proved by producing its scribe as well as attesting witnesses of same, which can only be done at stage, when investigations are carried out in criminal case--Document neither was tendered to police for recording statement of scribe and attesting witnesses of same nor it was made part of prosecution evidence, so, presenting that document in examination-in-chief of witness does not render a document admissible in evidence--Courts below while exercising jurisdiction in

allowing application of respondent has not committed any jurisdictional illegality, therefore, impugned orders do not require any interference by High Court. [Pp. 709 & 710] A & B

Ch. Muhammad Saeed Gujjar, Advocate for Petitioner.
Ch. Muhammad Imran Bhatti, Advocate for Respondent.
Ch. Muhammad Ishaque, D.P.G. for State.
Date of hearing: 3.6.2016.

ORDER

This criminal miscellaneous petition filed under Section 561-A, Cr.P.C. is directed against the order dated 22.06.2015 passed by the learned Addl. Sessions Judge, Faisalabad whereby the order passed by the learned Judicial Magistrate dated 10.12.2014 was maintained and it was observed that the document Iqrar-nama Ex.P.B was rightly de-exhibited by the Court.

2. This petition has arisen out of the circumstances that during the trial proceedings the learned Judicial Magistrate on 25.03.2014 recorded the examination-in-chief of three prosecution witnesses in the absence of learned defence counsel and during the examination-in-chief of complainant document Iqrar-nama was tendered in evidence, upon which the Court had marked as Ex.P.B. Later on application was filed by Muhammad Khalid before the Court for de-exhibiting the document on the ground that document was not the part of police investigations nor the Investigating Officer had taken into possession that document, therefore, that document cannot be tendered in evidence. The learned Judicial Magistrate while agreeing with the contention of that applicant, *vide* order dated 10.12.2014, allowed the application and de-exhibited the Iqrar-nama.

3. Against that order revision petition was filed by the complainant, which was dismissed by the Court on the same premises which had prevailed upon the mind of learned Judicial Magistrate, hence, this petition.

4. After hearing the parties and perusing the record, it is found that during recording of the statement of the complainant the document was tendered in evidence which was exhibited as Ex.P.B. It is further noticed that said document was not the part of the investigations nor the same was taken into possession by the police through any recovery memo. The document has not been mentioned in the final report submitted by the police u/S. 173, Cr.P.C. so, in this manner it was surprise for the defence to see that document on the file of the Court. Learned Judicial Magistrate has rightly allowed the request of respondent and de-exhibited the document, which is not the part of the process of collection of prosecution evidence. It follows that only those documents could be tendered in the evidence, which have been proved in accordance with the Qanoon-e-Shahadat Ordinance, 1984 or against whom the law has provided presumptions of truth. The documents prepared by the private party are required to be proved by producing its scribe as well as attesting witnesses of the same, which can only be done at the stage, when the investigations are carried out in the criminal case.

5. In the instant case, the said document neither was tendered to the police for recording the statement of scribe and attesting witnesses of the same nor it was made part of prosecution evidence, so, presenting that document in the examination-in-chief of witness does not render a document admissible in evidence. The learned Courts below while exercising the jurisdiction in allowing the application of the respondent has not committed any jurisdictional illegality, therefore, the impugned orders do not require any interference by this Court.

6. For the foregoing reasons, the petition in hand having no merits, is dismissed.

(R.A.) Petition dismissed

PLJ 2016 Lahore 812

Present: **SYED MUHAMMAD KAZIM RAZA SHAMSI, J.**

Mst. **MEHTAB TAYYAB--Petitioner**

versus

STATE and 6 others—Respondents

W.P. No. 4899 of 2015, decided on 9.3.2016.

Constitution of Pakistan, 1973—

----Art. 199--Constitutional petition--Change of investigation--Cancellation report--Facts were not brought into notice of judicial magistrate--Report was forwarded for trial--Validity--All these facts were not brought into notice of judicial magistrate, when impugned order was passed, so., impugned order passed by Court is not sustainable--Petition is accepted and impugned order passed by judicial magistrate was set aside. [P. 813] A

Mr. Muhammad Bilal Butt, Advocate for Petitioner.
Mirza Muhammad Saleem Baig, Addl. Advocate-General.
Date of hearing: 9.3.2016.

ORDER

This constitutional petition has been filed, challenging order dated 07.01.2014 passed by learned Judicial Magistrate, Multan whereby cancellation report submitted by the police in case FIR No. 88/2013 was agreed upon.

2. Parties heard, record perused.

3. It is noticed from the file that the learned Court agreed upon the cancellation reported prepared by the police, *vide* order dated 07.01.2014, whereas in the instant case the

investigations was changed by the orders of Standing Board and the same were entrusted to Regional Investigating Officer; Multan *vide* order dated 19.06.2013.

Zimni No. 9 dated 03.07.2013 contained this fact of change of investigation but that fact was not brought into the notice of the learned Judicial Magistrate, when impugned order was passed. The SSP to whom the investigations were entrusted by Board,*vide* his report dated 04.02.2014 found the respondents involved in commission of crime, thus forwarded the report to the Court for trial. All these facts were not brought into the notice of the learned Judicial Magistrate, when the impugned order was passed, so., the impugned order passed by the learned Court is not sustainable.

4. For the foregoing reasons, instant petition is accepted and impugned order passed by the learned Judicial Magistrate dated 07.01.2014 is set aside Since, challan has already been submitted in the Court therefore, there is no need to take further proceeding the matter as the learned trial Court seized with trial would take care of afore-noted facts.

(R.A.) Petition accepted

PLJ 2016 Cr.C. (Lahore) 544 (DB)
[Multan Bench Multan]
Present: **SYED MUHAMMAD KAZIM RAZA SHAMSI AND ASLAM JAVED MINHAS, JJ.**
MUHAMMAD ASLAM--Petitioner
versus
STATE and another—Respondents

Crl. A. No. 707 of 2011 & C.M. No. 1 of 2014, decided on 14.12.2015.

Pakistan Penal Code, 1860 (XLV of 1860)—

----Ss. 302(b), 109 & 34--Criminal Procedure Code, (V of 1898), S. 426--Suspension of sentence--Not nominated in FIR--Supplementary statement was recorded after 2½ months of occurrence--No identification parade--Principle of consistency--Accused was not named in F.I.R and he was nominated on basis of supplementary statement of complainant recorded under Section 161, Cr.P.C. after a considerable delay--Although repeater gun was recovered from petitioner yet he did not cause any injury to deceased or PW--According to allegations, co-accused was main accused who made firing upon deceased--There was no mark of violence on arms of deceased to show that he was grappled by accused forcibly--On similar evidence, co-accused had been acquitted of charges--Sentence of co-accused of petitioner had been suspended by High Court, therefore, on principle of consistency, petitioner was also entitled for same relief. [P. 545] A & B

Mr. Nadeem Ahmad Tarar and Malik M. Siddique Kamboh, Advocates for Petitioner.

Mr. Javed Iqbal Hashmi, Advocate for Complainant.

Mr. Muhammad Ali Shahab, DPG for State.

Date of hearing: 14.12.2015.

ORDER

Petitioner Muhammad Aslam through the instant petition filed under Section 426, Cr.P.C. seeks suspension of his sentence. Me along with his co-accused Muhammad Asif and Nasir Abbas alias Nasiri was tried by the learned Sessions Judge, Khanewal in case FIR No. 306/2008, dated 07.08.2008, under Sections 302, 109/34, PPC registered at Police Station Saray-i-Sidhu, District Khanewal and *vide* judgment dated 30.04.2011 he was convicted under Section 302(b), PPC to imprisonment for life as Tazir with a fine of Rs. 25,000/-, in default of which to further undergo two months SI. Benefit of Section 382-B, Cr.P.C. was, however, extended to him.

2. It has been contended on behalf of the petitioner that he is not named in the F.I.R rather he was implicated on the basis of supplementary statement recorded by the complainant after 2 ½ months of the occurrence and that no identification parade: was conducted to connect the petitioner in this case. Further argued that sentence of co-accused namely, Muhammad Asif has been suspended by this Court *vide* order dated 30.11.2011; that the similar role was attributed to the petitioner, therefore, in view of principle of consistency, the petitioner is also entitled for the same relief.

3. On the other hand, learned DPG assisted by learned counsel for the complainant has opposed this petition. They further contended that the petitioner fully facilitated the main accused to commit murder of the deceased; that although sentence of the co-accused Muhammad Asif has been suspended but no weapon of offence was recovered from him whereas repeater gun was recovered from the petitioner, therefore, he is not entitled for suspension of his sentence.

4. Arguments heard. Record perused.

5. Admittedly, the petitioner was not named in the F.I.R and he was nominated on the basis of supplementary statement of the complainant recorded under Section 161, Cr.P.C. after a considerable delay. Although the repeater gun was recovered from the petitioner yet he did not cause any injury to the deceased or PW. According to the allegations, Nasir co-accused is the main accused who made firing upon the deceased. There is no mark of violence on the arms of deceased to show that he was grappled by the accused forcibly. On the similar evidence, co-accused Tariq alias Tahir, Nazar alias Kalu, Mehdi Khan and Muhammad Ramzan have been acquitted of the charges. Admittedly, no identification parade was held in this case. The sentence of co-accused of the petitioner namely, Muhammad Asif has been suspended by this Court, therefore, on the principle of consistency, the petitioner is also entitled for the same relief. In this regard reference may be made to the case of *Ghulam Abbas vs. The State* (1996 SCMR 978) wherein the August Supreme Court held that although the complainant claimed to have been hit by the shots fired by the accused, yet from the contents of the F.I.R it was difficult to distinguish the case of accused from that of four other co-accused already enlarged on bail. Petition for leave to appeal was converted into appeal in circumstances and the accused was admitted to bail on the principle of consistency.

5. In view of the above, the instant petition is accepted, sentence of the petitioner, Muhammad Aslam is suspended and he is released on bail, subject to his furnishing bail bonds in the sum of Rs. 200,000/- (Rupees two lac only) with one surety in the like amount to the satisfaction of the Deputy Registrar(Judl) of this Court. He is further directed to appear before this Court on each and every date of hearing till the final disposal of the main appeal.

(R.A.) Petition accepted.

KLR 2016 Criminal Cases 261

[Lahore]

Present: SYED MUHAMMAD KAZIM RAZA SHAMSI, J.

Tariq Muhammad

Versus

The State, etc.

Crl. Misc. No. 2021-B of 2013, decided on 7th March, 2013.

BAIL (MURDER)---(Common intention)

Criminal Procedure Code (V of 1898)---

---S. 497(2)---Pakistan Penal Code, 1860, Ss. 302/337-F5/337-L2/337-A1/337-F1/147/149---Bail plea---Sota injuries---Common intention---As to what role petitioner had played in commission of offence was to be determined by Trial Court including question of prosecution of common intention---Injuries attributed to petitioner was not reported to be fatal to life---Guilt of petitioner was yet to be probed---Bail after arrest granted. [COMMON INTENTION] (Para 6)

[Role of petitioner was to be determined by Trial Court. Bail was allowed in offence of murder].

For the Petitioner: Shahid Ali Shakir, Advocate.

For the State: Muhammad Ishaque, DPG.

For the Complainant: Rana Ghulam Dastgir, Advocate.

Date of hearing: 7th March, 2013.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J. – Tariq Mahmood petitioner seeks his release on bail in case F.I.R. No. 341, dated 28.6.2012 registered at Police Station, Saddar Jaranwala, District Faisalabad under Sections 302, 337-F5, 337-L2, 337-A1, 337-F1, 147, 149, PPC.

2. In the statement of accusation made by Haji Ilam Din the complainant of the case, it is narrated that petitioner Tariq Mehmood while armed with sota had caused injuries at the finger and thumb of the left foot of the deceased Salah-ud-Din. In the occurrence

beside the petitioner Shabbir Ali, Liaquat, Muhammad Hussain and Muhammad Kashif participated and caused injuries at the person of Salah-ud-Din resulting into his death.

3. It is argued by the learned counsel for the petitioner that the injuries attributed to the petitioner is on the non-vital part of the body of the deceased which is also not the cause of his death and Medical Officer declared the injuries as abrasion. Further adds that it is case of cross-version and the same has been lodged and investigated by the police, according to which the petitioner Tariq had also received injuries during the fight which injuries had been concealed by the complainant while lodging F.I.R.; that a private complaint is also on its way on trial and the co-accused has already been admitted to bail by this Court vide order 17.1.2013. Further contended that accused of cross-version namely Muhammad Yasin, Manzoor Ahmad, Nasir-ud-Din and Bashir Ahmad were admitted to bail by this Court on 24.9.2012, therefore, the petitioner is also entitled to the same relief.

4. The petition has been opposed by the learned DPG assisted by the learned counsel for the complainant with the submissions that the petitioner is an accused of causing of injuries to the deceased, as he had acted in furtherance of common object and he is equally liable for the sentence to be awarded for the death of Salah-ud-Din. He further submitted that the presence of the petitioner at the time of occurrence at the spot is established and that challan in the case has been submitted in the Court, therefore, at this stage the petitioner is not entitled for the concession of bail.

5. Parties heard. Record perused.

6. No doubt by lodging cross-version the time, date and place of occurrence vis-a-vis presence of the petitioner at the spot stood admitted but the question as to what role the petitioner had played in the commission of offence is to be determined by the learned Trial Court during the trial including the question of prosecution of common intention. Even otherwise the injuries attributed to the petitioner is not reported to be fatal to the life of Salah-ud-Din rather this injury appears to be mere abrasion measuring 2 c.m., thus at this stage it cannot be said that this injury was caused by the petitioner or it was result of the act of some other accused. Viewing the case from each angle, it is observed that the guilt of the petitioner is yet to be probed, therefore, at this stage; the petitioner is entitled for the concession of bail.

In view of the above, this petition is allowed and petitioner Tariq Mahmood is admitted to post-arrest bail subject to his furnishing 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.

2017 P Cr. L J 440
[Lahore (Multan Bench)]
Before Syed Muhammad Kazim Raza Shamsi, J
Mian FAIZ RASOOL---Petitioner
Versus
The STATE and 2 others---Respondents

W.P. No.18516 of 2015, decided on 29th January, 2016.

Criminal Procedure Code (V of 1898)---

----Ss. 498, 155, 173, 177 & 190----Penal Code (XLV of 1860), Ss. 467, 468, 471, 420 & 409---Prevention of Corruption Act (II of 1947), S. 5---Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act (III of 2006)---Bail before arrest, refusal of---Accused was alleged to have an electricity connection installed in connivance with the WAPDA officials on the basis of bogus ownership documents---Accused filed an application to the Special Judge (Central) for anticipatory bail on the ground that the complainant had no nexus with the plot in dispute---Special Judge (Central), while allowing the application, observed that the case was triable by an ordinary court and therefore ordered the Investigating Officer to delete the offence under S. 409, P.P.C. and S. 5 of Prevention of Corruption Act, 1947---Question before the High Court was whether the Special Judge (Central) had the jurisdiction to consider the point of its jurisdiction to entertain pre-arrest bail application at the stage when it was going to decide the same---Court could take cognizance of a case at any stage, including the stage when the bail application was under consideration of the court---Material available before the Special Judge (Central), when it had proceeded to decide the bail, was to be seen---Investigating Agency, at that stage, was still busy in sorting out the true facts of the case and had not opined that the offence was not triable by the Special Judge or the offences were not made out---Prosecution having no evidence to make such an opinion, at bail stage, the court could not take cognizance of the case---Court below had found that the offence under S. 5 of Prevention of Corruption Act, 1947 and S. 409, P.P.C. were not made out, which observation had been given in ignorance of the fact that the Investigating Officer had found the Sub-Divisional Officer and Line Superintendent of WAPDA having been involved in granting electricity connection at the premises of the accused; even otherwise, said finding of the court amounted to decision of the whole case, at the stage when no challan was before it---Sufficient material was available with the prosecution to bring its case within the jurisdiction of Special Judge (Central)---Special Court had no jurisdiction to order for deletion or addition of offence and sending the aggrieved person to the ordinary court, unless and until final report under S. 173, Cr.P.C had been submitted in the court---Court had been vested with the powers to order deletion or addition of the offence, at the stage when it framed charge against the persons concerned and not before that---Prosecution agency, under Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act, 2006, enjoyed the powers to delete or add the offence, according to the facts and evidence collected by the agency, before submitting the report under S. 173, Cr.P.C to the court---Impugned order of the court below was, therefore, not sustainable in the eye of law---High Court, declaring the impugned order as having no legal consequence, held that court

might exercise such jurisdiction when final report was submitted before it and when it proceeded to frame the charge against the culprit---Constitutional petition was allowed in circumstances.

Allah Din and 18 others v. The State and another 1994 SCMR 717; Abdur Rehman v. Ghazan and 5 others 2005 MLD 954 and Asrar Ahmed Khan v. Special Judge, Anti-Terrorism Court, Faisalabad and others 2012 YLR 1938 rel.

Ch. Shakir Ali for Petitioner.

Muhammad Zubair Ch. for Respondents.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---In this petition, filed in terms of Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the basic question involved for consideration is whether the Court has jurisdiction to consider the point of its jurisdiction to entertain pre-arrest bail application at the stage when it was going to decide the same.

2. In FIR No.298/2014 registered on the statement of Mian Faiz Rasool under sections 467/468/471/420/409, P.P.C. read with section 5 of the Prevention of Corruption Act, 1947, with Police Station FIA/CC Multan, it is alleged that Ch. Amanat Ali, on the basis of bogus documents of ownership in respect of plot, got an electricity connection with the connivance of WAPDA officials.

3. In that FIR, Ch. Amanat Ali, through an application prayed for anticipatory bail on the ground that the complainant had no nexus with the plot in dispute and the story narrated by him, is cooked up story.

4. Learned Court while deciding the bail application of Ch. Amanat Ali, found that during the investigation, the authority had not collected any evidence constituting offence charged in the FIR, thus vide order dated 27.11.2015, the learned Special Judge (Central), Multan observed that the case was not triable by Special Court, rather it is triable by an ordinary Court as such disposed of the bail application. He has also ordered the investigating agency to delete the offence under section 409, P.P.C. and section 5 of the Prevention of Corruption Act, 1947. This order is subject matter of the instant petition.

5. Learned counsel for the petitioner submitted that the learned Special Judge (Central) did not have the power to declare at premature stage that the case of the petitioner against respondent No.2 was not triable by that Court and it falls within the exclusive jurisdiction of ordinary Court. In this connection, learned counsel has relied upon the case of "Allah Din and 18 others v. The State and another" (1994 SCMR 717).

6. The argument of learned counsel for the petitioner has been controverted by the learned counsel for the respondent No.2, while relying upon the cases of "Abdur Rehman v. Ghazan and 5 others" (2005 MLD 954) (Division Bench Peshawar) and "Asrar Ahmed Khan v. Special Judge, Anti-Terrorism Court, Faisalabad and others" (2012 YLR 1938) (Division Bench Lahore), submitted that a Court can take cognizance of a case when it applies its mind to the facts of the case and the relevant law and it can be done at any stage because cognizance in its general meaning means identification, ascertainment of, and

getting knowledge about, the facts and relevant law of the case, so, according to the learned counsel, learned Court while deciding the pre-arrest bail application has rightly concluded that it has no jurisdiction to entertain the same.

7. I have considered the submissions made by the learned counsel for the parties and minutely examined the case law.

8. In the case of Allah Din (supra) the apex Court has made observations in the following words:

> "Question of jurisdiction of Special Court can be determined on the basis of FIR and other material produced by prosecution at the time of presentation of challan."

When applied this principle to the facts and circumstances of the case, it is found that the learned Special Judge has shown his inability to decide the bail application of respondent No.2 due to lack of jurisdiction at the stage when the investigations were still under way and the prosecution has not submitted challan to the Court. The case of Asrar Ahmad Khan (supra), when examined, it is found that the question involved in this petition was not under consideration of that learned Division Bench rather the Court had made observations by considering section 23 of the Anti-Terrorism Act, 1997, bestowing the power to transfer the cases. For the purposes of this case, the judgment is not relevant and not applicable to the facts and circumstances of instant case. In the case of Abdur Rehman (supra), the learned Division Bench, Peshawar High Court has taken the view in the following words:

> "that Court takes cognizance of a case when it applies its mind to the facts of the case and the relevant law. It can be done at any stage because cognizance in its general meaning means identification, ascertainment of and getting knowledge about, the facts and relevant law of the case."

The observation so, made by the learned Bench shows that at any stage the Court can take cognizance of a case including the stage when the bail application is under consideration of the Court. Although that judgment has been rendered while considering the vires of section 23 of the Anti-Terrorism Act, 1997, but for the purposes of understanding the real meanings of the words used by the said Court, the same is considered.

9. In this scenario, it is to be seen as to what material was available with the learned Special Judge (Central), when it proceeded to decide the bail. The record shows that at that stage, the investigating agency was still busy in sorting out the true facts of the case and did not opine that offence was not triable by the learned Special Judge or the offences were not made out. In this situation, when the prosecution has no sufficient evidence to make such an opinion then it would not be in the fitness of the things to say that even at bail stage a Court can take cognizance of the case. In this case, the lower Court found that the offence under the Prevention of Corruption Act, 1947 and 409, P.P.C. are not made out which observation was given in ignorance of the fact that the Investigating Officer has found the Sub-Division Officer and Line Superintendent of WAPDA, involved in granting electricity connection to the premises of respondent No.2. Even otherwise, this finding of Court tantamount decision of whole case, at the stage when no challan was before it.

10. In this background there is sufficient material with the prosecution to bring its case within the jurisdiction of Special Judge (Central). It would be valid to say now that unless and until final report under section 173, Cr.P.C. is not submitted in the Court, the Court has no jurisdiction to order for deletion or addition of offence and sending the aggrieved person to the ordinary Court. Moreover, the Court has vested with the powers to order deletion or addition of the offence, at the stage when it frames charge against the persons concerned and not before that. The prosecution agency under the Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act 2006, enjoys the powers to delete or add the offence, according to the facts and evidence collected by the agency, before submitting the report under section 173, Cr.P.C. to the Court. Learned trial Court has exercised its jurisdiction at the stage when the final report under section 173, Cr.P.C. was not before it and till that time investigations in the case had not been completed, so, this exercise of jurisdiction in any way cannot be treated as legal exercise by the Court. The order so, passed by the Court below in these circumstances, is not sustainable in the eyes of law.

11. For the foregoing reasons, the petition in hand is accepted and order passed by the learned Court below is declared of no legal consequences and is recalled. The learned Court may exercise such jurisdiction, when final report is submitted to it and when it proceeds to frame the charge against the culprits.

SL/F-13/L Petition allowed.

PLJ 2017 Cr.C. (Lahore) 61

[Multan Bench Multan]

Present: SYED MUHAMMAD KAZIM RAZA SHAMSI, J.

MUHAMMAD NAVEED ASLAM alias NAVEED AHMED--Petitioner

versus

STATE and another—Respondents

Crl. Misc. No. 4603-B of 2016, decided on 28.9.2016.

Criminal Procedure Code, 1898 (V of 1898)—

----S. 498--Pakistan Penal Code, (XLV of 1860), Ss. 376/511--Anticipatory bail--confirmed--Previous enmity--False implication-- FIR has been lodged with delay of two weeks, even no date of occurrence is mentioned in FIR, for which no plausible explanation has been given by complainant--FIR was registered on statement of victim but charge of rape against petitioner is required to be determined by trial Court seized with trial--Nothing is required to be recovered from petitioner--Moreover, record shows previous enmity existed between parties, so false implication of petitioner in instant case cannot be ruled out, thus he was found entitled for relief of bail. [P. 62] A

Prince Rehan Iftikhar Sheikh, Advocate for Petitioner.
Mr. Muhammad Abdul Wadood, Deputy Prosecutor General for Respondents.
Malik Azhar Hussain, Advocate for Complainant.

Date of hearing: 28.9.2016.

ORDER

Muhammad Naveed Aslam alias Naveed Ahmed, petitioner seeks anticipatory bail in case FIR No. 94 dated 14.07.2016, registered under Sections 376/511, PPC with Police Station Khairpur Sadar District Muzaffargarh having allegation that he attempted to commit rape with the complainant.

2. After having heard the learned counsel for the parties and perusing the record it is found that FIR has been lodged with the delay of two weeks, even no date of occurrence is mentioned in the FIR, for which no plausible explanation has been given by the complainant. Instant FIR was registered on the statement of the victim but charge of rape against petitioner is required to be determined by the learned trial Court seized with the trial. Nothing is required to be recovered from the petitioner. Moreover, record shows previous enmity existed between parties, so false implication of the petitioner in this case cannot be ruled out, thus he is found entitled for relief of bail.

3. In view of the above facts and circumstances, the petition in hand is **accepted** and anticipatory bail already granted to the petitioner vide order dated 31.08.2016 is **confirmed,** subject to his furnishing fresh bail bonds in the sum of Rs. 50,000/- with one surety in the like amount to the satisfaction of learned trial Court.

(A.A.K.) Bail confirmed

PLJ 2017 Cr.C. (Lahore) 76
[Multan Bench Multan]
Present: SYED MUHAMMAD KAZIM RAZA SHAMSI, J.
ABDUL GHAFFAR--Petitioner
versus
STATE and another—Respondents

Crl. Misc. No. 3247-B of 2016, decided on 26.9.2016.

Criminal Procedure Code, 1898 (V of 1898)—

----S. 497--Pakistan Penal Code, (XLV of 1860), Ss. 302/148/149--Bail, grant of--Qatl-e-amd--Unexplained delay of four hours in FIR--Only lalkara was attributed--Only lalkara has been attributed to petitioner and during physical remand nothing was recovered at stance of petitioner--Petitioner is behind bars, whose person is not required for further investigations and his long incarceration in jail would amount as sentence before judgment--By granting bail to petitioner, his custody is being handed over to sureties, who would produce him on each and every date of hearing and that would serve purpose of law--Bail was granted. [P. 77] A

Khawaja Qaiser Butt, Advocate for Petitioner.
Mr. Muhammad Wadood, Deputy Prosecutor General for State.
Mian Abdul Rehman Khan Joiya, Advocate for Complainant.
Date of hearing: 26.9.2016.

ORDER

Abdul Ghaffar, petitioner seeks his release on post arrest bail in case FIR No. 324 dated 26.07.2015, registered under Sections 302/148/149, PPC with Police Station Kasowal, District Sahiwal.

2. As per FIR, the petitioner in the company of his co-accused, attacked upon the complainant party and committed murder of Khalil Ahmed and caused injuries to injured persons with their respective weapons.

3. Parties heard. Record perused.

4. Perusal of the record shows that alleged occurrence reported to the police with the delay of four hours while has not been explained by the complainant in the plausible manner. Bare perusal of FIR reveals that two injuries were caused at the head of deceased by present petitioner and Muhammad Ramzan but according to post-mortem report there was only one injury at the head of deceased, which evidently shows that ocular account and medical evidence are not at same page. During the investigation it was opined by Investigating Officer that only lalkara has been attributed to the petitioner and during the physical remand nothing was recovered at the stance of present petitioner. The petitioner is behind the bars since 26.11.2015, whose person is not required for further investigations and his long incarceration in jail would amount as sentence before the judgment. By granting bail to the petitioner, his custody is being handed over to the sureties, who would produce him on each and every date of hearing and that would serve the purpose of law.

5. For the foregoing reasons, the petition in hand is accepted and petitioner is admitted to post arrest bail subject to furnishing bail bonds in the sum of Rs. 100,000/- (Rupees One Lac Only) with one surety in the like amount to the satisfaction of learned trial Court.

(A.A.K.) Bail granted

PLJ 2017 Cr.C. (Lahore) 81

[Multan Bench Multan]

Present: SYED MUHAMMAD KAZIM RAZA SHAMSI, J.

MUHAMMAD RIZWAN BABER & 2 others--Petitioners

versus

STATE & another—Respondents

Crl. Revision No. 344 of 2015, decided on 1.2.2016.

Criminal Procedure Code, 1898 (V of 1898)—

----Ss. 439, 154 to 157--Pakistan Penal Code, (XLV of 1860), S. 161--Prevention of Corruption Act, (II of 1947), S. 5--Criminal revision--Cancellation of reports--Cognizance of case--Special Judge, while disagreeing with cancellation reports, has observed that I.O., cannot recommend cancellation of case or droppage of same, at investigation stage--Under such misdirection, Court proceeded to disagree with cancellation reports and summoned respondents to face trial--Observation made by Court below amounts to withdrawal of powers from I.O., to prepare discharge report in case which is against spirit of Sections 154 to 157, Cr.P.C.--Under Section 154, Cr.P.C., SHO is bound to record statement of a person reporting commission of cognizable offence whereas, under Section 155, Cr.P.C., if, SHO finds that offence committed, is non-cognizable, then to seek permission from Magistrate to investigate same--Section 156 of Cr.P.C., authorizes SHO to investigate any cognizable offence whereas under Section 157, Cr.P.C., if, from information received or otherwise, SHO has reasons to suspect commission of offence, he shall forthwith, send a report of same to Magistrate--Further under Section 158, Cr.P.C., every report sent to magistrate under Section 157, Cr.P.C., in required to be submitted through such superior officer of police--According to Art. 24.5 of Police Rules, 1934, cancellation report through superior officer of police, is required to be submitted before Court--Investigating agency, cannot recommend cancellation of case or droppage of same, summarily--Orders passed by Court below, are found to be in violation of provisions of law, as such, same are liable to be set aside--Petitions were accepted. [P. 83] A

Khawaja Qaiser Butt, Advocate for Petitioners.

Mr. Shakeel Javaid Choudhry, Advocate for Petitioner (in Crl. Rev. No. 272 of 2015 and for Respondent No. 2 in Crl. Rev. No. 344 of 2015).

Mr. Muhammad Ali Shahab, Deputy Prosecutor General.

Mr. Muhammad Masood Bilal, Advocate for Respondent.

Date of hearing: 1.2.2016.

ORDER

Since, common question of law and fact is involved in the instant petition (Crl. Revision No. 344 of 2015) as well as Crl. Revision No. 272-2015, therefore, the same are being decided through this single order.

2. In both the revision petitions, the petitioners have assailed the vires of order dated 21.09.2015 (Crl. Revision No. 344-2015) and order dated 13.07.2015 (Crl. Revision No. 272-2015), whereby the Court below, while disagreeing with the cancellation reports submitted by the police, summoned the accused of the case to face trial.

3. Muhammad Rizwan Baber, Dr. Atta Zafar and Abdul Tawab, petitioners were charged for an offence falling under Section 161, PPC read with Section 5 of the Prevention of Corruption Act, 1947, vide FIR No. 18/2012, registered with Police Station Anti-Corruption Establishment, Multan. After conducting investigations in the case, a cancellation report was prepared and the same was placed before the learned Special Judge, Anti-Corruption, Multan, who, vide impugned order dated 21.09.2015, disagreed with the cancellation report and ordered for summoning of the petitioners to face trial.

4. Similarly, Munir Ahmad, Muhammad Arshad and Muhammad Zahid, were charged for an offence falling under Section 409, PPC read with Section 5 of the Prevention of Corruption Act, 1947, vide FIR No. 15/2013, registered with Police Station Anti-Corruption Establishment, Vehari and after the investigations, cancellation report was prepared and sent to the Court where the Court, vide impugned order dated 13.07.2015, disagreed with the same and summoned the respondents to face trial in the case.

5. Parties heard. Record perused.

6. The learned Special Judge, Anti-Corruption, Multan, while disagreeing with the cancellation reports, has observed that the Investigating Officer, cannot recommend cancellation of case or droppage of the same, at investigation stage. Under this misdirection, the Court proceeded to disagree with the cancellation reports and summoned the respondents to face trial. The observation made by the Court below amounts to withdrawal of the powers from the Investigating Officer, to prepare discharge report in the case which is against the spirit of Sections 154 to 157, Cr.P.C. Under Section 154, Cr.P.C., SHO of the police station is bound to record statement of a person reporting the commission of cognizable offence whereas, under Section 155, Cr.P.C., if, SHO finds that offence committed, is non-cognizable, then to seek permission from the learned Magistrate to investigate the same. Section 156 of the Code of Criminal Procedure, 1898, authorizes the In-charge of the police station to investigate any cognizable offence whereas under Section 157, Cr.P.C., if, from the information received or otherwise, an Officer Incharge of the police station has reasons to suspect the commission of offence, he shall forthwith, send a report of the same to learned Magistrate. This section bestows jurisdiction upon the Incharge of the police station to send report to the concerned Court when he suspects the commission of cognizable offence. Further under Section 158, Cr.P.C.,every report sent to the learned Magistrate under Section 157, Cr.P.C., is required to be submitted through such superior officer of the police. These two Sections sufficiently authorize the Investigating Officer to prepare report and send it to the higher officers for onward transmission to the Court. According to Article 24.5 of the Police Rules, 1934, the cancellation report through superior officer of police, is required to be submitted before the Court. These provisions of law, sufficiently negate the observation given by learned Court where it was held that the investigating agency, cannot recommend cancellation of case or droppage of the same, summarily. In this view of the matter, the orders passed by the Court below, are found to be in violation of above said provisions of law, as such, the same are liable to be set aside.

7. For the foregoing reasons, both the revision petitions are accepted and the orders impugned in these petitions are set aside. The learned Special Judge, Anti-Corruption, Multan, is directed to re-consider the cancellation reports prepared by the investigating agency in the light of afore-noted provisions of law and then to make his opinion.

(A.A.K.) Revisions accepted

PLJ 2017 Lahore 280

Present: SYED MUHAMMAD KAZIM RAZA SHAMSI AND ALI BAQAR NAJAFI, JJ.

ZAHID HAFEEZ--Petitioner

versus

STATE and 2 others—Respondents

W.P. No. 3058 of 2015, decided on 6.4.2015.

Constitution of Pakistan, 1973—

----Art. 199--Travel Agents Act, 1976, Scope of--National Accountability Ordinance, 1999, Ss. 19 & 27--NAB reference--Bail, grant of--Harassment--Employee of travel agency--Suit for declaration, injunction and rendition of account for ascertaining actual liability--Tickets were issued under instructions of high ups of bank--Not beneficiary of any illegal transaction--Validity--Exact liability of petitioner on basis of minute scrutiny of air ticket issued and payment made has not been properly made by NAB authorities--Question like why payments were delayed, who consumed air tickets, how and in which circumstances payments were stopped and who authorized petitioner to release such amount in view of fact that she was working under nose of high-ups of bank, required further investigation and collection of evidence--Alleged amount were not traced out either in account of travel agency or personal account of petitioner raising question as to whether petitioners jointly of severely become beneficiaries of transaction--Allegation against petitioners relates to settlement of account, therefore, unless exact liabilities of petitioners are calculated, they cannot be held criminally responsible for their acts. [Pp. 283 & 284] A, B, C & D

Ch. Sajid Ali Baig, Advocate for Petitioner.

Syed Faisal Raza Bukhari, Addl. D.P.G., NAB for State.

Date of hearing: 6.4.2015.

ORDER

This order shall dispose of W.P. No. 3058 of 2015 titled Zahid Hafeez vs. The State, W.P. No. 5191 of 2015 titled "Humaira Rafique vs. Chairman, NAB authorities as in both the petitions the petitioners have sought their release on bail. Writ Petition No. 6211 of 2013 filed by Zahid Hafeez has become infructuous as the petitioner was arrested on 21.01.2015.

2. Brief facts as contained in the writ petition are that the petitioner is Chief Executive of Air Borne Travels, Travel Agency bearing Licence No. 4260 issued on 13.11.2009 under Travel Agents Act, 1976. On account of his competitive rates and un-parallel services the travelling agency was able to make its presence felt in the travel business. Al-Baraka Bank was also of the petitioner's patrons who established its relationship with the travel agency in the year 2009 during which it purchased a number of tickets for domestic and International route in the name of various passengers. An amount of Rs. 1,503,010/- was outstanding against the said Al-Baraka Bank for the air tickets purchased by it but the said amount was not paid to the petitioner. Meanwhile, on 15.09.2012, a civil suit for declaration, injunction and rendition of accounts was filed by the

petitioner against the Bank. During the pendency, the petitioner received a notice dated 28.01.2013 under Sections 19 & 27 of NAB, Ordinance, 1999 in respect of some inquiry in response to which the petitioner appeared before the NAB authorities and furnish the required details. On account of humiliating treatment the petitioner filed a W.P. No. 6211 of 2013 on 12.03.2013 seeking restraining order against the harassment in which Al-Baraka Bank also becomes a party. The petitioner was again served a notice on 09.09.2013. Meanwhile, the respondent-NAB authorities managed to record statement of the employee of Travel Agency namely, Hafiz Muhammad Bilal, who although denied making such statement under free will before the NAB authorities through separate affidavit or any statement under his free will. Thereafter, NAB authorities issued four notices to the petitioner freezing bank account of the petitioner. They sent another notice dated 04.10.2013 offering a voluntary return option. On 21.01.2015 both the petitioners were arrested and their physical remand was given to the NAB authorities and in view of the fact that civil suit was filed and the matter relates to rendition of account, the petitioner was sent to judicial lock up who seeks his release on bail through this constitutional petitions.

3. Learned counsel for the petitioner contends that Al-Baraka Bank has not filed a suit for recovery of amount against the petitioner and till pendency of the suit for declaration, injunction and rendition of account filed by the petitioner for ascertaining the actual liability, the petitioner be released. Submits that the petitioner in the operating with the NAB authorities by presens the entire documents which shows that under instructions the relatives of the high-ups of the bank were issued air ticket. Contends that the petitioner is not the beneficiary of any illegal transaction and during the remand, only Rs. 7,00,000/- was recovered from the petitioner. Places reliance on Baig Muhammad vs. Chairman, National Accountability Bureau and others [2002 MLD 703], Muhammad Saeed Mehdi vs. the State (PLD 2002 Lahore 124) and The State and others v. M. Idrees Ghauri and others [2008 SCMR 1118].

4. Conversely, learned counsel for the Bank contends that Zahid Hafeez being the proprietor of Air Borne Travel Agency connived with Humaira Rafique, who prepared the fake travel invoices and scanned the signatures of the competent, authority on the fake approval sheets, forwarded it to the Finance Department of the Bank and by misusing her official position she prepared pay orders in the name of Air Borne Travel Agency and credited in the Bank account of Zahid Hafeez. Meanwhile, Hafiz Muhammad Bilal became approver and, therefore, pardoned then 20.01.2015 by the D.G.NAB whose statement was recorded before the Magistrate and according to him he prepared the fake invoices on the instructions of HumairaRafique. Further contends that Humaira Rafique prepared 36 pay orders amounting to Rs. 12.676 million in the name of Air Borne Travel Agency. According to the NAB, claim of the petitioner of having issued 146 air ticket amounting to Rs. 8 millions to the official of Al-Baraka Bank and their relatives was not found correct as only 55 air ticket amounting to Rs. 2.7 millions approximately were issued to the official of Al-Baraka Bank but most of them were never presented before the Bank and in fact 37 air tickets amounting to Rs. 2.12 million approximately were issued in favour of official of Al-Baraka Bank and their relatives in the personal capacity but the official of Al-Baraka Bank who have already paid the amount in their personal capacity either to Humaira Rafique or to Zahid Hafeez and that the rest of the air ticket amounting to Rs. 3.285 million did not pertain to Al-Baraka Bank. In this way, in the year 2012 Zahid Hafeez received an amount

of Rs. 12.676 million against the travel expenses of Rs. 2.7 million who was paid Rs. 9.9 million in excess.

5. Arguments heard. File perused.

6. The official of Al-Baraka Bank filed a complaint with the NAB authorities for legal proceedings under the NAB Ordinance, 1999 against Humaira Rafique (Ex-official of Al-Baraka Bank), Zahid Hafeez, (a proprietor of Air Borne Travel Agency) and Hafiz Muhammad Bilal (Accountant) relating to bank fraud in Al-Baraka Bank amounting to Rs. 12.00 million. According to the complaint, in the year 2012, Zahid Hafeez in connivance with Humaira Rafique prepared 36 fake invoices amounting to Rs. 12.676 millions mentioning incorrect and bogus air ticket numbers, passengers name, destination fare which was duly signed by Hafiz Muhammad Bilal (Accountant) on the instruction of Zahid Hafeez and sent to Humaira Rafiquewho scanned the signature of the competent authority namely, (Ahmad Shuja Kidwai, Khawajas Maaz Khairuddin & Shafqat Ahmed) on the approval sheet. Thereafter, she forwarded it to the Finance Department of the bank and then prepared pay orders in the name of Air Borne Travels. During investigation, Hafiz Muhammad Bilal (Accountant) was made approver who recorded his statement against the petitioner to the extent that all what he did was under the instruction of Zahid Hafeez.

7. According to NAB authorities, out of the claimed 146 air ticket of Rs. 8.00 millions issued to the official and the relatives of Al-Baraka Bank by Zahid Hafeez only 55 air tickets amounting to Rs. 2.7 millions were scrutinized and most of them were never presented before the Bank. The amount of other 37 air tickets equal to Rs. 2.12 million was already paid in the account either to Humaira Rafique or Zahid Hafeez, therefore, had no dispute. However, rest of the air tickets amounting to Rs. 3.285 million approximately do not pertain to Al-Baraka Bank and therefore, the complainant cannot have any claim against the same. According to calculation by NAB authorities Zahid Hafeez received Rs. 12.676 million against their travel of Rs. 2.7 millions and thereby caused loss of 9.9 millions to the bank.

8. Significantly, such a calculation without verification by the professional auditors either by the bank or otherwise cannot be totally relied on. Morevoer, the exact liability of the petitioner on the basis of minute scrutiny of air ticket issued and the payment made has not been properly made by NAB authorities. Even if it was, the same can be adjudicated upon latter. So far no reference was filed against the petitioner. The question like why the payments were delayed, who consumed the air tickets, how and in which circumstances payments were stopped and who authorized Humaira Rafique, petitioner to release such amount in view of the fact that she was working under the nose of high-ups of the bank, required further investigation and collection of evidence.

9. During investigation, the alleged amount of Rs. 9.9 millions were not traced out either in account of travel agency or personal account of the petitioner raising question as to whether the petitioners jointly or severely become beneficiaries of the said transaction.

10. In our considered view, allegation against the petitioners relates to the settlement of account, therefore, unless exact liabilities of the petitioners are calculated, they cannot be held criminally responsible for their acts. We place our reliance on The State

and others vs. M. Idrees Ghauri and others [2008 SCMR 1118], the relevant extract is re-produced below:

> "The prosecution of a person without distinction of criminal and civil liability in a transaction, is misuse of process of law and similarly stretching the law in favour of prosecution is unjust and unfair, therefore, the Courts without ascertaining the true character of the transaction and drawing the distinction in the civil and criminal liability, must not proceed to raise a presumption of guilt in terms of Section 14(d) of the NAB Ordinance."

In our humble view, the petitioners have made out a case for bail for which we place reliance on Makhdoom Javed Hashmi vs. The State and 2 others [2003 P.Cr.LJ 266] wherein it has been held, as under:

> "The concept of pre-trial release of the accused was developed on three presumptions; firstly the accused was presumed to be innocent till he was found guilty; secondly the accused should have a right to prepare his defence and prove his innocence before the Court of trial; and thirdly the accused should not be punished before the finding of his conviction was rendered by the Court."

11. In this view of the matter, the Writ Petition Bearing No. 3058 of 2015 titled Zahid Hafeez vs. The State, W.P. No. 5191 of 2015 titled "Humaira Rafique vs. Chairman, NAB authorities are allowed and the petitioners are admitted to bail subject to their furnishing bail bonds in the sum of Rs. 5,00,000/- each with two sureties each in the like amount to the satisfaction of the trial Court.

(R.A.) Petitions allowed

PLJ 2017 Lahore 285

[Multan Bench Multan]

Present: SYED MUHAMMAD KAZIM RAZA SHAMSI, J.

MUHAMMAD ASLAM--Petitioner

versus

RPO, etc.—Respondents

W.P. No. 12277 of 2016, decided on 11.11.2016.

Constitution of Pakistan, 1973—

----Art. 199--Pakistan Penal Code, (XLV of 1860), Ss. 302 & 34--Constitutional petition--Change of investigation--After taking cognizance of case by Court--Validity--Police authority after changing investigations first time, have no authority to order change of investigation at stage has taken cognizance in instant case. [P. 286] A

Rana Asif Saeed, Advocate for Petitioner.

Mirza Muhammad Saleem Baig, Addl. A.G. and Ch. Faisal Nauman Ghazi, Advocate for Respondents.

Date of hearing: 11.11.2016.

ORDER

The grievance of the petitoiner as canvassed in this constitutional petition is that the police officials after awarding First change of investigation of case FIR No. 126/2016, registered under Sections 302 & 34, P.P.C. with Police Station NoorShah, District Sahiwal, have no authority to continue with the change of investigation successively requested by the accused of the case on the ground that all the accused persons are facing charge before the learned trial Court and the law contained in the cases reported as Muhammad Nasir Cheema vs. Mazhar Javaid and others (PLD 2007 SC 31) and Qari Muhammad Rafique vs. Additional Inspector General of Police (Inv.) Punjab and others (2014 SCMR 1499) does not authorize the further investigation in the case.

2. Learned counsel for the respondent concurred with the proposition laid down by the learned counsel for the petitioner that after first change of investigation and after taking the cognizance of the case, by the Court, the investigations cannot be ordered to be changed in view of the afore-noted judgments of the Hon'ble Supreme Court. He also assented to the first change of investigations which were ordered to be changed before taking the cognizance by the Court.

3. In view of the afore-noted legal proposition, the petition in hand is disposed of by observing that the police authority after changing the investigations first time, in view of afore-cited case law, have no authority to order the change of investigation at stage when the Court has taken cognizance in the case.

(R.A.) Petition disposed

PLJ 2017 Lahore 289

[Multan Bench Multan]

Present: SYED MUHAMMAD KAZIM RAZA SHAMSI AND ALI BAQAR NAJAFI, JJ.

HAMEED ULLAH KHAN, etc.--Appellant/Petitioner

versus

DIVISIONAL SUPERINTENDENT PAKISTAN RAILWAYS, MULTAN and 3 others—Respondents

I.C.A. No. 311 and C.M. No. 2 of 2016, decided on 20.10.2016.

Limitation Act, 1908 (IX of 1908)—

----S. 5--Law Reforms Ordinance, 1972, S. 3--Intra Court Appeal--Condonation of delay--Delay in filing intra Court appeal was condoned--Sufficient cause--Policy for license of un-agricultural purposes where major efforts for investment is required--Question of

extension of license period--Lease agreement--Opinion for renewal of agreement for 5 years--No intention to extend lease period for 5 years--Validity--Lease of shops initially granted for 10 years has already been extended to 5 years to similarly placed persons--Government is within its right to apply any beneficial terms and conditions in policy for leasing out land but it would not prejudice rights of existing lease holders already acknowledged as such by government--Prayer made in writ petition in respect of policy is to be allowed--Intra Court appeal, therefore, stands allowed. [P. 293] A, B & C

1992 SCMR 1652, rel.

Rana Asif Saeed, Advocate for Petitioner/Appellant.
Mian Muhammad Ishfaq Hussain, Advocate for Respondent.
Date of hearing: 20.10.2016.

ORDER

C.M. NO. 2/2016

As both the learned counsel for parties, have argued on the point of limitation, therefore, this application under Section 5 of the Limitation Act for condonation of delay is being taken, up first.

2. After hearing the learned counsel for the parties, we have noted that the office had sent the copy of the impugned order dated 07.06.2016 to respondents on 19.07.2016 after when it reached in the office during the summer vacation. The applicant applied for the issuance of certified copy on 28.07.2016 and on the same day it was prepared and delivered to the applicant and the ICA was filed on 04.08.2016. i.e. within 20 days and during the summer vacation. Since the file was transmitted to the office on 12.07.2016, though the applicant applied on 28.07.2016, therefore, delay in filing the ICA is condoned as there is sufficient cause to file the I.C.A. after the expiry of 20 days without any fault of the applicant. This C.M., therefore, is allowed.

I.C.A. No. 311/2016.

3. This single order shall dispose of the instant appeal as well as I.C.A. No. 312 of 2016 titled "Ghulam Rasool etc. versus D.S. Pakistan Railways etc." and I.C.A. No. 313 of 2016 titled "Khalil-ur-Rehman etc versus D.S. Pakistan Railways", as all these appeals have arisen out of one order deciding common question of law and facts.

4. This Intra Court Appeal under Section 3 of the Law Reforms Ordinance, 1972 is directed against order dated 07.06.2016 passed by learned Single Judge in Chamber whereby through a single; order the writ petition filed by the appellants was dismissed alongwith other Writ Petition Nos. 4262 and 4043 of 2016 praying for declaring the policy of 2014 as not applicable to them and also for holding that the impugned advertisement dated 25.02.2016 was illegal, without jurisdiction and lawful authority with a further prayer to restrain the respondents from auctioning the land interfering into the possession of the appellants.

5. Brief facts giving rise to the filing of this Intra Court Appeal are that respondent/Pakistan Railways put to auction the land for construction of shops in the year 2004 under the policy dated 24.04.2002 initially for a period of 10 years with a renewal option for one-time extension of 5 years with 5% increase every year. The appellant being the highest bidder in the public auction advertised through the newspaper, was declared the successful bidder who deposited the money including the annual increase as per schedule and policy as well as the security. According to the appellants, after the completion of initial period of 10 years, a request was made to respondents to further extend the period for 5 years but they had taken the stand that vide the then existing policy dated 14.04.2014, extension of the period beyond 10 years was banned and thereafter shops were put to auction. The appellant challenged the said policy through the writ petition on the ground that it could not operate retrospectively to their dis-advantage. However, the writ petition was dismissed by learned judge, in Chamber primarily on account of the fact that it involved disputed question of facts and that the arbitration clause was available in the agreement for resolution of such disputes-arising out between the parties.

6. Rana Asif Saeed, Advocate learned counsel for the appellants contends firstly, that no notice was issued to the appellants of termination of lease agreement; secondly; said policy of 2014 would not be applicable to the appellants as it had already been declared as policy without a retrospective effect vide order dated 15.04.2015 passed in Writ Petition No. 4644 of 2015; thirdly, the agreement between the appellants and respondents was made on the basis of policy of the year 2002 which clearly stipulates for one time extension for 5 years; fourthly, by accepting the lease amount by respondents subsequent to the expiry of 10 years and by retention of the possession by appellants and security by the respondents they had impliedly admitted the extension of lease period and fifthly, submits that appellants are being discriminated as against other similarly placed persons who have been granted 5 years extension vide Letter No. 469-W/Auction/SDK issued in the month of April 2015.

7. Conversely, Mian Muhammad Ishfaq Hussain, Advocate, learned counsel for respondents contends that the order passed by learned Judge in Chamber is legal. Adds that as per prevalent policy dated 09.05.2016, the property of Pakistan Railways is to be leased out, therefore, it needs to be dismissed straightway.

8. Arguments heard. Filed perused.

9. After hearing the learned counsel for the parties we have straightway observed that policy dated 24.04.2002 “for license of UN-CULTIVATED BARREN RAILWAY LAND FOR AGRICULTURAL PURPOSES WHERE MAJOR EFFORTS FOR INVESTEMENT IS REQURIED” the land was allotted to the appellants for 10 years, with 5 years renewal option. However, before the expiry of the said period the “REVISED POLICY FOR LEASING OF CULTIVABLE/BARREN AGRICULTURAL LAND” was promulgated on 14.04.2014 with immediate effect stipulating as follows:

> “The above said policy will be immediately enforced and no farther extension beyond ten (10) years will be granted in case of already leased barren land”.

It signifies that it was immediately enforceable and no extension beyond the period of 10 years was to be granted to the existing lease holders. (underlining is for emphasis.)

10. We have also read the order dated 15.04.2015 passed by Single Judge of this Court in Writ Petition No. 4644 of 2015 titled "Raja Riffat Hayat versus Pakistan Railways through Chairman etc." wherein policy dated 10.7.2014 regarding Railways agricultural land measuring 4000 acres was already declared to operate prospectively. In this context, the learned counsel for the respondents has drawn the attention of this Court to "POLICIES FOR EXTENSION IN LICENSE PERIOD AND AUCTION OF ALREADY CONSTRUCTED PREMIUM SHOP" dated 09.05.2016 regarding the question of extension of license period of already constructed premium shops whose license was not extended to 5 years, permits only subject to deposit of 50% of the DC rates of area as premium, with 30% increase in rent of the previously paid annual rent. However, as its vires is not challenged before us, therefore, we will-restrain commenting upon it.

11. As per clause 3 of the lease agreement between the parties, a lease period of 10 years was extendable to 5 years subject to enhancement, at the rate of 5% of last, year rental charges. Clause 3 of the agreement is reproduced as under:--

> 3. NOW THIS INDENTURE WITNESSTH that in pursuance of the said agreement and in consideration of the rent hereby reserved and the conditions and convents hereinafter contained and to be observed by the lessee, the lessor do hereby demise unto the lease of the said shop(s) hereinbefore mentioned to hold the same unto, the lessee for a period of 10 years extendable for another term of five years with the consent of both the parties, subject to enhancement of the rent @ 5% after the expiry of each year.

The option for renewal of agreement for 5 years was also provided in Clause 15 which is reproduced as under:

> 15. That the lessee shall have to apply with the lessor three month before the expiry of the agreement showing his intention for extension of the agreement for another term of five years. Lessor will consider the application of the Lessee on merit and according to rules of the department. If approved by the competent authority, the agreement will be renewed on enhanced rate of 5% of the last year's rental charges. The Lessee shall deposit the yearly rental charges in full, in advance, with Station Master/Divisional Accounts officer, Pakistan Railways under the authority letter issued by the Divisional Superintendent Pakistan Railways, Multan in this regard."

Importantly, nowhere in the agreement the unilateral change in the terms and conditions was allowed to respondents.

12. Admittedly, 10 years lease period of the appellants had already expired but they have retained the possession and have also been paying the rent to the government treasury besides retaining their security in the account of respondents/department. We have also noticed that lease of the sops at Railway Market, Sadiqabad initially granted for 10 years has already been extended to 5 years to similarly placed persons vide Letter No. 469-

W/Auction/SDK issued in the month of April 2015 from Pakistan Railways Sukkur, Division.

13. The respondents have not issued any notice to the appellants to vacate the shops or even intimated them that they have no intention to extend the lease period for 5 years. Under clause 15 of the agreement, although it was required of the appellants to have applied for such extension but their intention can also be ascertained and gathered through the above said admitted facts. The similarly placed persons were already extended the lease period for 5 years. Needless to observe that the government is within its right to apply any beneficial terms and conditions in the policy for leasing out the land but it would not prejudice the rights of the existing lease holders already acknowledged as such by the government. Here reliance can be placed upon Messrs Army Welfare Sugar Mills Ltd. and others versus Federation of Pakistan and others (1992 SCMR 1652).

14. Keeping in view the above facts, we are of the firm view that prayer made in the writ petition in respect of the policy dated 15.07.2014 is to be allowed and we hereby hold that it operates prospectively and not to the appellants. This Intra Court Appeal, therefore, stands allowed.

(R.A.) I.C.A. allowed

PLJ 2017 Cr.C. (Lahore) 454

[Multan Bench Multan]

Present: SYED MUHAMMAD KAZIM RAZA SHAMSI, J.

QAISER REHMAN alias IMRAN--Petitioner

versus

STATE and another—Respondents

Crl. Misc. No. 5774-B of 2016, decided on 14.11.2016.

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

----S. 497(2)--Pakistan Penal Code, (XLV of 1860), Ss. 376 & 511--Bail, grant of--Further inquiry--Allegation of--Attempt to rape with 85 years old lady and filed application u/S. 22-A, Cr.P.C. supported by medico-legal certificate--This allegation is further supported by medico-legal certificate of petitioner showing that on same day he was examined through police by Medical Expert regarding injuries received by him and declared one of those injuries falling under Section 337-F(v) PPC--This fact as per medical certificate as well as application filed by father of petitioner show that petitioner had received injury on his head at hands of complainant party which has been concealed by them in their crime report--Case was of two versions one given in crime report alleging attempt to rape an old lady and other one contained in application filed under Section 22-A Cr.P.C. supported by medico-legal certificate of petitioner showing that he had serious injury in scuffle--It is not proper stage to determine correctness of versions which would determine by Court, seized of trial of case after recording evidence of parties--Case of

petitioner needs further inquire within meaning of Section 497 (2) Cr.P.C. entitling him for concession of bail. [P. 455] A

Kh. Qaiser Butt, Advocate for Petitioner.
Mr. Hassan Mehmood Khan Tareen, DPG for State.
Mr. Abdul Rehman Tariq Khand, Advocate for Complainant.
Date of hearing: 14.11.2016.

ORDER

Qaiser Rehman alias Imran, petitioner prays for post arrest bail in case age FIR No. 336/16 registered under Sections 376 and 511 PPC with Police Station Shah Kot, Distric Sahiwal having allegations that he had attempted to rape with 85 years old lady when she had come out of her house for easing herself in the fields.

2. Parties heard. Record perused.

3. The perusal of the record shows that regarding the same occurrence Muhammad Ramzan, the father of the petitioner made an application to the learned Ex-Officio Justice of Peace for registration of criminal case against the complainant and others alleging that they had committed criminal trespass into his house and injured the petitioner while making a blow on his head. This allegation is further supported by the medico-legal certificate of the petitioner showing that on the same day he was examined through the police by the Medical Expert regarding injuries received by him and declared one of those injuries falling under Section 337-F(v) PPC. This fact as per medical certificate as well as the application filed by the father of the petitioner show that the petitioner had received injury on his head at the hands of the complainant party which has been concealed by them in their crime report. In this manner the case in hand has become of two versions one given in the crime report alleging the attempt to rape an old lady and the other one contained in the application filed under Section 22-A Cr.P.C. supported by the medico-legal certificate of the petitioner showing that he had serious injury in the scuffle. It is not the proper stage to determine the correctness of the versions which would determine by the Court, seized of the trial of the case after recording evidence of the parties. In this manner the case of the petitioner needs further inquiry within the meaning of Section 497(2) Cr.P.C. entitling him for the concession of bail.

4. For the fore-going reasons the petition in hand in accepted and Qaisar Rehman alias Imran petitioner is admitted to post arrest bail on furnishing of bail bonds in the sum of Rs. 100,000/- with one surety in the like amount to the satisfaction of trial Court.

(A.A.K.) Bail accepted

PLJ 2017 Cr.C. (Lahore) 690

Present: SYED MUHAMMAD KAZIM RAZA SHAMSI, J.

MUHAMMAD SARWAR--Petitioner

versus

STATE—Respondent

Crl. Appeal No. 1106 of 2008, heard on 13.4.2016.

Criminal Procedure Code, 1898 (V of 1898)—

----S. 540--Jurisdiction to examine witness--Jurisdiction given by Section 540, Cr.P.C. can only be exercised in cases where person other than cited witness is conversant with facts and circumstances of case and Court deems it fit to record his statement in order to reach at just decision, could summon him in Court to state facts but in case where a person is cited as witness and who has also been examined as prosecution witness then in that case. [P. 693] A

Pakistan Penal Code, 1860 (XLV of 1860)—

----Ss. 409, 468 & 471--Prevention of Corruption Act, 1947, S. 5--Conviction and sentence--Challenge to--In absence of such material evidence, passing conviction and sentence of appellant on oral statements of PWs, is not sufficient--Witnesses so produced by prosecution were not authors of those documents nor any comparison of same was obtained from relevant department, therefore, liability calculated on basis of those documents against appellant, is not established--Another important factor which has been noticed from statement of prosecution witnesses is that said misappropriated amount remained undetected when audit for disputed years was conducted by authorized agents and thereafter in year 1993, appellant was also transferred therefrom--This analysis of evidence brings me to an irresistible conclusion that prosecution could not establish charge against appellant beyond any reasonable shadow of doubt--Evidence so produced by prosecution is not sufficient to fit rope around neck of accused--Trial Court seems to be overzealous when it had convicted and sentenced appellant on basis of quite insufficient evidence which has otherwise not been proved in accordance with law, as such, judgment handed down by Court below, is not sustainable in eyes of law--Appeal was accepted. [Pp. 694 & 695] B

M/s. Javed Iqbal Raja and Muhammad Farid Khan Chaudhry, Advocates for Appellant.

Ch. Muhammad Ishaque, D.P.G. for State.

Mr. M.A. Hamid Awan, Advocate for Complainant.

Date of hearing: 13.4.2016.

JUDGMENT

The appellant Muhammad Sarwar son of Muhammad Anwar, was tried by the learned Senior Special Judge, Anti-Corruption, Punjab, Lahore, in case FIR No. 23/1998 registered under Sections 406, 409, 109, 420, 468, 471, PPC read with Section 5 of the

Prevention of Corruption Act, 1947 with Police Station Anti-Corruption Establishment, Lahore and after conclusion of the trial, vide judgment dated 25.10.2008, he was convicted and following sentences were inflicted upon him:--

u/S. 409, PPC — Five years S.I. with fine of Rs. 15-Lakhs and in default of payment of fine, to undergo two years S.I.

u/S. 468, PPC — Two years S.I. with fine of Rs. 100,000/-, in default of which, to undergo six months S.I.

u/S. 471, PPC — Sentenced to two years S.I. with fine of Rs. 100,000/-, in default whereof, to undergo one year S.I.

u/S. 5 of PCA, 1947 — Sentenced to five years S.I. with fine of Rs. 300,000/-, in default of which, to undergo one year S.I.

He was also held entitled for the benefit of Section 382-B, Cr.P.C.

2. As per FIR (Ex.PA/1), made by one Irshad Ahmad (PW.1), Manager Admin and Personnel Cooperative Store, during the period from 06.03.1990 to 28.11.1993, the appellant being the Incharge of the Cooperative Shop, Baghbanpura, Lahore, had embezzled amount of Rs. 27,91,644.35, by preparing forged goods receiving report (G.R.R.).

3. The Investigating Officer Zulfiqar Ali Awan, Assistant Director-I, Anti-Corruption Establishment, Lahore Region, Lahore (PW.6) conducted the investigations in the case, who had taken into possession Rs. 75,000/- produced by wife of the appellant, prepared recovery memo. Ex.PC, took into possession G.R.R. Ex.P2 to Ex.P644 produced by Amjad Rashid, Financial Manager, Cooperative Head Office, Lahore (PW.2) and memo. prepared in this respect was Ex.PB. After finding the appellant involved in misappropriation of huge amount, he forwarded the report to the Court for commencing trial.

4. The Court, after receiving the final report, charged the petitioner for the afore-noted offences vide order dated 16.09.1999. Since, the appellant denied from the charges, the prosecution evidence was summoned. The Court proceeded to record statement of Irshad Ahmad, PW.1, Amjad Rashid, PW.2, Saeed Ahmad, PW.3, Muhammad Nazir, PW.4, Maqsood Ahmad, PW.5 and Zulfiqar Ali Awan, PW.6. The documents as mentioned in the preceding para, were also made part of the record.

5. The incriminating evidence produced by the prosecution, was confronted to the accused which, appellant did not accept as of correct one and negated the same and in the answer given regarding the question of registration of case against him, he summarized some facts stating that the case was planted upon him at the behest of employees of Head Officer, who, in order to save their own skin, made him a scapegoat in the case. The learned Court has also proceeded to record statement of Amjad Rashid, PW.2, as CW.1 which evidence was also confronted to the accused, who has also given brief history of the case lodged against him in his statement again recorded under Section 342, Cr.P.C.

6. The learned Court, after concluding all the proceedings and after appreciating the evidence, proceeded to convict and sentence the appellant in the afore-noted manner. The appellant, by filing this criminal appeal, has assailed his conviction and sentence.

7. Parties have been heard at length and record has been examined.

8. First of all the moot point which has cropped up for consideration, is that the Court has summoned PW.2 Amjad Rashid as Court witness without mentioning the reasons as to why the said witness has been examined as a Court witness. In this respect, an incomplete order existing on the file, has been noticed wherein it is mentioned that the learned counsel for complainant was asked to address the Court as to what is the effect of not proving the forged bills through which money was drawn as authorship of the accused was not proved through fingerprint bureau. This order ends here and on the pages appended with this record, there is nothing on the file as to what proceedings were taken by the Court thereafter. Another incomplete order is available at Page-53 of Lower Court record, in which Amjad Rashid, was directed to appear on 09.10.2004 and perhaps that order was passed on 18.09.2004. This order does not seem to be in continuity of the afore-noted contents of the order, however, on 09.10.2004, the learned Court simply recorded that it deems fit to record statement of Amjad Rashid as CW. Perhaps the Court has exercised the jurisdiction vested in it by way of Section 540, Cr.P.C. I am afraid that the Court could adopt such procedure during the trial of the case, as said Amjad Rashid was firstly examined as prosecution witness No. 2 and thereafter, if anything has not been stated by him then in that case under Article 132 of the Qanun-e-ShahadatOrder, 1984, he could be re-examined. The jurisdiction given by Section 540, Cr.P.C. can only be exercised in cases where the person other than the cited witness is conversant with the facts and circumstances of the case and Court deems it fit to record his statement in order to reach at just decision, could summon him in the Court to state facts but in case where a person is cited as witness and who has also been examined as prosecution witness then in that case, the Court has to exercise jurisdiction under the provisions of Qanun-e-Shahadat Order, 1984. This examination of PW.2 as CW.1, amounts filling of the lacuna left by the witness in his own previous statement which statement as CW.1, cannot be permitted to bring on the record as evidence for the prosecution evidence. Furthermore, there is nothing on file to suggest that the prosecution has ever applied for summoning of PW.2 as C.W rather it appears that Court has suo-moto summoned him as C.W. The learned Court below has committed material irregularity in recording the statement of PW.2 as C W. 1 which is not curable thus has vitiated the trial commenced against appellant.

9. Another point which has been highlighted by the learned counsel for appellant is that the Court below had announced oral judgment in the open Court but dictated and signed the same later on, thus violated the provisions of Section 366 read with Sections 369 and 371, Cr.P.C. which has also rendered the conviction and sentence of the appellant as nugatory. The learned counsel has made a reference, to an application moved by the appellant to the Court on the date of announcement of judgment under the afore-noted provisions of Code of Criminal Procedure upon which the Court had passed an order dated 08.11.2008, admitting that the judgment was orally announced in the open Court and same was dictated to the stenographer in shorthand which was finalized after few days, as such, the copy of said judgment could not be delivered to the appellant on the day of announcing

conviction and sentence. In this regard, when the provisions of Section 366, Cr.P.C. have been examined, it is found that the Court has to pronounce or explain the substance of its judgment in the open Court immediately or on some adjourned date and time of which is to be notified to the accused or pleaders. Similarly, Section 371 of the Code requires a Court to deliver copy of the judgment to the accused where he is convicted of an offence at the time when the judgment is pronounced. Since, in the case in hand, both the provisions of law have been violated by the Court below while pronouncing the judgment which has also prejudiced the appellant as he, at that time, was in the custody, therefore, the judgment rendered by the Court below on this score also, is liable to be set aside.

10. On merits of the case, it is found that the prosecution case rests upon the documents Ex.P2 to Ex.P466. When these documents have been examined, it is found that same have not been proved in accordance with law, as such, cannot be read into evidence. It has been stated by the witnesses that G.R.R. is consisted upon four copies out of which one copy is given to the contractor for supplying the goods mentioned therein and that copy was found forged whereas other three copies were intact and were maintained at different level in the Head Office including the Accounts Branch. The copy of G.R.R. given to the contractor was found forged and it is alleged that on the basis of that G.R.R., the contractor had supplied less goods to the shop of the appellant than mentioned in other copies of G.R.R. then in that case, the contractor is also required to be associated in the investigations which has not been done by PW.6 and he has also admitted this fact in his Court's statement. It is noticed that the petitioner has been booked in the case in hand due to his signatures on the second copy of G.R.R. but the prosecution has not made any attempt to get verification of the contents of that G.R.R. with three counterparts of the same nor the said document i.e. second copy was sent to the fingerprint expert bureau for determining the forgery in those documents. In the absence of such material evidence, passing the conviction and sentence of appellant on the oral statements of PWs, is not sufficient. The witnesses so produced by the prosecution were not the authors of those documents nor any comparison of the same was obtained from the relevant department, therefore, liability calculated on the basis of those documents against the appellant, is not established. Another important factor which has been noticed from the statement of prosecution witnesses is that the said misappropriated amount remained undetected when the audit for the disputed years was conducted by the authorized agents and thereafter in the year 1993, the appellant was also transferred therefrom. This analysis of the evidence brings me to an irresistible conclusion that the prosecution could not establish the charge against the appellant beyond any reasonable shadow of doubt. The evidence so produced by the prosecution is not sufficient to fit the rope around the neck of the accused. The learned trial Court seems to be overzealous when it had convicted and sentenced the appellant on the basis of quite insufficient evidence which has otherwise not been proved in accordance with law, as such, the judgment handed down by the Court below, is not sustainable in the eyes of law.

11. For the reasons stated above, the appeal in hand is accepted and conviction and sentence recorded against the appellant is set aside as a ssult of which he is acquitted from the charge. The appellant is present the Court on bail, whose bail-bonds are cancelled and the surety is slieved of his liability.

(A.A.K.) Appeal accepted

PLJ 2017 Lahore 1000 (DB)
[Multan Bench Multan]
Present: SYED MUHAMMAD KAZIM RAZA SHAMSI AND ALI BAQAR NAJAFI, JJ.
GHULAM HUSSAIN @ BHUTTO--Appellant
versus
ADDITIONAL SESSIONS JUDGE, MAILSI, DISTRICT VEHARI
and 2 others—Respondents

I.C.A. No. 264 in W.P. No. 3835 of 2015, decided on 27.9.2016.

Pakistan Penal Code, 1860 (XLV of 1860)—

----S. 336--Constitution of Pakistan, 1973, Art. 199--Law Reforms Ordinance, 1972, S. 3(2)--I.C.A, Itlaf-i-Slahiat-i-udv, disformation on head damaging skull, constitution of medical board, charge was not framed--Question of--Whether eyesight of injured persons is permanently impared--Determination--It will be relevant for Court to know exact position about nature of injuries sustained by said injured persons with a view to impose compatible sentence--It should be medical Board comprising of professors of relevant specialized area at Nishtar Hospital, Multan so as to attach greater importance to medical opinion--Consequently, medical superintendent, Nishtar Hospital, Multan is directed to constitute required Medical Board to examine injured persons, and gives its opinion accordingly--Intra Court appeal was disposed of. [P. 1001] A & B

Malik Altaf Hussain Rawn, Advocate for Appellant.
Mr. Nadeem Ahmed Tarar and Rana Muhammad Iqbal Noon, Advocates for Respondent No. 3.
Mian Adil Mushtaq, A.A.G. for State.
Date of hearing: 27.9.2016.

ORDER

This Intra Court Appeal under Section 3 of the Law Reforms Ordinance, 1972 is directed against the order dated 01.06.2015 passed by learned Judge in Chamber whereby the writ petition filed by the appeliarit against the order dated 03.01.2015 passed by learned Addl. Sessions Judge, allowing the application for constitution of Medical Board, was dismissed with the observation that the trial Court has clarified that the Medical Board will only report whether eyesight of Safdarand Yasin, have permanently been restored to reach at a just conclusion.

2. Learned counsel for the appellant submits that since Section 336, PPC has already been added, therefore, opinion of any Medical Board would not be relevant. He refers to the definition of Section 336, PPC regarding Itlaf-i-Salahayat-i-udw and argues that dis-formation on the head damaging the skull is visible which will be sufficient to constitute the offence.

3. Conversely, learned counsel for Respondent No. 3 contends that application for constitution of Medical Board was filed by him when the charge was not even framed, therefore, after recovery of the injured persons, the Medical Board will be in a better position to give the opinion as to whether eyesight of Safdar and Yasin, injured persons is permanently impaired.

4. Arguments heard. File perused.

5. The application for constitution of Medical Board was filed by Respondent No. 3 on 23.01.2015 and the charge was framed on 20.04.2015 and as such said application was competently filed before Magistrate Section-30, Mailsi. Originally, the FIR No. 88/13 was registered under Sections 324, 337-A(i), 337-A(ii), 337-F(i), 143, 149, PPC on 19.03.2013 but Section 336. PPC was added on 12.05.2014, the application, therefore, was filed after about 8 months alleging that Safdar and Yasin, injured persons have not suffered permanently due to impairing the functioning power or capacity of eye and have also not suffered from permanent disfigurement. We have been taken through the file by the learned counsel for the appellant but could not locate any opinion of the Medical Board on the basis of which Section 336 PPC was added, rather a ward report given by Dr. Yasrab Habib, Medical Officer, T.H.Q Hospital, Mailsi, was mentioned as its basis Even therwise, at the time of pronouncemen of judgment by the learned trial Court, it will be relevant for the Court to know the exact position about the nature of injuries sustained by said injured persons with a view to impose the compatible sentence.

6. In our humble opinion, it should be the Medical Board comprising of the Professors of the relevant specialized area at Nishter Hospital, Multan so as to attach greater importance to medical opinion. Consequently, the Medical Superintendent, Nishter Hospital, Multan is directed to constitute the required Medical Board to examine the injured Yasin and Safdar, and give its opinion accordingly.

7. With this modification, we dispose of this Intra Court Appeal.

(Y.A.) ICA disposed of

2018 P Cr. L J 823

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi, J

NAZIR AHMED---Petitioner

Versus

MUHAMMAD ASIF and 3 others---Respondents

W.P. No. 3752 of 2015, decided on 28th September, 2017.

(a) Constitution of Pakistan---

(b)

----Art. 189---Article 189 of the Constitution mandatorily made the decisions of the Supreme Court binding upon all the courts functioning in the country.

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

(d)

----Ss. 173 & 439---Penal Code (XLV of 1860), S. 406---Criminal breach of trust---Cancellation report---Respondent had lodged FIR under S. 406, P.P.C. against petitioner---Police, after investigating the matter prepared a cancellation report and submitted the same before the Judicial Magistrate---Judicial Magistrate agreed with the cancellation report---Respondent preferred a criminal revision petition against the decision of the Magistrate which was accepted---Validity---Criminal revision petition was not maintainable against the executive order passed by the Judicial Magistrate agreeing with the cancellation report submitted by police---Order passed in criminal revision was not sustainable---Constitutional petition was accepted, in circumstances, by setting aside the impugned order.

Bahadur and another v. The State and another PLD 1985 SC 62 rel.

Bakhat Baidar Ali Shah v. The State and 5 others 2011 YLR 2587 ref.

Ch. Abdul Waheed-I for Petitioner.

Asim Aziz Butt, Assistant Advocate-General for the State.

Salman Faisal for Respondent No.1.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---This constitutional petition filed in terms of Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, is directed against an order dated 21.01.2015, passed by learned Additional Sessions Judge, Kasur, whereby learned Court while accepting the revision petition, set aside order dated 20,02.2013, passed by learned Judicial Magistrate, Kasur whereby cancellation report prepared by the police in case FIR No.247/2012, agreed upon by learned Judicial Magistrate, was disallowed.

2. Brief facts of the case are that respondent No.1, lodged FIR No.247/2012, under section 406, P.P.C. with Police Station B-Division, Kasur against petitioner and police, after thoroughly investigating the matter, prepared a cancellation report and submitted the same before learned Judicial Magistrate, Kasur. The learned Judicial Magistrate, vide order

dated 20.02.2013, agreed with the cancellation report against which order, respondent No.1, preferred a criminal revision petition which was accepted through the impugned order by learned Additional Sessions Judge, Kasur.

3. Parties heard. Record perused.

4. The perusal of the record shows that police, after investigating the matter, recommended the case for cancellation and that cancellation report was agreed upon by learned Judicial Magistrate. After the order passed by learned Judicial Magistrate, agreeing with cancellation report, an aggrieved party could file a constitutional petition in this Court instead of challenging the same in the criminal revision petition but respondent No.1, adopted the other way and preferred the revision petition which, in view of the case of "Bahadur and another v. The State and another" (PLD 1985 Supreme Court 62), is not maintainable. It was held by the Honble Supreme Court of Pakistan in the case (supra) that order passed by learned Judicial Magistrate, agreeing with cancellation report, is amenable to constitutional petition and could not be challenged in the revision petition and such petition before Sessions Court was not competent. The learned Additional Sessions Judge, although has referred to this case law but has distinguished it while relying upon the ratio of case of "Bakhat Baidar Ali Shah v. The State and 5 others" (2011 YLR 2587), a judgment delivered by learned Single Bench of this Court. In the referred judgment of Bakhat Baidar, the learned Single Bench has tried to distinguish the case of Bahadur and another, by stating that after separation of judiciary from the executive, the order passed by learned Judicial Magistrate could be assailed in the revision petition. As per Article 189 of the Constitution of the Islamic Republic of Pakistan, 1973 "any decision of Supreme Court shall be binding on all Courts in the Pakistan". This Article of the constitution mandatorily makes the decision of the apex Court binding upon the Courts functioning in the whole country. In the referred case of Bahadur and another, the Hon'ble Supreme Court has laid a principle of law that against the order passed by learned Judicial Magistrate, agreeing with the cancellation report sent by police, only constitutional petition is maintainable then no other Court other than the Hon'ble Supreme Court of Pakistan, has the jurisdiction to say otherwise that against an order of learned Judicial Magistrate, a revision petition is competent. Even the Courts other than the Hon'ble Supreme Court of Pakistan, have no jurisdiction to distinguish the judgment passed by the apex Court on any ground. To my mind, the judgment delivered by learned Single Bench of this Court in the case of Bakhat Baidar Ali Shah (supra) is not in accordance with the ratio of case of Bahadur and another, thus the same is per incuriam and cannot be relied upon holding otherwise than the ratio of case of Bahadur and another. Since, it is well settled principle of law that against an executive order passed by learned Judicial Magistrate agreeing with the cancellation report submitted by police, no criminal revision petition is maintainable, therefore, the order passed by learned Additional Sessions Judge, Kasur is not sustainable in the eyes of law.

5. For the reasons stated above, the petition in hand is accepted and impugned order passed by learned Additional Sessions Judge, Kasur, is set aside and that of learned Judicial Magistrate, Kasur is restored.

JK/N-30/L Petition allowed.

2018 Y L R 415

[Lahore]

Before Syed Muhammad Kazim Raza Shamsi, J

SHAMIM BIBI---Petitioner

Versus

The STATE---Respondent

Crl. Misc. No.886-M of 2016, decided on 12th October, 2017.

Criminal Procedure Code (V of 1898)---

----S. 561-A---Penal Code (XLV of 1860), Ss. 337-A(ii), 337-F(i), 337-F(v) & 337-L(2)---Shajjah-i-mudihah, damiyah, hashimah, hurt---Appreciation of evidence---Enhancement in payment of Daman---Scope---Prosecution case was that respondents were facing trial before the Judicial Magistrate in the cross version of FIR and they were convicted and awarded sentence of payment of Daman amounting to Rs. 5000/- each payable to the different victims---One of the accused was directed to pay Daman amounting to Rs. 15000---Complainant challenged the said amount of Daman and prayed for enhancement in the sentence by filing revision petition before the first appellate court, which was dismissed---Complainant through the petition under S.561-A, Cr.P.C. prayed for the enhancement in sentence by stating that a lesser amount had been awarded by the court---Validity---Record showed that the respondents had not challenged their conviction before the first appellate court nor before the High Court---Case for enhancement of punishment in circumstances, was not made out---Under S.337-Y, P.P.C., the court was required to determine the amount of Daman keeping in view the expenses incurred on the treatment of the victim, loss or disability caused in the functioning or power of any organ and the compensation for the anguish suffered by the victim---Record revealed that victims had suffered simple injuries so the amount of Rs. 5000/- was fixed by the Trial Court keeping in view the nature of injuries received by the ladies/victims---Injured persons in their statements never asserted that they had suffered any loss or disability in the functioning or power of any of their organs---Victims were required to prove the expenses incurred on their treatment and that they had suffered some anguish, so that the court could determine the amount of Daman---In the absence of such evidence, Trial Court had rightly determined the amount of Daman to be paid to the injured---Petition under S.561-A, Cr.P.C. was dismissed in limine.

Malik Ahmad Saeed Awan for Petitioner.

ORDER

SYED MUHAMMAD KAZIM RAZA SHAMSI, J.---Shabbir Hussain and five others (respondents) faced trial before the learned Judicial Magistrate, Faisalabad in the cross version of FIR No. 358 dated 29.3.2010 registered under sections 337-F(v), 337-A(ii), 337-F(i), 337-L(2), 354 and 34, P.P.C. and at the conclusion of trial vide judgment dated 13.2.2015, Shabbir Hussain, Munir Hussain, Altaf Hussain, Muhammad Ramzan, Haq Nawaz and Sultan were con-victed under sections 337-F(v), 337-A(ii), 337-F(i), 337-L(2),

P.P.C. and awarded sentence of payment of Daman amounting to Rs.5000/- each payable to the different victims whereas under section 337-F(v), P.P.C., Haq Nawaz convict was directed to pay Daman amounting to Rs.15,000/-.

2. Mst. Shamim Bibi the complainant of the case feeling aggrieved of the award of punishment of Daman to the convicts, prayed for enhancement in the sentences by filing criminal revision petition before the learned Additional Sessions Judge which was dismissed on 3.2.2016.

3. Now the petitioner through the instant petition prays for the enhancement in sentences awarded by the learned trial court to the respondents and maintained by revision court by stating that a lesser amount has been awarded by the court which may be enhanced.

4. This submission of the learned counsel for the petitioner has been considered and it is found that the respondents have not challenged their conviction before the first appellate court nor in this court so seeking enhancement in the punishment of the respondents in the circumstances is not made out.

5. Even otherwise according to section 337-Y, P.P.C., the court is required to determine the amount of Daman keeping in view the expenses incurred on the treatment of the victim; loss or disability caused in the functioning or power of any organ and the compensation for the anguish suffered by the victim. This section shows that it is left at discretion of the court to determine the amount of Daman keeping in view the afore-noted facts. The perusal of the record shows that in most of the offences, the respondents were convicted and sentenced under sections 337-L(2) and 337-F(i), P.P.C., meaning thereby that the victims Mst. Shamim Bibi, Mst. Baharan Bibi and Mst. Nusrat Bibi had suffered simple injuries so the amount of Rs.5000/- was fixed by the court keeping in view the nature of the injuries received by the ladies. Moreover, the injured in their statements never asserted that they had suffered any loss or disability in the functioning or power of their organs of body, the expenses on their treatment and that they had suffered some anguish. The victims are required to prove these facts in their testimony so that the court could determine the amount of Daman keeping in view those facts. In the absence of such evidence, the learned trial court had rightly determined the amount of Rs.5000/- to be paid to the injured as Daman which order was maintained by learned first appellate court. Further, the courts while following the principles laid down in subsection (2) of section 337-N, P.P.C., did not inflict any sentence of imprisonment as Tazir upon the convicts as prosecution has failed, to establish that convicts were previous convict, habitual or hardened, desperate or dangerous criminals. Moreover, such sentence of imprisonment as tazir can only be inflicted in cases where sentence of Arsh is awarded and not in other cases.

6. For the foregoing reasons, the petition in hand having no merits, is dismissed **in limine.**

JK/S-77/L Petition dismissed.